

1284

553

1913

Cornell University Library

KF 1284.S53 1913

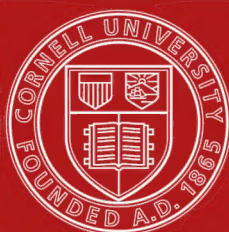
v.1

A treatise on the law of negligence.



3 1924 019 317 803

low



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A TREATISE
ON THE
LAW OF NEGLIGENCE

BY
THOMAS G. SHEARMAN
AND
AMASA A. REDFIELD

SIXTH EDITION

EDITED BY ROBERT G. STREET
District Judge, Galveston, Texas
Author of STREET ON "PERSONAL INJURIES" IN TEXAS

IN THREE VOLUMES

VOL. I

NEW YORK
BAKER, VOORHIS & COMPANY
1913

B 2680

Copyright, 1869, 1870, 1874, 1880, 1888, 1898

By THOMAS G. SHEARMAN and AMASA A. REDFIELD

Copyright, 1913

by

BAKER, VOORHIS & CO.

Hamilton Printing Company
Albany, N. Y.

PREFACE TO THE SIXTH EDITION.

For the first time an edition of Shearman & Redfield on Negligence appears without the advantage of the master hand of at least one of its distinguished authors. Both Thomas G. Shearman and Amasa A. Redfield have passed to their honored rest. Shearman & Redfield was originally published in 1868. It was the pioneer work on the subject and quickly attained a high position with the bench and bar, a position it has ever since held by successive editions presenting the expansion and modification of the law by legislation and judicial decision on the subject treated. A comparison of the first editions with the later ones discloses the enormous increase in such litigation, and the multitudinous aspects of cases to which the principles of the law of negligence have been applied. In the light of these decisions may be read not only the story of the numerous, varied and constantly increasing mechanical inventions of the age and their adaptation to social needs, but quite as unmistakably also the development of a higher conception of duty in the relations of men to one another; especially is this true of recent years with respect to the law of Master and Servant. To this awakened conscience, reflected by the law, Shearman & Redfield have made a notable contribution by their frank animadversions upon erroneous decision and the consistent advocacy of higher ethical views on questions that were unsettled at the time they arose. This edition has been prepared with the highest respect and admiration for the work of the authors, and it is hoped will not be found wanting in the spirit that animated them.

The purpose of the present edition has been to bring the work up to date. This was to be done principally by

citation of recent cases confirming or modifying the text, but not exclusively so. In the method of treatment, the general and subordinate divisions of the subject into parts, chapters and sections according to the fifth edition, has been followed. Hence this edition will continue responsive to references made in decisions of the courts to the fifth edition. Where it has been found necessary to add new sections, these have been indicated by a literal suffix. Some eliminations have been made and a few sections have been consolidated, while others have been expanded, and in a few instances sections have been rewritten. No pains have been spared to make complete the Employers' Liability Acts and Acts with respect to Death by Wrongful Act, and the citation of cases showing their application. The Federal Employers' Liability Act of 1908 and the Federal Safety Appliance Act of 1893, with amendments of each and the decisions thereunder, are also given. Workmen's Compensation Acts are not given, except specimens thereof in the appendix, because the purpose of such acts is to eliminate questions of negligence in the relation of Master and Servant from judicial discussion and determination. Reference may be here made to section 176a on that subject. While seeking to avoid incumbering the work with the citation of an unnecessary number of decisions the effort has been constantly made to cite new cases from different jurisdictions illustrative of the various propositions discussed. About 15,000 such cases are cited.

ROBT. G. STREET.

GALVESTON, TEXAS, 1913.

INTRODUCTION.

It must be conceded that, in a scientific Code of civil law, there would be no separate chapter on Negligence, The very first definition of negligence shows that a strictly scientific arrangement of the law would call for a statement of rights and duties, rather than of the facts which show neglect to perform those duties or to respect those rights.

Nevertheless, a great mass of judicial decisions had clustered themselves under the general title of Negligence, long before this or any other book had been planned under that title; and the number of such cases is constantly increasing.

In the preparation of the various editions of this book, not less than forty thousand reported cases have been examined, nearly all of which had a direct bearing upon some question of negligence. After throwing out thousands of these, as obsolete or repetitions, there remain 16,000 cases in these volumes, over 6,000 of which are from reports published within the last ten years. We leave others to estimate the vast number of unreported cases which must have been tried within the same period. It is manifest that there is an enormous and increasing amount of such litigation, and that it demands treatment as, practically, a separate department of the law.

There is much lamentation over the continual increase of negligence suits; and the courts have sometimes expressed impatience with it. Indeed, it has become quite common for judges to state, as the ground of decisions, the necessity of restricting litigation. Reduced to plain English, this means the necessity of compelling the great majority of men and women to submit to injustice,

in order to relieve judges from the labor of awarding justice. We venture to suggest that, if justice were more certainly and promptly rendered, there would be much less disposition to resist just claims or to push unjust ones. It is because so many erroneous decisions are still made, and because court proceedings are so full of complexities and delays, that unjust suitors are encouraged to take the chances of law, as if it were a lottery.

There is no difficulty in accounting for the multiplication of negligence cases. All men fail a hundred times to use the proper degree of care and diligence in the performance of some duty, where they fail once to perform the duty itself. And while total failure to perform a contract usually causes legal injury to one person only, carelessness in the attempt to perform it usually injures more than one person, if it injures any. Then the rapid advance of civilization, with all its inventions and delicate complexities, immensely increases the number and importance of duties and the difficulty of fully performing them. Finally, while the measure of damages, in cases of contract, is generally capable of easy computation, the measure of damages for mere negligence in the attempted performance of a duty is in most cases incapable of exact computation and must be settled by compromise. It is inevitable that a very large proportion of such cases should be referred to the compromise of a jury.

It is indeed to be regretted that the prosecution of negligence claims has so largely become a mere trade, conducted on shares, by lawyers whose runners are eager in their pursuit of clients. But this is mainly due to the unfortunate and unnecessary construction put upon the New York Code of Procedure, at an early day, and followed almost everywhere, by which the courts shirked the duty of control over their officers, and allowed lawyers to practice extortion, under the name of free contract. The only remedy is for the courts to resume supervision over contracts between client and counsel, and to confine fees to a reasonable amount.

The fact must also be recognized that an immense amount of fraud and perjury is resorted to in preparing and prosecuting negligence claims. The temptation to overstate the actual injury, even in well-founded actions, is very strong; and the manufacture of fictitious claims has become a regular business. The prejudice of ordinary juries against defendants in such actions, especially when wealthy corporations are the defendants, has been commented upon in scores of judicial opinions and illustrated in thousands of cases.

These considerations, we believe, have led the courts in many cases to lay down general rules of law, intended to restrict claims for negligence within narrow limits. But this seems to us unjust and unwise. A rule of law, framed with intent to make fraudulent claims difficult, may easily make just claims impossible. The true remedy is, on the part of the courts, to use resolutely the power of ordering new trials, in unsatisfactory cases, and on the part of great corporations, to meet all just claims with such manifest fairness as to establish a reputation for willingness to do what is just and fair, without compulsion. We have known instances in which the adoption of such a policy, in place of the opposite one, has made it very difficult for any plaintiff to recover a verdict against railway companies thus acting.

After making the fullest allowance for all wrongs done by the prejudices of jurors and the frauds of claimants, it is certain that the maintenance of the right of private action for damages in cases of negligence is essential to the welfare of the entire community. It is the only effective protection which society has against wholesale destruction of life and property, through the reckless indifference of men to the rights and safety of others. This recklessness is shown by all men occasionally, by most men frequently, and by vast numbers of men habitually.

The gigantic development of power for harm as well as good, in the modern use of steam, electricity and explo-

sives, placed increasingly under the control of irresponsible servants, whose duties make them so familiar with danger that they cease to appreciate it, has made it impossible to protect society against their errors by criminal prosecutions, if for no other reason than that the courts could not be multiplied sufficiently to meet the situation.

The concentration of these powers in the hands of corporations makes the very idea of restraint by criminal law absurd. One private action for damages involves a penalty more severe than ten public prosecutions.

Private actions for negligence, therefore, answer a great public purpose and render a public service, such as can be rendered in no other way. Damages, recovered in such actions, are the only punishment which is feared by those who control the tremendous forces now daily used in business; and nearly all the progress which is made in reducing the dangers of these forces is due to the fear of those damages.

The stubborn resistance of business corporations, common carriers and mill owners to the enforcement of the most moderate laws for the protection of human beings from injury, and their utter failure to provide such protection of their own accord, ought to satisfy any impartial judge that true justice demands a constant expansion of the law in the direction of increased responsibility for negligence, instead of attempts, unfortunately too common, to restrict such responsibility by introducing new exceptions.

The law of master and servant, in its relation to the law of negligence, affords perhaps the most striking example, within the last half century, of gross injustice done by this disposition to restrict responsibility and suppress litigation.

A small number of able judges, devoted, from varying motives, to the supposed interests of the wealthy classes, and caring little for any others, boldly invented an exception to the general rule of masters' liability, by which

servants were deprived of its protection. Very appropriately, this exception was first announced in South Carolina, then the citadel of human slavery. It was eagerly adopted in Massachusetts, then the centre of the factory system, where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other State, without even the compliment of refutation. It was promptly followed in England, which was then governed exclusively by landlords and capitalists. And when the fifteen judges of Scotland unanimously declared that it had never been the law of Scotland, four English law lords reversed their decision.

The final piece of judicial legislation was enacted in the famous case of *Wilson v. Merry*, where, by the wholly irrelevant *dictum* of two superannuated law lords, the doctrine of "vice-principal" was abolished. This led to a reaction. As the courts, while asserting unlimited power to create new and bad law, denied their power to correct their own errors, the legislature intervened, and to a large extent the whole defence of "common employment" has been taken away in Great Britain. And now, not a single voice is raised in Great Britain in justification of the doctrine once enforced by the unanimous opinions of the English courts. The infallible Chief Justice Shaw and Chancellor Cairns have fallen so low, on *this* point at least, that "there are none so poor as to do them reverence."

The results of this combination of boldness in making bad law and timidity in undoing it have been most disastrous. Great corporations, finding that diligence and humanity only increased their liability, naturally selected officers who were careful not to know too much about the faults of servants or of implements. The loss of life and the amount of human suffering which have ensued from the want of adequate pressure upon the great carrying companies to protect their servants from injury in their service have been appalling.

Most American courts have sought to multiply exceptions to the great exception, and have refused to follow the English House of Lords in its blind zeal for the exemption of capital from responsibility. Indeed, outside of Maine, Massachusetts, New York, New Jersey and Mississippi, American courts have been as much in advance of English courts, in this respect, as American legislatures have lagged in the rear of the British Parliament.

For it is a fact, not to be denied, that the legislature of Great Britain, for the last half century, has been constantly in advance of nearly ever American legislature in protecting from the rapacity and oppression of unscrupulous masters not only the public at large, but also their servants, and especially women and children. All our statutes giving a right of action for death, limiting hours of labor, restricting the forced labor of women and children, requiring precautions against unhealthy conditions in places of work, prohibiting "pluck-me stores" and providing for the enforcement of such laws by government inspection, were in substance copied from British statutes. There is probably not one State in the entire Union which, even yet, has a code of labor laws as favorable to laborers as that of Great Britain; while there is certainly not one in which those laws are so faithfully enforced.

With each successive edition of this treatise more and more freedom has been used in criticising decisions of even the highest courts. The conflict of opinions among these courts makes this absolutely necessary in some instances, and justifiable in all. Judges are not infallible. Not only does their present disagreement prove this; it is far more signally illustrated by the unanimous condemnation, in one generation, of the unanimous decisions of a previous one. The truth is, that every good statute affecting a general rule of law is passed to correct either a previous bad statute or a previous bad judicial decision. The doctrine of *stare decisis*, which seldom stands in the

way of a court of last resort, when its passions or prejudices are involved, is constantly used as an excuse for refusing to recognize changed social conditions, where the plainest justice requires it.

There should be much less hesitation than there is, in courts of last resort, in acknowledging previous mistakes and overruling their own erroneous decisions. And if, instead of making new iron rules (which must in time become obsolete and oppressive), legislatures would devise some method by which the courts could declare that to be law which is known to be justice, without disturbing contracts or operating retroactively, the whole law might be vastly improved. We believe this to be possible, but, unfortunately, far from probable. Legislatures are unwilling to relinquish powers which they are unable to use; and judges are reluctant to assume new duties.

Nevertheless, within the narrow limits allowed to them by precedent, American judges have upon the whole made for themselves an honorable record by their decisions upon these questions. It is particularly noteworthy that, even after allowing for some recent reactionary decisions, the general tendency of the Federal courts has been towards a liberal interpretation of the law of negligence in favor of the public, and especially of servants. This is all the more remarkable and commendable, because Federal judges are not merely entirely independent of the popular vote, but never owe their appointment to what is usually spoken of as popular influence.

From the tone of these remarks, and indeed from the general tone of these volumes, it might not unreasonably be inferred that the authors were engaged in prosecuting claims upon negligence against corporations. That inference, however, is not at all justified by the facts. The personal and professional interests of the authors are almost exclusively on the side of great corporations and of defendants in negligence cases. The writer of this introduction has only twice in his life been counsel for

the plaintiff in a negligence case; while both the authors have been counsel for defendants in many such cases. The views here expressed are the result of an impartial study of the whole situation, while constantly engaged in the professional service of railway companies and other corporations.

The truth is that equal and exact justice, in all these matters, is in the long run as much for the interest of business corporations as it is for the interest of those who deal with them. If their agents are permitted to be reckless in their treatment of customers or of fellow-servants, they inevitably become reckless in their treatment of the corporate property. Indeed, it seldom happens that a railway servant's negligence inflicts injury upon any one, without at the same moment inflicting serious injury upon the railway property. And, although it may seem hard to make the railway company suffer for injury to a stranger, as well as for loss of its own property, experience shows that this double liability is none too much, indeed not enough, to secure a careful administration of such property.

March 15, 1898.

T. G. S.

TABLE OF CONTENTS.

PART I. GENERAL PRINCIPLES.

- II. LIABILITIES ARISING OUT OF PERSONAL RELATIONS.
 - III. PUBLIC CORPORATIONS AND OFFICERS.
 - IV. PUBLIC WAYS.
 - V. CARRIERS.
 - VI. PERSONAL SERVICES.
 - VII. MANAGEMENT OF PROPERTY.
 - VIII. MEASURE OF DAMAGES.
-

PART I.

GENERAL PRINCIPLES.

CHAPTER I. NEGLIGENCE IN GENERAL.

- II. PROXIMATE CAUSE.
 - III. DEGREES OF NEGLIGENCE.
 - IV. QUESTIONS OF FACT AND LAW.
 - V. EVIDENCE.
 - VI. CONTRIBUTORY NEGLIGENCE.
 - VIa. ASSUMED RISK AS A DEFENCE TO ACTIONS
FOR NEGLIGENCE GENERALLY.
 - VII. PARTIES.
 - VIII. DECEASED PERSONS.
-

CHAPTER I.

NEGLIGENCE IN GENERAL.

	PAGE.
SEC. 1. Negligence variously defined.....	2
1a. Negligence in law.....	4

	PAGE.
SEC. 2. Difficulty of exact definition.....	9
2a. Different senses in which term is used.....	9
3. Definition of actionable negligence.....	10
4. Negligence and concurring damage distinguished.....	10
5. Analysis of a cause of action on negligence.....	11
6. Dr. Wharton's definition reviewed.....	11
7. Election between intended and unintended injury.....	12
8. Duty, an essential element.....	13
9. The duty must be to use care.....	15
9a. Right limited by duty.....	16
9b. Standard test	16
10. The duty must be legal, not merely moral.....	17
10a. Generally, a duty not knowingly to injure others exists....	18
10b. Negligence not a specific tort, but an imputed mental quality	18
11. No unreasonable duty required.....	19
12. In determining duty, regard to be had to era.....	21
12a. Customary acts or customary manner of their performance.	22
13. Violation of duty imposed by statute or ordinance.....	23
13a. Regulations, whether for public benefit only or for the benefit of individuals as well.....	27
14. A personal duty cannot be delegated.....	28
15. No negligence where there is no breach of duty.....	30
16. Inevitable accident	30
16a. <i>Casus</i>	32
16b. Negligence of defendant where accident or act of God is a concurring cause	32
17. Apparent exceptions to rule as to inevitable accident.....	33
18. What is not inevitable accident.....	35
19. Absence of intent to produce damage.....	36
20. Distinction between negligence and fraud.....	37
21. Defendant's anticipation of injury not essential.....	38
21a. Actual anticipation of injury excluded by definition.....	39
22. Election between contract and tort.....	40
23. Damage an essential element.....	41
24. Damage must be special to plaintiff.....	42
24a. Right to recover over.....	42
24b. Recovery over, continued	44

CHAPTER II.

PROXIMATE CAUSE.

SEC. 25. Breach of duty must cause the damage.....	46
25a. When an act or omission becomes a breach of duty.....	47
26. Breach of duty must be the proximate cause.....	48
26a. It is not requisite that the injury should be the necessary or even the usual result of the neglect.....	50

TABLE OF CONTENTS.

xiii

	PAGE.
SEC. 27. Breach of statutory duty.....	51
27a. Violation of statutes and ordinances considered as negligence <i>per se</i> , or otherwise.....	52
27b. Breach of rules	54
28. "Natural and continuous sequence" defined.....	54
29. Foreseen and unforeseen consequences of negligence.....	58
29a. Doctrine of consequences foreseen applied as a limitation..	59
30. Extraordinary consequences of negligence.....	60
31. Intervening cause, breaking connection.....	64
32. Intervening cause must be either a superseding or a responsible cause	66
33. Superseding cause and inevitable accident, distinguished..	67
34. Intervening responsible cause, not superseding.....	68
35. Intervening cause illustrated	69
36. Intervening cause must be culpable.....	72
36a. Who are responsible for intervening negligence.....	73
37. Intervening cause must be a free agent.....	73
38. Intervener not culpable, if ignorant of facts.....	74
38a. Same tests to be applied to intervener's acts or omissions in determining whether they are a responsible cause as in cases of original or primary negligence.....	75
39. Superior force concurring with defendant's negligence....	76
39a. Acts of animals as an intervening cause.....	79
40. Superior force concurring with defendant's delay.....	80

CHAPTER III.

DEGREES OF NEGLIGENCE.

SEC. 41. The theory of two degrees of negligence.....	83
42. Its impracticability in modern affairs.....	84
43. Unsatisfactory tests of "ordinary care".....	85
44. Necessity of an exceptional degree of care.....	86
45. The requirement just and reasonable.....	87
46. "Utmost care," when required.....	89
47. The standard — no technical degrees of negligence.....	90
48. Correlative degrees of negligence.....	93
49. "Gross," "ordinary" and "slight" negligence defined....	93
50. Standard of "great care" stated.....	95
51. Application of the rule to passenger carriers.....	96
51a. Comparative negligence	99
51b. Effect of Federal Employers' Liability Act of 1908.....	100
51c. Interpretation of doctrine of Illinois.....	101
51d. Former Illinois doctrine not applicable to the interpretation of Federal statute.....	102

CHAPTER IV.

QUESTIONS OF FACT AND LAW.

	PAGE.
SEC. 52. Negligence, a question of mingled law and fact.....	104
53. Province of court and jury.....	105
54. Questions proper for the jury.....	108
55. Proximate cause, when question for the jury.....	112
56. When question should not be left to the jury.....	113
56a. Instructions to juries	118
56b. Error in instructions to state what facts constitute negligence, to assume controverted facts, to emphasize a particular fact and ignore others that are essential; and, in most jurisdictions, to charge on the weight of evidence	120

CHAPTER V.

EVIDENCE.

SEC. 57. Plaintiff's burden of proof.....	122
58. Burden of proof does not shift, but burden or weight of evidence on particular issues does.....	126
58a. <i>Res ipsa loquitur</i>	130
58b. Does not arise from the injury itself, but from nature of its cause	131
59. Presumptions of negligence, continued.....	133
60. Illustrations of presumptive negligence.....	134
60a. Admission and declarations.....	136
60b. Other similar accidents	140
60c. Subsequent repairs	142

CHAPTER VI.

CONTRIBUTORY NEGLIGENCE.

SEC. 61. General rule	146
62. Contributory negligence under statutory claims.....	153
63. Reason of rule	155
64. When no defence	157
65. Fault must be that of injured party or his agent.....	160
65a. Doctrine of imputed negligence.....	162
66. Doctrine of "identification".....	164

TABLE OF CONTENTS.

XV

	PAGE.
SEC. 66a. Stranger's contributory fault no excuse for plaintiff's....	168
67. Husband and wife	170
68. Knowledge of principal, when imputed to agent.....	172
69. Knowledge of agent, when imputed to principal.....	173
70. Contributory negligence of children.....	173
71. Negligence of parent, in parent's action.....	175
72. Parents must be actually in fault.....	177
72a. Contributory negligence in the case of children.....	178
73. Degree of care required from child.....	179
73a. Age of discretion.....	186
74. Imputation of parent's negligence; New York rule.....	193
75. New York rule criticised.....	197
76. Imputed negligence; Illinois rule.....	198
77. Identification of child and custodian.....	198
78. True rule; no imputation of parental negligence.....	199
79. No imputed negligence, if child careful.....	201
80. Imputed negligence; limitations of rule.....	201
81. Imputed negligence; parent must be acting as such.....	201
82. Imputed negligence; parent must be negligent in fact...	202
83. Imputed negligence; age of child.....	203
84. Imputed negligence; lunatics, etc.....	203
85. Acts in emergencies; plaintiff not prejudiced unless actually in fault	204
85a. Danger to life; where the life of the plaintiff or his bodily injury is threatened	205
85b. Danger incurred to save the life of another.....	209
85c. Neither the discharge of a high moral duty, nor the exer- cise of a legal right can be made the basis of contribu- tory negligence	211
85d. When property is imperiled by the defendant's negligence.	212
86. Plaintiff not prejudiced by want of more than ordinary care	213
87. Ordinary care defined	215
88. Care required of infirm, etc.....	218
88a. Traveler suffering from mental or physical infirmity...	220
89. This section has been transferred and becomes a part of § 185.	
90. Duty of looking and listening.....	222
91. Effect of defendant's advice or invitation.....	225
92. Plaintiff not bound to anticipate negligence.....	229
93. Plaintiff's fault must contribute to injury.....	233
94. Plaintiff's fault must proximately contribute to injury..	236
94a. Degree of contribution	238
94b. Negligence by the plaintiff without which the injury would not have occurred.....	239
95. Negligence increasing damages only, no bar.....	239
96. Plaintiff's fault need not be cause of injury.....	241
97. Effect of technical trespass.....	242
98. Technical trespass no bar.....	247

	PAGE.
SEC. 99. Defendant's later negligence where the injury could have been avoided notwithstanding plaintiff's prior negligence; rule in <i>Davies v. Mann</i>	248
100. Illustrations of rule	256
101. Plaintiff last in fault.....	257
102. Comparative negligence	258
103. Rule in Georgia, Florida, Tennessee, Kansas and Wisconsin	259
104. Plaintiff's violation of statute.....	261
105. Plaintiff's fault in representative capacity.....	265
106. Burden of proof; conflict of decisions.....	266
107. Burden of proof on plaintiff.....	267
108. Burden of proof on defendant.....	268
109. Burden ought to be on defendant.....	272
110. Presumption against negligence; how over-balanced.....	273
111. What proof of care sufficient.....	276
112. Inference from circumstances.....	279
113. Pleading; absence of fault.....	281
114. Questions of fact and law.....	283
114a. Where the defendant's negligence is willful or wanton...	288

CHAPTER VIa.

ASSUMED RISK AS A DEFENCE TO ACTIONS FOR NEGLIGENCE GENERALLY.

SEC. 114b. <i>Volenti non fit injuria</i>	290
---	-----

CHAPTER VII.

PARTIES TO ACTIONS FOR NEGLIGENCE.

SEC. 115. Who may be plaintiffs at common law.....	295
116. Who may sue on breach of contract.....	298
117. Liability for selling dangerous goods.....	300
117a. Liability of manufacturers and others for selling dangerously defective machinery	302
118. Private actions upon public obligations.....	303
119. Reversioners and mortgages.....	305
120. Landlords and tenants	307
120a. Railroads	311
120b. Receivers, assignees and trustees.....	312
121. Infants and lunatics	313
121a. Married women	314
122. Who are jointly liable.....	315
123. Who are not jointly liable.....	319

CHAPTER VIII.

DECEASED PERSONS.

	PAGE.
SEC. 124. No common-law remedy for injuries causing death.....	321
125. The statutory remedy.....	323
126. The English statute (Lord Campbell's Act).....	323
127. Constitutional provisions	324
128. State statutes (also see Appendix).....	324
129. [Omitted]	325
130. [Omitted]	325
131. Action; when brought where injury occurred.....	325
132. Action; when may be brought in another State.....	327
132a. State statutes enforceable in Federal courts.....	329
133. Who may bring action.....	330
134. For whose benefit action may be brought.....	330
134a. Non-resident aliens as plaintiffs or beneficiaries.....	331
135. No action without surviving statutory beneficiary.....	332
135a. Abatement of action on death of beneficiaries.....	333
135b. Abatement of action on death of the wrongdoer.....	334
136. Illegitimates; when entitled to benefit of the statute...	335
137. Pecuniary injury; how far essential to action.....	336
138. Miscellaneous points	338
139. Effect of survival statutes.....	340
140. Effect of releases and settlements.....	343
140a. Contributory negligence	344

PART II.

LIABILITIES ARISING OUT OF PERSONAL
RELATIONS.

CHAPTER IX. LIABILITY OF MASTERS FOR SERVANTS.

X. LIABILITY OF MASTERS TO SERVANTS.

Xa. LIABILITY OF MASTERS TO SERVANTS
(CONTINUED).

XI. LIABILITY OF SERVANTS.

CHAPTER IX.

LIABILITY OF MASTERS FOR SERVANTS.

	PAGE.
SEC. 141. General rule of liability.....	347
142. Principle of the rule.....	348
143. Relation of master and servant.....	350
144. Agency necessary to create responsibility.....	351
145. Master's liability for servant's acts under implied authority	354
146. Master liable for acts in course of employment.....	356
147. What acts are within employment.....	360
147a. Deviation by the servant.....	362
148. Master not liable for acts outside of employment.....	364
149. [Omitted]	367
150. Liability for servant's willful acts.....	367
151. Ostensible authority for willful acts.....	369
152. [Omitted]	374
153. Willful acts; when consequence of negligence.....	374
154. Liability for negative results of willful act.....	374
154a. Dangerous agencies and instrumentalities entrusted to a servant	377
155. Disobedience of master's orders.....	379
156. [Omitted]	380
157. Liability for subagents or strangers.....	381
158. Implied liability of owner of vehicle.....	384
159. Ownership of other property; how far implies liability...	385
160. Who is to be deemed a master.....	386
160a. There cannot be two masters as to the same acts.....	389
161. Nominal master, when not liable.....	390
162. Liability for servant hired out.....	391
163. Liability of trustees for employee's acts.....	394
164. Who is a "contractor".....	395
165. When contractor and when servant.....	398
166. Effect of employer's control over contractor.....	401
167. Effect of right of dismissal.....	402
168. Employer not liable for contractor's negligence.....	404
169. Negligence of subcontractor and part contractor.....	406
170. [Omitted]	407
171. Employer liable for servants selected by him.....	408
172. Liability for servant compulsorily employed — pilots....	408
173. Liability of owner for persons employed on land.....	410
174. Liability of employer for his own fault.....	411
175. Employer liable for act contracted for.....	414
176. Omission of duty not excused by contracting to have it done	416

CHAPTER X.

LIABILITY OF MASTERS TO SERVANTS.

	PAGE.
SEC. 176a. Workmen's Compensation Acts.....	420
177. Limitations of master's liability to servant.....	422
177a. Limitations of master's liability to servant, continued...	424
178. Reason assigned for rule.....	425
179. The real reason	427
180. The general rule	429
181. Who are servants	433
182. Volunteer, when considered servant.....	434
183. Who is a volunteer assistant.....	435
183a. Master's duties	437
183b. Servant's duties	438
183c. Rationale of foregoing rules.....	483
183d. Master's duties non-delegable.....	439
184. Master does not insure against risks.....	440
184a. <i>Res ipsa</i>	442
185. Master liable for his own negligence.....	445
186. Concurrent negligence	447
187. Degree of care required of master.....	449
188. Duration of master's duty and exemption.....	453
189. Duty to select competent fellow servants.....	455
190. Evidence of negligence in employment of servant.....	461
191. Duty to employ sufficient force.....	465
192. Duty to provide proper instrumentalities and place of work	467
193. Duty of inspection and repair.....	473
194. To what extent the duty of inspection may be cast on the servant	481
195. Limits of master's liability for instrumentalities.....	482
195a. Purchase of instrumentalities from reputable manu- facturers	493
196. Master's duty as to instrumentalities not his own prop- erty	494
197. Illustrations of master's liability.....	496
198. Low bridges	502
198a. Low bridges; contributory fault.....	504
199. Low bridge cases limited.....	505
200. [Omitted]	507
201. Other dangerous projections.....	507
202. Master's duty to prescribe and enforce rules.....	510
203. Master's duty to guard and warn against unusual risks..	514
203a. Duty of supervision.....	521
204. Delegation of master's personal duties.....	523
205. Illustrations of non-transferable duties.....	527

	PAGE.
SEC. 206. What is sufficient notice to master.....	530
207. Contributory negligence.....	535
207 <i>a</i> . What is not contributory negligence.....	544
207 <i>b</i> . Disobedience of rules and orders.....	547
207 <i>c</i> . Rule must be plain.....	554

CHAPTER Xa.

LIABILITY OF MASTERS TO SERVANTS (CONTINUED).

SEC. 207 <i>d</i> . Ordinary risks of the service as distinguished from extraordinary risks	556
207 <i>e</i> . What risks servants assume.....	557
207 <i>f</i> . What risks servants do not assume.....	565
207 <i>g</i> . What facts servants may presume.....	565
207 <i>h</i> . Risks assumed under special orders.....	569
207 <i>i</i> . Risks of service, outside of ordinary employment.....	576
208. Assumption of extraordinary risks, or basis of imputed assumption of risks arising from master's negligence..	579
209. Servant accepting employment with notice of defects...	584
209 <i>a</i> . Extraordinary risks assumed by servant's continuing in the service with notice of defects.....	585
210. Effect of refusal to repair.....	591
211. True rule as to effect of servant's knowledge.....	593
211 <i>a</i> . Special risks incurred under coercion.....	595
212. Test of servant's prudence.....	597
213. Excusable omissions of usual care.....	598
214. Notice of defect, without notice of danger, immaterial...	601
214 <i>a</i> . When the defence of assumption of risks of the master's default becomes unavailable	604
215. Effect of master's promises and assurances.....	605
216. Presumption as to servant's knowledge.....	617
217. Means of knowledge; duty to investigate.....	621
218. Application of rule to minors.....	627
219. Special duties of masters to minors.....	633
219 <i>a</i> . Inexperienced servants	637
220. Servant's knowledge of master's personal defects.....	640
221. Servant's duty to warn and complain.....	641
222. Burden of proof.....	645
223. What is sufficient proof.....	648
223 <i>a</i> . Assumption of risk by servant of neglect by the master to comply with statutory duties imposed on him for the servant's protection	655
224. Who are fellow servants.....	657
225. Who are not fellow servants.....	658
226. American rule; vice-principals not fellow servants.....	661
227. British rule; no vice-principals.....	662

TABLE OF CONTENTS.

xxi

	PAGE.
SEC. 228. British rule criticised.....	664
229. British rule condemned at home.....	665
230. Who are vice-principals; general managers.....	666
231. Who are vice-principals; New York rule.....	670
232. Principle and application of New York decision.....	672
233. [Consolidated with § 232].....	685
233 <i>a</i> . Examples of who are, or are not, vice-principals.....	685
233 <i>b</i> . Peculiar local rules.....	685
234. Servants must be in common employment.....	688
235. Common employment; general rule.....	689
236. Who are in common employment under general rule.....	691
237. Who are not in common employment.....	693
238. Common employment; "association" rule.....	694
239. Illustrations of common employment.....	695
240. [Omitted]	697
241. [Omitted]	697
241 <i>a</i> . Effect of statutes and codes.....	697
241 <i>b</i> . Statutes of general application.....	698
241 <i>c</i> . Statutes applying to railroad companies.....	700
241 <i>d</i> . Exemption from liability by special contract.....	703

CHAPTER XI.

LIABILITY OF SERVANTS.

SEC. 242. Servant's liability to master.....	705
243. Servant not liable to third person for nonfeasance.....	705
244. Servant liable to third person for misfeasance.....	707
245. Servant's liability to fellow servants.....	710
246. Liability of shipmasters.....	712
247. Servant not liable for negligence of a fellow servant.....	712
248. Joint liability of master and servant.....	713

PART III.

PUBLIC CORPORATIONS AND OFFICERS.

CHAPTER XII. MUNICIPAL CORPORATIONS

XIII. PUBLIC OFFICERS.

XIV. INCORPORATED PUBLIC TRUSTEES.

CHAPTER XII.

MUNICIPAL CORPORATIONS.

	PAGE.
SEC. 249. The State cannot be coerced by suit.....	716
250. Extent of State's immunity.....	718
251. Liability of State by its own consent.....	719
252. [Consolidated with § 253].....	720
253. Municipal corporations as State agencies.....	720
253a. Rule in admiralty	723
254. Statutory test of corporate liability.....	723
255. Public and private functions of corporations.....	726
256. Liability of counties, towns etc., generally.....	727
257. Liability of counties, towns, etc., in Pennsylvania, Mary- land and Iowa	733
258. Non-liability of New England towns.....	735
259. Qualification of common-law non-liability of New England towns	741
260. [Consolidated with § 291].....	742
260a. Maintenance of city halls, jails, etc.....	742
261. Statutory liability for mob violence.....	744
262. Adoption and execution of laws and ordinances.....	745
263. Discretionary powers — granting licenses.....	753
264. [Omitted]	755
265. Supplying water and apparatus for extinguishing fires...	755
266. Providing for public health.....	758
267. Providing and maintaining public schools.....	760
268. [Consolidated with § 258].....	761
269. [Consolidated with § 262].....	761
270. [Consolidated with § 262].....	761
271. Devising plan of public improvement.....	761
272. Error of judgment distinguished from negligence.....	763
273. [Consolidated with § 272].....	766
274. Planning inefficient or injurious drainage.....	766
275. Duty to remedy defects in plan.....	771
276. Discretion in the application of limited funds.....	773
276a. The want of funds as a defence.....	774
277. [Consolidated with § 374].....	774
278. How far professional advice will excuse defect in plan...	774
279. Statutory directions as to plan.....	775
280. [Consolidated with § 281].....	776
281. Liability for breach of ministerial duties.....	776
282. [Consolidated with § 281].....	779
283. Damage consequent on authorized act.....	780
284. [Consolidated with § 334].....	783
285. Municipal lands and structures.....	783
286. Management of water and gas service.....	788
287. Maintenance and repair of sewers.....	790

TABLE OF CONTENTS.

xxiii

	PAGE.
SEC. 288. [Consolidated with § 258].....	795
289. Implied liability for non-repair of streets.....	795
290. [Consolidated with § 367].....	799
291. Implied liability for negligence of agents.....	799
292. [Consolidated with § 291].....	805
293. [Consolidated with § 291].....	805
294. [Consolidated with § 291].....	805
295. Departments of government, not agents of city.....	805
296. When departments are city's agents.....	807
297. [Omitted]	808
298. Independent contractors not agents.....	809
299. Liability limited to matters within jurisdiction.....	811
300. [Consolidated with § 299].....	813
301. Recovery over by corporation.....	814

CHAPTER XIII.

PUBLIC OFFICERS.

SEC. 302. Immunity of political officers.....	816
303. Immunity of judicial officers.....	817
304 to 309. [Omitted]	823
310. <i>Quasi</i> -judicial officers, how far protected.....	823
311. [Consolidated with § 310].....	825
312. Non-judicial public officers classified.....	825
313. Negligent performance of ministerial duties.....	826
314. Liability for nonfeasance.....	828
315. [Consolidated with § 313].....	829
316. [Consolidated with § 314].....	829
317. Presumption in favor of officer.....	829
318. [Consolidated with § 313].....	830
319. Liability for negligence of subordinates.....	830
320. [Omitted]	832
321. Non-liability of postmasters for subordinates.....	832
322. Non-liability of army and navy officers.....	833
323. Public school officers	834
324. [Consolidated with § 340].....	835
325. Liability of government contractors.....	836

CHAPTER XIV.

INCORPORATED PUBLIC TRUSTEES.

SEC. 326 Former rule of liability of statutory trustees.....	837
327. Present rule of liability in England.....	838
328. Incorporated administrative boards.....	840
329. Voluntary corporations performing public functions.....	841
330. Trustees not liable when agents only.....	843
331. Trustees of public charities.....	843

PART IV.

PUBLIC WAYS.

CHAPTER XV. HIGHWAYS.

XVI. TURNPIKE ROADS.

XVII. BRIDGES.

XVIII. CANALS.

XIX. CONSTRUCTION AND MAINTENANCE OF RAIL-ROADS.

XX. RAILROAD INJURIES TO ANIMALS.

XXI. RAILROAD INJURIES TO PERSONS.

CHAPTER XV.

HIGHWAYS.

	PAGE.
SEC. 332. Highways are public works.....	849
333. What are highways within the rule.....	852
334. When liability in respect to highway attaches.....	854
334a. Obligation dependent on jurisdiction of structure.....	860
335. Liability pending construction of way.....	862
336. When obligation ceases	862
337. No common-law duty to repair highways.....	864
338. Statutory liability for defective ways.....	866
339. Implied liability for defective ways.....	870
340. Liability of road officers.....	872
340a. Liability of road officers, continued.....	874
341. Contract obligations to repair.....	875
342. [Consolidated with § 359].....	875
343. Obligations of abutting owners as to highway.....	875
344. [Omitted]	880
345. Joint and several liability for defective way.....	880
346. Defects in way concurring with other causes.....	881
347. [Omitted]	885
348. Duty to rebuild destroyed highway.....	885
349. [Consolidated with § 356].....	886
350. What are statutory "defects".....	886

TABLE OF CONTENTS.

XXV

	PAGE.
SEC. 351. Defects in margin of way.....	889
352. When whole width must be passable.....	892
353. Sidewalks and street crossings.....	894
354. Overhanging roofs, awnings, trees, etc.....	898
355. Objects on highway likely to frighten horses.....	900
356. Duty to guard and light defective way.....	903
357. [Consolidated with § 359].....	908
358. Authorized interference with highway.....	909
359. Liability of licensee of use of street.....	912
360. [Consolidated with § 359].....	917
361. Obstructions incident to building operations.....	917
362. Obstructions incident to traffic.....	920
363. Obstructions from natural causes.....	922
364. [Consolidated with § 363].....	929
365. Individual liability for wrongful obstructions.....	929
366. [Consolidated with § 367].....	931
367. Ground of liability for defective ways.....	931
368. Actual notice of defect.....	937
369. When notice will be implied.....	941
370. Who may maintain action.....	947
371. Damage must be special.....	950
372. [Omitted]	951
373. Notice of injury preliminary to action.....	952
374. Defences	954
375. Contributory negligence	956
376. Traveler's knowledge of defect.....	962
377. Care required in traveling at night.....	968
378. Defect in traveler's carriage, harness or horses.....	970
379. Unskillful or improper driving.....	973
380. Negligent stowing and excessive weight of load.....	975
381. Sunday traveling	976
382. [Consolidated]	976
383. [Consolidated]	976
384. Action over against third person.....	977

CHAPTER XVI.

TURNPIKE ROADS.

SEC. 385. Turnpikes are highways.....	981
386. Maintenance of road.....	981
386a. Liable where defective condition is combined with fright of horse	984
387. Statutory liability for non-repair.....	984
388. Reappropriation of road by the public.....	985
389. Effect of change of control.....	985

CHAPTER XVII.

BRIDGES.

	PAGE.
SEC. 390. Bridges distinguished from highways.....	987
391. [Consolidated with § 390].....	988
392. Approaches to bridges	988
393. Abutments and railings.....	990
394. By whom bridges are repairable.....	992
395. Bridges across navigable streams.....	993
396. Draw-bridges	991
397. Toll-bridges	995

CHAPTER XVIII.

CANALS.

SEC. 398. State canals	997
399. Obligation of canal companies to navigators.....	998
400. Construction of canals	999
401. Maintenance bridges, locks, etc.....	999
402. Maintaining embankments, etc.....	1000
403. Repair of towing path and fencing canal.....	1001
404. Duties of boat owners.....	1002
405. [Omitted]	1002

CHAPTER XIX.

CONSTRUCTION AND MAINTENANCE OF RAILROADS.

SEC. 406. Construction and maintenance of track, roadbed, bridges, etc.	1003
407. What dangers must be provided against.....	1005
407a. Not liable for consequential damages.....	1008
408. Railroads on highways	1008
409. [Omitted]	1012
410. Accessories of railroads.....	1012
411. [Omitted]	1015
412. Rights of compensated landowners	1015
413. Obligations of lessor or lessee.....	1016
414. Interference with highway.....	1020
415. Restoration of roads and bridges.....	1022
416. Road bridges over railroads.....	1024
417. Highway crossing at level.....	1026
417a. Other crossings at level.....	1030

CHAPTER XX.

RAILROAD INJURIES TO ANIMALS.

	PAGE.
SEC. 418. English rule as to keeping animals in.....	1033
419. Where English rule does not prevail.....	1036
420. Unequal operation of common-law rule.....	1041
421. Statutory regulations	1041
422. Application and validity of statutes.....	1046
423. [Omitted]	1047
424. Fences must be sufficient.....	1048
424a. Gates and bars closed.....	1050
425. Fences must be maintained.....	1051
426. Frightening animals on fenced roads.....	1054
427. Duty to signal to cattle.....	1058
428. Care towards trespassing cattle.....	1060
428a. Injuries to trespassing animals on highways.....	1063
429. Checking or stopping train.....	1064
430. Checking speed for trespassing cattle.....	1069
431. Statutory rules as to checking speed.....	1071
432. Presumption as to negligence.....	1073
433. When animal is rightfully on track.....	1075
434. Where fences are not required.....	1077
435. Fences and cattle-guards in towns.....	1081
436. Injury must be owing to defect in fence.....	1083
437. Effect of adjoining owner's agreement.....	1085
438. Employment of adjacent owner to build fence.....	1087
439. Adjacent owner's option to build fence.....	1088
440. Compensated owner of land cannot recover.....	1088
441. Company's agreement to fence.....	1089
442. Grants of right of way.....	1091
443. Who may enforce contract to fence.....	1091
444. Liability where one company uses another's track.....	1091
445. Liability of lessees of road.....	1092
446. Liability of other parties.....	1094
447. Application of fence laws to personal injuries.....	1094
448. For what injuries company is liable.....	1095
449. Who entitled to benefit of statutes.....	1097
450. Notice of defect, when to be given.....	1099
451. Contributory negligence on fenced roads.....	1100
451a. Contributory negligence on unfenced roads.....	1101
452. Owner's willful conduct	1107
453. [Omitted]	1108
454. Rule in Maryland and Georgia.....	1108
455. Degree of care in maintaining fence.....	1108
456. Company's action against owner.....	1112

CHAPTER XXI.

RAILROAD INJURIES TO PERSONS.

	PAGE.
SEC. 457. Care required to avoid injury to persons.....	1114
458. Illustrations of want of care.....	1121
459. Lessor and lessee, liability for injuries inflicted on persons on or near the track.....	1124
459a. Companies permitting the operation or use of their road, etc., by another	1126
459b. Companies operating or using the roads of others.....	1127
459c. Liability for foreign cars.....	1129
460. Rate of speed	1131
461. Care required of railroads on and near highways.....	1136
462. [Transferred to § 485a].....	1138
463. Care required at highway crossings.....	1138
463a. Statutory requirements do not exclude the duty of dili- gence and care imposed by the common law.....	1147
464. Care required at other crossings.....	1148
464a. Intersecting railroads	1154
465. Care of stationary cars and engines.....	1155
466. Gates, flagmen and watchmen.....	1156
466a. Duty to maintain fences.....	1161
467. Neglect of statutory precautions.....	1162
468. Omission to ring or whistle at crossings.....	1168
469. Presumptions in such cases.....	1172
470. Who entitled to benefit of statutes.....	1174
471. Trains running backwards.....	1177
472. Contributory negligence	1180
473. What is not contributory negligence.....	1184
474. Fractious horse	1187
475. Crossing track in view of train.....	1189
476. Duty to look and listen.....	1194
477. When failure to look and listen excused.....	1207
478. Obstructions to view.....	1213
479. Crossing when highway is blocked.....	1217
480. Traveling along the track.....	1220
481. Infirm persons	1228
481a. Children	1232
481b. Deceased persons	1237
482. Effect of contributory negligence on statutory liabilities..	1241
483. Discovered peril or duty to avoid effects of negligence or contributory negligence of trespassers and others.....	1243
484. Duty to anticipate negligence or contributory negligence..	1251
485. Evidence of negligence	1257
485(1). Street railways, generally.....	1263
485(2). Street railways and municipalities.....	1265

TABLE OF CONTENTS.

xxix

	PAGE.
SEC. 485 <i>a</i> . The use of streets by street cars.....	1266
485 <i>aa</i> . Care required of street railways.....	1270
485 <i>ab</i> . Reciprocal duties of street car companies and the public generally	1271
485 <i>b</i> . Electric and cable cars, etc.....	1273
485 <i>ba</i> . Defects in equipment of street cars.....	1274
485 <i>bb</i> . Crossing street railway track in front of car.....	1275
485 <i>bc</i> . Children and aged and infirm persons on or near street railway tracks	1276
485 <i>bd</i> . Street cars frightening animals.....	1279
485 <i>c</i> . Street cars; contributory negligence.....	1280
485 <i>d</i> . Persons present by invitation or permission on the prem- ises or vehicles of carriers of passengers.....	1287

PART V.

CARRIERS.

CHAPTER XXII. CARRIERS OF PASSENGERS.

XXIII. TELEGRAPHS AND TELEPHONES

CHAPTER XXII.

CARRIERS OF PASSENGERS.

SEC. 486. Obligations of carrier not merely in contract.....	1293
487. Who are common carriers of passengers.....	1295
488. Who deemed passengers	1297
489. Who not passengers	1304
490. When relation begins and ends.....	1306
491. Liability to free passengers.....	1311
492. Who are not free passengers.....	1313
492 <i>a</i> . [Transferred to § 485 <i>d</i>].....	1314
493. Ejection of passengers.....	1314
494. Carrier not insurer.....	1326
495. Degree of care required.....	1329
496. Application of the rule requiring great care.....	1336
497. Obligation as to vehicles, locomotives, machinery, appli- ances and roadway	1338
498. [Consolidated with § 497].....	1345

	PAGE.
SEC. 499. [Consolidated with § 497].....	1345
500. Liability for acts of strangers.....	1345
501. Stational facilities, etc.	1348
502. Liability in case of divided ownership.....	1358
503. Accidents beyond carrier's line.....	1360
504. Limitation of liability by notice or contract.....	1362
505. Validity of restrictions on liability.....	1363
506. [Consolidated with § 501].....	1368
507. [Consolidated with § 490].....	1368
508. Negligence in starting and stopping.....	1368
509. Duty to passengers alighting.....	1377
510. Duty to assist passengers in getting on and off.....	1381
511. Duty to maintain guard against egress.....	1384
512. Duty to preserve order.....	1384
513. Liability for servant's malicious acts.....	1389
513a. Passengers on freight trains.....	1396
514. Obligations of coach proprietors.....	1400
515. Carriers by steam vessels.....	1402
516. <i>Res ipsa</i> , or presumption of negligence.....	1405
517. Presumption of negligence, how rebutted.....	1417
518. Evidence	1419
519. Contributory negligence.....	1426
520. Getting on and off moving vehicle.....	1434
521. Getting on and off in other cases.....	1445
522. Statutes as to platforms, etc.....	1452
523. Passengers in improper places.....	1454
524. Changing places on train.....	1463
525. Crossing tracks	1466
526. Care of passengers' personal effects.....	1469
526a. Sleeping cars, etc.....	1472
526b. Liability of sleeping car companies for baggage or money stolen	1473
527. [Omitted]	1477

CHAPTER XXIII.

TELEGRAPHS AND TELEPHONES.

SEC. 528. Nature of the business.....	1478
529. Its peculiarities	1479
530. Risks to which it is exposed.....	1480
531. Statutory regulations	1480
532. Obligations not merely in contract.....	1482
533. [Consolidated with § 536].....	1483
534. Telegraph companies, common carriers.....	1483
535. Reasons for considering them such.....	1486
536. Obligation to furnish telegraphic facilities.....	1487
537. Responsible only for negligence	1488
538. Unlawful messages	1489

TABLE OF CONTENTS.

xxxī

	PAGE.
SEC. 539. Degree of care required.....	1491
539a. Forged and fraudulent messages.....	1492
540. Duty as to receiving messages.....	1493
540a. Duty as to delivery.....	1497
541. Messages must not be altered.....	1501
542. Evidence of negligence	1503
543. To whom company is responsible.....	1507
543a. Interstate messages	1511
544. Connecting lines	1513
545. Power to make regulations.....	1516
546. Certain reasonable rules considered.....	1516
547. Certain unreasonable rules considered.....	1519
548. Notice of rules necessary.....	1521
549. [Consolidated with § 548].....	1523
550. Limitation of liability by mere notice.....	1523
551. Limitation of liability by contract.....	1524
552. Proof of special contract.....	1524
553. Validity of contracts exempting from liability generally..	1526
554. Validity of other stipulations.....	1529
555. Effect of stipulations	1533
556. Evidence under special contracts.....	1537
556a. Contributory negligence	1538
556b. Wireless telegraphy, etc.....	1539
556c. Telephone companies	1540

PART VI.

PERSONAL SERVICES.

CHAPTER	XXIV. ATTORNEYS AND COUNSELLORS.
	XXV. BANKERS AND BILL COLLECTORS.
	XXVI. CLERKS AND RECORDING OFFICERS.
	XXVII. NOTARIES PUBLIC.
	XXVIII. PHYSICIANS AND SURGEONS.
	XXIX. SHERIFFS AND CONSTABLES.

CHAPTER XXIV.

ATTORNEYS AND COUNSELLORS AT LAW.

SEC. 557. The relation of attorney and client.....	1547
558. Degree of skill, etc., required of attorneys.....	1548
559. General rule of liability.....	1549

	PAGE.
SEC. 560. When liable for gross negligence only.....	1553
561. Liability to summary jurisdiction of court.....	1554
562. Obligation not dependent upon compensation.....	1555
563. Retainer implies professional employment only.....	1556
564. Advice of counsel, how far a protection to an attorney...	1557
565. Negligence a question for the jury.....	1558
566. Burden of proof	1558
567. Negligence in instituting proceedings.....	1559
568. Obligation to proceed in the cause.....	1560
569. Conduct of cause.....	1561
570. Obligation to take collateral proceedings.....	1563
571. [Consolidated with § 569].....	1564
572. Proceedings after trial	1564
573. Compromising suit or judgment.....	1566
574. Negligence in conveyancing and searching titles.....	1568
575. Negligence in keeping and investing money.....	1570
576. [Omitted]	1571
577. Liability for partners or agents.....	1571

CHAPTER XXV.

BANKERS AND BILL COLLECTORS.

SEC. 578. Who are bankers	1573
579. Obligation to use care.....	1573
580. Duty to present bill for payment or acceptance.....	1574
580a. Duty to remit proceeds of collection.....	1577
581. Duty to give notice of dishonor of bill.....	1579
582. Liability for negligence of sub-agents.....	1581
583. Exceptions to the rule	1585
584. Personal liability of sub-agents.....	1588
584a. Right of action against sending bank or sub-agent.....	1589
585. Collecting by notary.....	1590
586. Who may sue for banker's negligence.....	1592
587. Banker not bound to sue upon paper.....	1593
587a. Burden of proof.....	1593
588. Special deposits	1596
589. Liability of directors.....	1598

CHAPTER XXVI.

CLERKS AND OTHER RECORDING OFFICERS.

SEC. 590. General rule of liability.....	1600
591. Illustrations of the rule.....	1601
592. False certificates, and mistakes in recording.....	1604
593. Liability of towns for negligence of their clerks.....	1606

CHAPTER XXVII.

NOTARIES PUBLIC.

	PAGE.
SEC. 594. General rule of liability for negligence.....	1607
595. [Consolidated with § 594].....	1608
596. [Consolidated with § 585].....	1608
597. Standard of care in presenting and protesting bills.....	1608
598. Illustrations of liability.....	1610
599. Giving notice of dishonor of bills.....	1611
600. Negligence must be direct cause of indorser's discharge...	1611
601. Defences by notary	1612
602. Liability for defective acknowledgments.....	1612

CHAPTER XXVIII.

PHYSICIANS AND SURGEONS.

SEC. 603. Right to recover for services.....	1615
604. Obligation of physician	1616
605. [Consolidated with § 604].....	1618
606. Degree of skill required.....	1618
607. He is bound to have skill.....	1619
608. Standard of skill not absolute.....	1621
609. Tests of skill.....	1622
610. Character of disease may determine degree of skill.....	1623
611. And so may the habits and tendencies of the patient....	1624
612. Physicians not liable for errors of judgment.....	1624
613. Duty of continuing in attendance.....	1625
614. Evidence of negligence and burden of proof.....	1626
614a. Recent cases illustrating the foregoing principles.....	1628
615. Contributory fault	1631

CHAPTER XXIX.

SHERIFFS AND CONSTABLES.

SEC. 616. Common-law liability	1632
617. Sheriff must owe a duty to plaintiff, etc.....	1633
618. Liability for misconduct of deputy.....	1635
619. Diligence in executing process.....	1637
620. Inadequacy of levy.....	1639
621. Safe keeping of property.....	1640
622. Duty as to sale of property.....	1641
623. Liability for not returning writ; and for false return....	1642
624. Liability for insufficient sureties.....	1644
625. Liability for escape.....	1645
625a. Liability of sureties on official bond.....	1646

PART VII.

MANAGEMENT OF PROPERTY.

CHAPTER XXX. CARE OF ANIMALS.

XXXI. DRIVING, RIDING AND FLYING.

XXXII. FENCES.

XXXIII. FIRE.

XXXIV. EXPLOSIVES, MACHINERY AND MISCELLANEOUS CASES.

XXXV. GAS AND ELECTRICAL WORKS.

XXXVI. LAND AND STRUCTURES.

XXXVII. WATER AND WATERCOURSES.

CHAPTER XXX.

CARE OF ANIMALS.

	PAGE.
SEC. 626. Owner's liability for injuries committed by animals.....	1650
627. Owner's liability for animal's trespass.....	1652
628. Owner's notice of disposition of animal.....	1654
629. Presumption of notice of disposition.....	1656
630. What deemed sufficient notice.....	1660
631. What kind of notice necessary.....	1661
632. Sufficient evidence of notice.....	1662
633. Keeping infectiously diseased animals.....	1665
634. Animals running at large.....	1667
635. Who will be deemed owner of animal.....	1670
636. Ownership of animal; how proved.....	1672
637. Imputed knowledge of animal's habits.....	1673
638. Separate owners; when jointly liable.....	1675
639. Contributory negligence	1676
640. Driving trespassing animals off land.....	1679
641. Negligence in impounding cattle.....	1680
642. [Omitted]	1681
643. Injuries to a dog fighting another.....	1681

CHAPTER XXXI.

DRIVING, RIDING AND FLYING.

	PAGE.
SEC. 644. Management of horses and vehicles.....	1683
644 <i>a</i> . Care as to children and others under disability.....	1685
645. Examples of negligence.....	1687
646. Rate of speed	1689
647. Injuries from driving vicious or runaway horses.....	1691
648. [Consolidated with § 647].....	1692
649. Rule of the road.....	1692
650. [Consolidated with § 649].....	1694
651. Persons on wrong side assume risk.....	1694
652. Application of rule of the road.....	1695
653. Cycling	1697
653 <i>a</i> . Motor vehicles or automobiles.....	1700
653 <i>b</i> . Motor vehicles frightening horses.....	1703
653 <i>c</i> . Motor vehicle and pedestrians.....	1706
653 <i>d</i> . Liability of owner and operators of motor vehicles for injuries to passengers	1708
653 <i>e</i> . Statutes regulating the use of automobiles.....	1708
653 <i>f</i> . Law of aviation	1711
654. Contributory negligence	1712

CHAPTER XXXII.

FENCES.

SEC. 655. English common-law rule as to fences.....	1719
656. Peculiar American common-law rule.....	1720
657. Statutory regulations	1721
658. Effect of contract to maintain fences.....	1722
659. Who entitled to protection of animals by fence.....	1723
660. Who entitled to protection against animals by fence.....	1724
661. Who are liable for defects of fence.....	1724
662. Injuries to animals from insufficient fence.....	1725
663. Injuries by animals from insufficient fence.....	1726
664. Division fences	1727

CHAPTER XXXIII.

FIRE.

SEC. 665. Fire accidentally kindled on one's own land.....	1729
666. Liability for spread of fire.....	1732
667. Proximate cause of injury.....	1740

	PAGE.
SEC. 668. Fire purposely kindled.....	1742
669. Fire kindled to clear land.....	1744
670. Firing other land	1745
671. Statutory liability	1746
672. Fire communicated from locomotives.....	1747
673. Duty to use approved appliances on locomotives.....	1752
674. Other neglect than want of approved appliances.....	1754
675. Evidence of origin of fire.....	1756
676. Burden of proof	1760
677. [Omitted]	1766
678. Combustibles on right of way.....	1766
679. Contributory negligence	1770
680. Negligent use of adjacent land.....	1774
680a. Plaintiff's exposure to personal injury in effort to save property	1778
691. [Consolidated with § 680].....	1779
692. [Consolidated with § 679].....	1779

CHAPTER XXXIV.

EXPLOSIVES, MACHINERY AND MISCELLANEOUS CASES.

SEC. 683. Management of machinery.....	1780
684. Who may complain of negligent management.....	1783
685. Statutory duty to fence machinery.....	1784
686. Negligent use of firearms, etc.....	1786
687. [Consolidated with § 686].....	1788
688. Negligent use of fireworks, etc.....	1789
688a. Blasting	1791
689. Storing of dangerous materials.....	1793
690. Vendors and bailors of dangerous material.....	1796
691. Pharmacists, opticians, etc.....	1801

CHAPTER XXXV.

GAS AND ELECTRICAL WORKS.

SEC. 692. Duty in construction and manufacture.....	1803
693. Duty of inspection and repair.....	1805
694. [Consolidated with § 693].....	1808
695. Contributory act of stranger.....	1808
696. Defence of contributory negligence.....	1809
697. Negligence of company's servants.....	1810
698. Electrical works	1811
698a. Contributory negligence	1815

CHAPTER XXXVI.

LAND AND STRUCTURES.

	PAGE.
SEC. 699. Obligation of owner of land.....	1817
700. Liberty in use of premises.....	1819
701. Interference with lateral support.....	1820
701a. Owner's absolute liability.....	1824
702. Dangerous structures	1826
702a. Violation of building laws; fire escapes.....	1830
703. Liability to travelers on adjoining highway.....	1832
703a. Liability of abutting owners for personal injuries caused by the failure to keep their sidewalks in repair.....	1836
704. Liability to business visitors.....	1838
705. Liability to persons entering under bare license.....	1843
705a. Peace officers, firemen and others present on premises in the discharge of public duty.....	1850
706. Owner's liability to persons present on premises on in- vitation, express or implied.....	1853
707. Unusual or improper use of land or buildings.....	1856
708. Landlord's liability for defects arising after lease.....	1857
708a. Liability of landlord, whether in contract or tort, where he covenants to keep in repair.....	1860
709. Liability to tenant for defects at date of lease.....	1865
709a. Liability to strangers for defects at date of lease.....	1868
710. Liability of partial lessor.....	1870
711. [Consolidated with § 709].....	1873
712. Tenant, when not liable.....	1873
713. Tenant, when liable	1874
714. [Consolidated with § 343].....	1875
715. [Consolidated with § 703].....	1875
716. Miner's absolute liability.....	1875
717. Miner's liability for negligence.....	1876
718. Liability for condition of unfinished buildings.....	1878
719. Trap-doors, hoistways, hatchways, etc.....	1878
719a. Passenger elevators	1880
720. Traps for trespassers.....	1885
721. Dripping water and snow.....	1886
722. [Consolidated with § 709].....	1887
723. Occupant's liability for leakage.....	1887
724. Liability where landlord and tenant are both in fault....	1889
725. Wharfingers, etc.	1890
726. Inspection of wharves	1893
727. [Omitted]	1894
727a. Warehousemen	1894

CHAPTER XXXVII.

WATER AND WATERCOURSES.

	PAGE.
SEC. 728. Artificial collections of water.....	1895
729. Rights of riparian owners.....	1897
730. Erection of dams.....	1903
731. Overflowing the banks of streams.....	1904
732. Care in construction and maintenance of dams.....	1906
733. Diversion of watercourse	1907
734. Fouling of streams and wells.....	1909
735. Drainage of surface water.....	1912
736. Interference with water.....	1916
737. Obstruction of navigation.....	1917
738. Duty to remove wrecks.....	1918

PART VIII.

CHAPTER XXXVIII.

MEASURE OF DAMAGES.

I. DAMAGES GENERALLY.

SEC. 739. General rule of damages.....	1920
740. Uncertainty; how resolved.....	1925
741. Damages which might be avoided.....	1926
742. Disease resulting from injury.....	1931
743. Future damage	1935
744. Loss of profits	1939
745. Speculative or illegal profits not allowed.....	1941
746. Recovery not to exceed value of property.....	1942
747. Interest as damages	1943
748. Exemplary damages	1944
749. Exemplary damages against masters.....	1949
749a. Damages against municipal corporations.....	1954

II. DAMAGE TO PROPERTY.

750. Damage to real property.....	1955
751. Damage to personal property.....	1961
752. Damage to animals	1964
753. Damages against attorneys.....	1965
753a. Telegraph damages	1966
754. Telegraph damages limited by want of notice.....	1971

TABLE OF CONTENTS.

xxxix

	PAGE.
Sec. 755. Telegraph damages in particular cases.....	1978
756. Social telegrams	1985
756a. General rule	1989
756b. Rationale of doctrine of liability for mental anguish.....	1990
757. Statutory penalties	1992
757a. Telephone companies	1993

III. DAMAGE TO THE PERSON.

758. Damages for personal injuries.....	1994
759. Expenses of cure	2000
760. Loss of time and capacity to earn.....	2002
761. Bodily and mental suffering.....	2010
761a. Ejected passenger	2014
762. Circumstances of parties.....	2016
763. Damages in favor of parent, master, etc.....	2017
764. Damages of husband and wife.....	2019
765. Insurance, etc., not deducted from damages.....	2022

IV. DAMAGES FOR DEATH.

766. Damages in case of death; general rule.....	2023
767. Peculiar statutes	2025
767a. Actions on surviving rights.....	2026
768. For whose benefit recovery allowed.....	2027
769. What is pecuniary damage.....	2028
770. Expenses incurred by death.....	2035
771. Loss of parent	2036
772. Loss of child	2038
773. Loss of husband or wife.....	2040
774. Loss of collateral relatives.....	2044
775. Damages for death; how ascertained.....	2045
776. Statutory limitations of amount.....	2049

APPENDIX.

I.

DEATH STATUTES	2051
----------------------	------

II.

EMPLOYERS' LIABILITY STATUTES	2108
-------------------------------------	------

III.

WORKINGMEN'S COMPENSATION ACTS	2199
--------------------------------------	------

TABLE OF CASES.

[References are to sections.]

- | | |
|---|--|
| <p>Aaron v. Broiles, 262
 Aaronson v. Pa. R. Co., 727a
 Abbett v. Chicago, etc. R. Co., 54, 56
 v. Johnson county, 256, 257
 Abbitt v. Lake Erie, etc. R. Co., 66a,
 207a, 471
 Abbot v. Gore, 676, 678
 v. McCadden, 773
 Abbott v. Detroit, 758
 v. Jackson, 713
 v. Johnstown, etc. R. Co., 413,
 459
 v. Kalbus, 426
 v. Kansas City, etc. R. Co., 735
 v. Kerswell, 619
 v. Kimball, 621
 v. Oregon, etc. Ry. Co., 501
 v. Macfie, 34
 v. Rockland, 368
 v. Smith, 582
 v. Wolcott, 379
 Abby v. Wood, 654
 Abeclin v. Porter (App. 2083)
 Abel v. North Hampton Tr. Co., 516
 v. Delaware, etc. Canal Co.,
 202, 203
 Abeles v. Bransfield, 115
 v. Western U. Tel. Co., 754
 Abend v. Terre Haute, etc. R. Co.,
 207b, 238, 241
 Abendroth v. Greenwich, 254
 Abernethy v. Van Buren, 379
 Abilene v. Cowperthwait, 353, 356,
 358
 Abney v. Indiana, etc. Tr. Co., 61
 v. Louisiana, etc. Ry. Co., 501
 Abraham v. Reynolds, 178, 225, 234,
 706
 Abrahams v. California Powder Co.,
 117
 v. Deakin, 145
 Abrams v. Seattle, etc. Ry. Co., 672
 Abston v. Waldon Academy, 331
 Achey v. Marion, 368
 Achtenhagan v. Watertown, 376</p> | <p>Acker v. Alexandria, etc. R. Co.,
 120a, 459
 v. Anderson, 376
 v. New Castle, 274
 Ackerman v. Cincinnati, etc. Ry. Co.,
 413, 459
 v. City of Williamsport, 334
 Acme Coal Min. Co. v. McIver, 207,
 209a
 Acme, etc. Co. v. McPhetridge (App.
 2137)
 Accord v. St. Louis, etc. Ry. Co.,
 434, 436
 Acton v. Fargo, etc. Ry. Co., 99, 485a
 Adam v. British, etc. S. S. Co., 134a
 v. Chicago, etc. Ry. Co., 750
 Adams v. Atchison, etc. Ry. Co., 455
 v. Boston, etc. St. Ry. Co., 88a
 (App. 2069)
 v. Brown, 635
 v. Carlisle, 8, 107
 v. Chicopee, 363
 v. Cost, 148
 v. Fitchburg R. Co., 132
 v. Fletcher, 703
 v. Grand Rapids, etc. Co., 203
 v. Gulf, etc. Ry. Co., 14, 19a
 v. Hall, 628, 638
 v. Hannibal, etc. R. Co., 518
 v. Hemenway, 686
 v. Iron Cliffs Co., 239
 v. Lancashire, etc. R. Co., 89
 v. Loraine Mfg. Co., 748
 v. Louisville, etc. Ry., 500,
 512, 516
 v. Natick, 356
 v. New Jersey Steamb. R. Co.,
 526
 v. Salina, 748
 v. Spangler, 620
 v. Union Ry. Co., 516
 v. Washington, etc. Ry. Co.,
 523
 v. Wilmington, etc. Ry. Co.,
 485c
 v. Young, 30, 666</p> |
|---|--|

[References are to sections.]

- Adams Hotel Co. v. Cobb, 758, 763
 Adamson v. Jarvis, 242
 v. New York, 261
 v. Noble, 617
 Adasken v. Gilbert, 241b
 Addington v. Canfield, 659
 Adkins v. Atlantic, etc. R. Co., 216
 Adkinson v. State, 398
 Adkisson's Admr. v. Louisville, etc.
 Ry. Co., 1
 Adolph v. Central Park, etc. Ry. Co.,
 480, 485a
 Adsit v. Brady, 118, 313, 338
 Aerkfetz v. Humphreys, 203, 207
 Ætna Ins. Co. v. Alton City Bank,
 582, 585
 Agnew v. Corunna, 355
 Agresta v. Stevenson, 207
 Agricultural, etc. Assn. v. State, 772
 Agricultural Bank v. Commercial
 Bank, 585
 Ahearn v. Connell, 617
 Ahern v. Kings county, 256
 v. Steele, 120
 v. Oregon Tel. Co., 359, 698
 v. Steele, 119, 120, 343, 708,
 709a, 725
 Ahlfeldt v. Mexico, 356
 Ahlstrand v. Bishop, 626
 Aicher v. City of Denver, 86, 274
 Aigeltinger v. Whelan, 622
 Aiken v. Holyoke St. Ry. Co., 73a,
 110, 150, 485
 v. Perry, 741
 v. Telegraph Co., 543, 553
 v. Western U. Tel. Co., 543,
 555
 Ainley v. Manhattan R. Co., 764
 Aireton v. Davis, 622
 Aitcheson v. Madock, 569
 Aitken, Matter of, 561
 Akerly Lumber Co. v. Rauen, 192
 v. White, 709
 Akers v. Chicago, etc. R. Co., 410,
 484
 v. Overbeck, 117, 690
 Akersloot v. Second Ave. R. Co., 508
 Akeson v. Chicago, etc. Ry. Co. (App.
 2141)
 Akridge v. Atlanta, etc. R. Co., 741
 Alabama Gt. So. Ry. Co. v. Linn, 464
 Alabama Mining, etc. Ry. v. Marcus,
 218
 Alabama, etc. Coal Co. v. Hammond,
 187, 197, 207
 v. Turner, 729, 733, 734
 Alabama, etc. R. Co. v. Anderson,
 477
 v. Davis, 66, 520
 Alabama, etc. Ry. Co. v. Appleton,
 758
 v. Arnold, 748
 v. Bates, 488
 v. Blivens, 432
 v. Bullard, 1
 v. Burgess, 140a (App. 2052)
 v. Carroll, 129, 131 (App.
 2120)
 v. Carter, 460
 v. Chapman, 421, 480
 v. Frazier, 493, 513, 749
 v. Fried Co., 680
 v. Fulghum, 131
 v. Godfrey, 484
 v. Groome, 184a
 v. Guilford, 51, 495, 497
 v. Guest, 114a, 457 (App.
 2052, 2053)
 v. Hall, 429
 v. Hamburg, 417a
 v. Hanbury, 31, 65a, 464a
 v. Harris, 150
 v. Hawk, 60a, 518, 523
 v. Hill, 742
 v. Horn, 508
 v. Jones, 429, 508, 769
 v. Livingstone, 513a
 v. Lowe, 463
 v. McAlpin, 457
 v. McAlpine, 47, 419, 429, 430,
 431, 451a
 v. McGill, 431
 v. McWhorter, 207
 Alabama Min. Ry. Co. v. Marcus, 218
 v. Moody, 11, 428
 v. Phillips, 460
 v. Powers, 429
 v. Roach, 201b, 207
 v. Samplex, 154, 500, 513
 v. Sellers, 509, 748, 749
 v. Siniard, 757
 v. Summers, 461
 v. Tally-Bates Const. Co., 164,
 168
 v. Planters' Warehouse Co.,
 680
 v. Weller, 187
 v. Williamson, 108
 v. Yount, 223
 G. S. R. Co. v. Hill, 518
 v. Linn, 464
 v. Ritchie, 209a
 Midland R. Co. v. McDonald,
 207b
 Alabama Steel, etc. Co. v. Clements,
 704, 706
 v. Tallant, 94, 758

TABLE OF CASES.

xliii

[References are to sections.]

- Alamango v. Albany county, 250, 256, 260
 Alamo Dressed Beef Co. v. Yeargan, 193
 Alaska, The, 124, 132
 Alaska Gold Min. Co. v. Barbridge, 717
 Alaska Mining Co. v. Whelan, 64, 232
 Albany v. Cunliff, 8, 334a
 v. Watervliet, 354
 Albany Tel. Co. v. Terry, 754
 Albany, etc. Ry. Co. v. Wheeler, 672, 673, 680, 747
 Albee v. Floyd Co., 392, 393
 Albers v. Western U. Tel. Co., 554
 Albert v. Albany R. Co., 71
 v. Bleecker St. R. Co., 634, 645, 654, 751
 v. Northern, etc. R. Co., 58, 675, 676
 v. State, 133, 726
 v. Sweet, 464a
 Alberts v. Vernon, 369
 Albie v. Jones, 617
 Albin v. Chicago, etc. Ry. Co., 513a
 v. Gulf, etc. Ry. Co., 493
 Albina Ferry Co. v. The Imperial, 737
 Albion v. Hetrick, 66, 114, 376
 Lumber Co. v. De Nobra, 486
 Albrecht v. Milwaukee, etc. R. Co., 241c (App. 2196)
 v. Queens County, 256
 Albritton v. Huntsville, 289, 369
 Albro v. Agawam Co., 226
 v. Jaquith, 245
 Alcorn v. Chicago, etc. R. Co., 207b
 v. Philadelphia, 291
 v. Sadler, 729
 Aldag v. Ott, 708
 Alden v. Minneapolis, 274
 v. N. Y. Central R. Co., 45, 497
 Aldrich v. Boston, etc. R. Co., 727a
 v. Concord, etc. R. Co., 60c
 v. Gorham, 346
 v. Illinois, etc. R. Co., 238
 v. Metropolitan, etc. Ry. Co., 407a
 v. Monroe, 647
 v. Pelham, 272
 v. St. Louis Trans. Co., 88a
 v. Tripp, 286
 Aldridge v. Great Western R. Co., 16
 v. Midland Furnace Co., 60a, 187
 v. Midland, etc. Furnace Co., 207c
 Alexander v. Big Rapids, 356
 Alexander v. Brady, 256
 v. Carolina Mills, 218
 v. Card, 303
 v. Central Lumber Co., 216
 v. Chicago, etc. R. Co., 424
 v. Humber, 18, 743, 761
 v. Louisville, etc. R. Co., 207b, 219a
 v. Macauley, 619
 v. Milwaukee, 274, 283
 v. Mount Sterling, 53
 v. New Castle, 346
 v. Oshkosh, 367
 v. Pennsylvania R. Co., 131
 v. Richmond, etc. R. Co., 476
 v. Vicksburg, 265
 v. Western U. Tel. Co., 753a, 755
 v. Wilson, 619
 Alexandria, etc. Co. v. Irish, 692
 Alexandria, etc. R. Co. v. Brown, 459
 v. Herndon, 506, 510
 Aley v. Missouri Pac. Ry. Co. (App. 2075)
 Alford v. Metcalf, 207i
 Alfson v. Bush Co. (App. 2083)
 Alger v. Boston, 291
 v. Duluth-Superior Tr. Co., 114a
 v. Lowell, 93, 114, 122, 346
 v. Mississippi, etc. R. Co., 419
 Alkire v. Myers Lbr. Co., 207h, 214a, 215
 Allan v. Logan, 207e
 v. State Steamship Co., 57, 605, 691
 Allard v. Chicago, etc. R. Co., 676
 Allaway v. Wagstaff, 701, 716
 Allegheny City v. Campbell, 285
 Allegany County v. Broadwater, 377
 Allegheny County v. Gibson, 261
 Allen v. Bainbridge, 665, 666, 669
 v. Barrett, 115, 765
 v. Boston, etc. R. Co., 287, 295, 449, 472
 v. Buffalo, etc. R. Co., 359, 415
 v. Burlington, etc. R. Co., 406, 410
 v. Chicago, etc. Ry. Co., 751
 v. Chippewa Falls, 271, 274, 363
 v. Deming, 104
 v. Elec. Ry., 195, 218
 v. Gilman, 207h
 v. Goodwin, 232
 v. Hancock, 378
 v. Hayward, 14, 165, 168, 173, 278

[References are to sections.]

- Allen v. Johnston, 704
 v. Logan City, 209a
 v. Maine Cent. R. Co., 476
 v. Manhattan R. Co., 764
 v. Merchants' Bank, 581, 582, 585, 599
 v. Murray, 58
 v. New Gas Co., 222
 v. New York, etc. Ry. Co., 207
 v. Northern Pacific Ry. Co., 516
 v. St. Louis Tr. Co., 522
 v. Smith Iron Co., 195
 v. Somers, 727a
 v. Standard Box, etc. Co., 214a, 215, 224
 v. State, 313
 v. Suydam, 572a
 v. Union Pac. R. Co., 195
 v. Voje, 612
 v. Willard, 8, 57, 111, 165, 166, 169
 v. Williamsburgh Sav. Bank, 588
 v. Wisconsin, etc. Ry. Co., 206, 213a
 County v. Creviston, 369, 380
 Allender v. Chicago, etc. R. Co., 31, 506, 508, 510
 Allentown v. Kramer, 274
 Allerton v. Boston, etc. R. Co., 90, 476
 etc. Co. v. Egan, 184, 208
 Allis v. Columbian University, 704
 Allison v. Chandler, 739
 v. Richmond, 299
 v. Southern Ry., 232
 v. Steiner, 197
 v. Western, etc. R. Co., 176, 690
 Allyn v. Boston, etc. R. Co., 476
 Alperin v. Earle, 707, 710
 Alperin v. Churchill, 680
 Alsever v. Minneapolis, etc. Ry. Co., 154a
 Alteirac v. West Pratt Coal Co., 214a
 Altman v. Schwab Mfg. Co., 214a, 215
 v. Western Union Tel. Co., 553, 753a
 Altnow v. Sibley, 256
 Alton v. Gilmanton, 569
 v. Hope, 262
 v. Midland R. Co., 116, 486
 Light, etc. Co. v. Oliver, 495
 etc. R. Co. v. Baugh, 419
 etc. Ry. v. Cox, 151
 v. Deitz, 408
 Altorf v. Wolfe, 157, 765
 Altvater v. Baltimore, 291, 295
 Aluminum, etc. Co. v. Ramsey (App. 2122)
 Amann v. Chicago, etc. Ry. Co., 760
 American Advertising Co. v. Flannigan, 73
 American Bolt Co. v. Fennell, 113
 American Bridge Co. v. Bialk, 207h
 v. Glenmore Distilleries Co., 744
 v. Seeds, 207
 v. Valente, 1, 195, 235
 Car, etc. Co. v. Clark, 223a (App. 2138)
 Exch. Bank v. Metropolitan Nat'l Bank, 583
 v. Theummler 584a
 Ex. Co. v. Haire, 598
 v. Ogles, 488
 v. Sands, 505
 Hoist, etc. Co. v. Hall, 57
 Ice Co. v. Gardiner Lbr. Co., 665, 668
 Locomotive Co. v. Hoffman, 729
 Malting Co. v. Lelivelt, 192
 Rolling Mill Co. v. Hullinger (App. 2136)
 Smelting, etc. Co. v. McGee, 206, 217
 Steamb. Co. v. Chase, 132
 Steel Co. v. Keef, 190
 Tel. Co. v. Walker, 588
 U. Tel. Co. v. Daugherty, 553
 Tobacco Co. v. Adams, 197
 Waterworks Co. v. Dougherty, 93, 761
 etc. Bank v. Swope, 708
 etc. Distillery Co. v. Hair, 705a
 etc. Co. v. Flannigan, 705
 etc. Foundry Co. v. Nachand, 193
 Americus v. Chapman, 356
 v. Johnson, 289, 337, 375
 R. Co. v. Luckie, 103
 Amerine v. Porteus, 719a
 Ames v. Broadway, etc. R. Co., 74
 v. Gilman, 557
 v. Jordan, 162
 Amiable Nancy, The, 744
 Amick v. O'Hara, 640
 Ammerman v. Wyoming Canal Co., 389
 Ammons v. Southern Pacific Ry. Co., 493, 761a
 Amory v. Wabash Ry. Co., 526
 Amos v. Duffy, 214

[References are to sections.]

- Amsbey v. Hinds, 336**
Amsterdam Knitting Co. v. Dean, 729
Amy v. Supervisors, 313
Anchor Brewing Co. v. Dobbs Ferry, 274
Anchovia, The, 186
Andersen v. N. Y. & Cuba S. S. Co., 719
Anderson v. Akeley Lumber Co., 211a
 v. Albion, 353
 v. Alton Nat'l Bank, 582
 v. Bassman, 729
 v. Bath, 355, 378
 v. Bennett, 232, 233
 v. Brownlee, 243
 v. Buckton, 627, 633
 v. Cape Fear Steamb. Co., 672
 v. Chicago, etc. R. Co., 60c, 108, 425, 451a, 480, 766, 775
 v. Citizens' R. Co., 508
 v. Chicago, etc. Ry. Co., 450, 457
 v. City, etc. Ry. Co., 516, 523
 v. Clark, 209a
 v. Columbia Imp. Co., 203a
 v. Daly Min. Co. (App. 2188)
 v. Dickie, 120
 v. Duckworth, 215
 v. East, 262, 354, 702
 v. Elder, 206
 v. Tentch, 175
 v. Fort Dodge, etc. Ry. Co., 705
 v. Fleming, 298, 341
 v. Globe Nav. Co., 203a
 v. Great Northern Ry. Co., 49, 99, 138, 481a, 772
 v. Henderson, 736
 v. Hervey, 113
 v. Hygeia Hotel Co. (App. 2100)
 v. Johett, 591
 v. Metropolitan St. Ry. Co., 66
 v. Michigan Cent. R. Co., 195
 v. Miller, 22
 v. Milliken, 193, 310 (App. 2171)
 v. Minneapolis St. R. Co., 64, 485
 v. Minnesota, etc. R. Co., 197
 v. Missouri, etc. Ry. Co., 490
 v. Morrison, 114, 218
 v. New York, etc. Ry. Co., 223
 v. Northern Mill Co, 207g
 v. Northern Pac. Lumber Co., 215
Anderson v. Northern Pac. Ry. Co., 207a, 208, 209a
 v. Oregon Ry. Co., 672
 v. Pennsylvania Steel Co., (App. 2171)
 v. Pitt Iron Min. Co., 207h, 215
 v. Pyper, 497
 v. Roberts, 303
 v. Rome, etc. R. Co., 518
 v. St. Louis, etc. Ry. Co., 184a
 v. Schloey, 495, 514, 516
 v. Scully, 404
 v. Southern Ry. Co., 61
 v. Sparks, 653a
 v. Standard Gas Co., 693
 v. Steamboat Co., 256
 v. Thunder Bay Boom Co., 730, 731
 v. Tug River, etc. Co., 164
 v. Wasatch, etc. R. Co., 58, 676
 v. Western U. Tel. Co., 552, 753a
 v. Wilmington, 263, 287, 289, 353, 375
 v. Worley, 655
 v. Young, 759, 760
Andre v. Chicago, etc. R. Co., 434
Andrea v. Thatcher, 617
Andrecsik v. New Jersey Tube Co., 215
Andreson v. Ogden Union R. Co., 203
Andrews v. Boedecker, 141, 164
 v. Chicago, etc. R. Co., 137, 760
 v. Green, 155
 v. Hartford, etc. R. Co., 135, 139
 v. Hawley, 562
 v. Mason City, etc. R. Co., 426
 v. New York, etc. Ry. Co., 460
 v. Yazoo, etc. Ry. Co., 513
Andricus' Admr. v. Pineville Coal Co., 203, 223
Andrist v. Union Pac. R. Co., 524
Angell v. Hill, 655
 v. Lewis, 649
 v. Simmons, 641
Anger v. Ontario, etc. Ry. Co., 449
Anglin v. Texas, etc. R. Co., 207c
Angus v. Dalton, 701
 v. Lee, 718
 v. Radin, 627
Anheuser-Busch Brewing Ass'n v. Peterson, 734
Anjou v. Boston L. Ry. Co., 501
Anna Maria, The, 744

[References are to sections.]

- Annacker v. Chicago, etc. R. Co., 466, 485
 Annapolis, etc. R. Co. v. Baldwin, 418, 456
 etc. Co. v. Frederick, 548
 v. Gantt, 30, 38, 666, 675, 676
 etc. Ry. Co. v. Pamphrey, 464
 Ann Arbor Ry. Co. v. Kleinz, 705
 Anne Arundel County Comrs. v. Carr, 367
 Anne Arundel County v. Duckett, 257, 262, 281
 v. Duval, 291, 298, 368
 Annett v. Foster, 166
 Anniston Elec. etc. Co. v. Rosen, 99
 Pipe Works v. Dickey, 195
 Anon., 731
 Anselment v. Daniell, 644
 Ansteth v. Buffalo R. Co., 489
 Anthony v. Adams, 299
 v. Glens Falls, 363
 v. Lapham, 729
 v. Leeret, 195
 v. Wilkerson, 634
 Ittner Brick Co. v. Ashby, 769
 Antioch Coal Co. v. Rockey, 193, 205, 206, 209a
 Antisdell v. Chicago, etc. R. Co., 425, 455
 Antonian v. Southern Pac. Co., 1, 472, 476
 Anustasakas v. International Contract Co., 134a (App. 2103)
 Apfelback v. Consol. Gas Co., 693
 Apker v. Hoquiam, 358
 Appel v. Buffalo, etc. R. Co., 209a, 216
 v. Eaton, etc. Co., 157
 Apple v. Marion County, 376
 Applebee v. Percy, 630
 Appleby v. Erie Bank, 588
 Appleton v. Water Commissioners, 291
 Apperson v. Lazro, 653c, 654
 Arbenz v. Wheeling, etc. Ry. Co., 414
 Arcade File Works v. Juteau, 203
 Archambault v. Archambault, 207e
 Archer v. Denver, 271
 v. Ft. Wayne, etc. R. Co., 523
 v. N. Y., New Haven, etc. R. Co., 458, 506
 v. Union Pac. Ry. Co., 457
 Foster Const. Co. v. Vaughan, 203
 Architectural, etc. Wks. v. Nagels, 232
 Arctic Fire Ins. Co. v. Austin, 61, 65
 Arden v. Tucker, 577
 Ardmore Coal Co. v. Bevil (App. 2062)
 Ardolino v. Reinhardt, 73a
 Arent v. Squire, 57
 Arey v. Newton, 379
 Argus v. Sturgis, 376
 Arine v. Minneapolis, etc. Ry. Co., 475
 Arizona Copper Co. v. Gillespie, 729
 Lumber Co. v. Mooney, 195
 Arkadelphia Lumber Co. v. Bethea, 207a
 v. Henderson, 219
 v. Smith 196
 v. Whitted, 218
 v. Windham, 289
 Arkansas City v. Payne, 49
 Arkansas Cotton Oil Co. v. Carr, 207e
 Arkansas Tel. Co. v. Ratteree, 698
 Arkansas, etc. Ry. Co. v. Graves, 457
 v. Griffith, 516
 v. Janson, 497, 523
 v. Lee, 542, 543a
 v. Rambo, 494, 516
 v. Robinson, 501, 758
 v. Sain, 485d
 v. Stroude, 542, 546, 756
 v. Worden, 218
 Arkerson v. Dennison, 195, 197
 Armbruster v. Auburn Gaslight Co., 692, 693
 Armour v. Carlas, 108
 v. Czischki, 772
 v. Golkowska, 59
 v. Hahn, 184, 239, 241
 v. Russell, 184
 Armistead v. Shreveport, etc. Ry. Co., 741
 Armstead v. Mendenhall, 485a
 Armstrong v. Ackley, 369
 v. Beadle, 131
 v. Chicago, etc. R. Co., 727a
 v. Cooley, 155
 v. Craig, 568
 v. Forg, 219
 v. Medbury, 702, 704
 v. Montgomery St. Ry. Co., 519, 520
 v. N. Y. Cent. R. Co., 490
 v. N. Y., New Haven, etc. R. Co., 464
 v. Oregon, etc. R. Co., 233b, 238
 v. Portland Ry. Co., 520
 v. Toler, 104
 County v. Clarion County, 301
 Armsworth v. Southwestern R. Co., 775

[References are to sections.]

- Arn v. Kansas City, 274
 Arndt v. City of Cullman, 287
 Arnold v. Atchison, etc. Ry. Co., 761*a*
 v. Blaker, 343
 v. Delaware, etc. Canal Co., 195, 207*c*
 v. Foot, 729
 v. Henry county, 256
 v. Holbrook, 343
 v. Illinois, etc. R. Co., 61
 v. Norton, 632
 v. Phila., etc. R. Co., 476
 v. Robertson, 574, 753
 v. San Jose, 258, 289
 v. Stanford, 299
 Arnot v. Bingham, 580*a*
 Arrowood v. South Carolina, etc. Ry. Co., 480
 Arrowsmith v. Nashville, etc. R. Co., 120*a*, 413, 459, 492
 Arroyo Ditch, etc. Co. v. Baldwin, 729, 732
 Artenberry v. Southern R. Co., 483
 Arthur v. Cohoes, 262
 Arthurs v. Chatfield, 655
 Artusy v. Missouri Pac. R. Co., 481
 Artz v. Chicago, etc. R. Co., 66, 93, 102, 463, 476
 Aryman v. Marshalltown, 369
 Aschoff v. City of Evansville, 286
 Ash v. Baltimore, etc. Ry. Co., 132, 133 (App. 2066)
 Ashbury v. Charlotte, etc. Co., 86
 Ashby v. White, 310
 Ashcraft v. Davenport Locomotive Wks., 184*a*
 Asher v. Cabell, 617
 v. East St. Louis, etc. Ry. Co., 495
 Ashford v. Thornton, 124
 Ashley v. Hart (App. 2150)
 Ashley v. Port Huron, 274, 287
 v. Root, 22
 Ashman v. Flint, etc. Ry. Co., 1
 Ashtabula, etc. Ry. Co. v. Holmes, 508
 Ashworth v. Stanwix, 185
 v. Southern Ry. Co., 484
 Askev v. Hall, 254
 Aspegren v. Kotas, 640
 Assop v. Yates, 209*a*
 Aston v. Heaven, 494, 694
 v. Newton, 334, 351
 v. Nolan, 701
 Atchison v. Challiss, 262, 274
 v. Dullam, 16, 686
 v. Goodrich Transp. Co., 667
 v. King, 289, 367
 Atchison v. Twine, 261
 Atchison, etc. Bridge Co. v. Miller, 184, 232
 Atchison, etc. R. Co. v. Ayers, 57
 v. Bailey, 73
 v. Baker, 99
 v. Bales, 58, 666
 v. Baty, 422
 v. Bell, 427
 v. Betts, 419
 v. Brassfield, 58, 241*c*
 v. Brown, 493
 v. Calhoun, 35, 70
 v. Campbell, 410
 v. Cash, 436
 v. Chance, 758, 761
 v. Cochran, 158
 v. Cogswell, 485*d*
 v. Cross, 772
 v. Davis, 429, 430
 v. Dickens, 224
 v. Dickerson, 493, 761*a*
 v. Elder, 436
 v. Fajardo (App. 2063)
 v. Farrow, 180
 v. Feehan, 54
 v. Frier, 508
 v. Gabbert, 453
 v. Gants, 493
 v. Geiser, 750
 v. Gibson, 676
 v. Hague, 460, 467, 473, 476, 485
 v. Headland, 488
 v. Henry, 102, 145, 417, 513, 749
 v. Hill, 478, 481*b*
 v. Hughes, 519, 520, 775
 v. Huitt, 115, 674, 750
 v. Johns, 458
 v. Johnson, 489, 523
 v. Jones, 741
 v. Judah, 464
 v. Kavanaugh, 452, 455
 v. Koehler, 241*c*
 v. Lannigan, 185*a* (App. 2063)
 v. Ledbetter, 195
 v. Lindley, 513*a*
 v. Loree, 426
 v. Love, 198
 v. McClurg, 463
 v. McElroy, 460
 v. McGinnis, 761
 v. McKee, 60*c*, 197, 203*a*, 205, 207*g*, 233*a*, 238
 v. Midgett, 206, 215, 761
 v. Miller, 238, 359
 v. Mills, 31
 v. Moore, 204, 205, 233

[References are to sections.]

- | | |
|---|--|
| <p>Atchison, etc. R. Co. v. Morgan, 102
 v. Myers, 196, 233a
 v. Napole, 133, 206
 v. Paton, 451a
 v. Parsons, 417a
 v. Paxter, 421
 v. Peck, 113
 v. Penfold, 196
 v. Plaskett, 479
 v. Plunkitt, 94, 375
 v. Priest, 481
 v. Reesman, 207b, 466a
 v. Riggs, 453
 v. Ringle, 748
 v. Roach, 503
 v. Rowan, 198, 199
 v. Rudolph (App. 2142)
 v. Sadler, 215
 v. Schriver, 464
 v. Schroeder, 211a
 v. Seeley, 238
 v. Shaft, 421, 453
 v. Shean, 477, 501
 v. Smith, 74
 v. Stanford, 28, 675
 v. Swarts, 193
 v. Schwindt, 480
 v. Todd, 481a
 v. Townsend, 137, 415, 478, 482, 766
 v. Twidall (App. 2143)
 v. Van Belle (App. 2097)
 v. Vincent (App. 2142)
 v. Wagner, 187
 v. Waltz, 467
 v. Weber, 137 (App. 2063)
 v. Wilkie, 474
 v. Willey, 476, 739
 v. Wilson, 223, 771, 773
 v. Winston, 187
 v. Zeiler, 187</p> <p>Athens Mfg. Co. v. Rucker, 731
 Atioka Coal Min. v. Miller, 195
 Atken v. Village of Wells River, 291
 Atkins v. Field, 245
 v. Lackawanna Trans. Co., 85a
 Atkinson, etc. Ry. Co. v. Mills, 31
 Atkinson v. Abraham, 114, 719
 v. Goodrich Tr. Co., 30, 31, 666
 v. Illinois Milk Co., 644
 v. Mott, 655
 v. Newcastle Water Co., 9
 v. Oelsner, 645
 v. Southern Ry. Co., 493</p> <p>Atlanta v. Buchanan, 368, 375
 v. Champe, 369</p> <p>Atlanta Cotton Co. v. Speer, 190, 230
 Atlanta Oil Mills v. Coffey, 706, 751
 Atlanta R. Co. v. Keeny, 761a</p> | <p>Atlanta, etc. R. Co. v. Ayers, 65, 103
 v. Ayres, 62</p> <p>Atlanta, etc. Ry. Co. v. Brown, 747, 750
 v. Bryant, 481b
 v. Dickerson, 508, 520
 v. Dunn, 749
 v. Gardner, 93
 v. Gravitt, 71, 457, 470
 v. Higdon, 406
 v. Hudson, 424
 v. Johnson, 743
 v. Kimberly, 168, 176
 v. Leach, 85, 85b
 v. Martin, 363
 v. Milam, 353
 v. Perdue, 353, 367
 v. Powell, 497
 v. Smith, 111, 219
 v. Venable, 138
 v. Walker, 60a, 104
 v. West, 8, 25
 v. Wilson, 346, 356
 v. Wood, 703, 761
 v. Wyly, 103</p> <p>Atlantic Factory Co. v. Speer, 705
 Atlantic City v. Brown, 488
 Atlantic, etc. Ry. Co. v. Adams, 460, 464, 484
 v. Bates, 490, 525
 v. Beazley, 207h, 237 (App. 2128)
 v. Burt, 430
 v. Crosby, 90
 v. Dees, 742
 v. Dunn, 749
 v. Farmer, 235
 v. Goodwin, 525
 v. Griffin, 419, 431
 v. Ironmonger, 66
 v. Jones, 769
 v. Laird, 22
 v. Linstedt, 207g
 v. McDonald, 772
 v. Mallard, 202
 v. Reiger, 466
 v. Ryland, 208
 v. Smith & Son, 432
 v. United States (App. 2118)
 v. Watkins, 668, 673, 676</p> <p>Atlas Engine Works v. Randall, 73, 203, 218</p> <p>Atoka Coal, etc. Co. v. Miller, 61, 94b, 180, 187, 209a</p> <p>Attaway v. Cartersville, 291
 Atterbury v. Wabash, etc. Ry. Co., 428
 Attorney General v. Tillinghast, 302
 v. Bradford Nav. Co., 401</p> |
|---|--|

[References are to sections.]

- Attorney General v. Brown**, 249
 v. Royal College of Physicians 603
Atwater v. Canandaigua, 262, 274
Atwell v. Keluff, 313
Atwood v. Atwater, 303
 v. Bangor, 274
 v. Biddeford, 299
 v. Chicago, etc. R. Co., 144
Atz v. Newark Lime Co., 195
Aucoin v. New Orleans, 353
Au v. N. Y., Lake Erie, etc. R. Co., 769
Auchmuty v. Ham, 123, 628, 635, 636, 638
Aufdenberg v. St. Louis, etc. R. Co., 519, 520
Augerstein v. Jones, 195
Augusta, The, 172
 v. Cone, 358
 v. Hafers, 369
 v. Hudson, 108, 285, 346
 v. Lombard, 286, 728
Augusta Factory v. Barnes, 219, 233
 v. Davis, 772
 v. Hill, 203
Augusta R. Co. v. Andrews, 97
 v. Glover, 518
Augusta, etc. Ry. Co. v. Carroll, 429
 v. Killian, 54, 225
 v. McElmurry, 103, 468
 v. Randall, 748, 756
 v. Renz, 87, 523
 v. Smith, 523
Augustus v. Chicago, etc. Ry. Co., 66a
Auld v. Manhattan Life Ins. Co., 60b, 186
Aune v. Austin, etc. Co., 741
Aurandt v. Chicago, etc. R. Co., 56
Aurora v. Bitner, 334a
 v. Brown, 60b
 v. Colshire, 334
 v. Dale, 376
 v. Hillman, 93, 367, 368, 369
 v. Pulfer, 262, 375
 v. Reed, 274
Aurora, etc. Ry. Co. v. Ruch, 495
 v. Seidelman, 356
 v. Grimes, 107
Austin v. Appling, 217
 v. Carter, 340
 v. Central of Georgia Ry. Co., 202
 v. Chicago, etc. R. Co., 678, 679, 741
 v. City of Charlotte (App. 2085)
 v. Colegate, 367, 368
Austin v. Great Western, etc. R. Co., 61, 491
 v. Long Island R. Co., 478
 v. Metropolitan St. Ry. Co., 769
 v. New Jersey Steamboat Co., 18, 94, 99, 100
 v. Ritz, 289, 334, 351, 368, 375, 745
 v. St. Louis, etc. Ry. Co., 490, 509
 v. Tanning Co., 209a
 etc. R. Co. v. Beatty, 47, 49, 89
 v. Groethe, 241c
 v. McElmurry, 476
 v. Saunders, 428
Austrian v. United Tr. Co., 742
Avegno v. Hart, 652
Averbuch v. Great Northern Ry. Co., 472, 476
Averitt v. Murrell, 669, 671
Avery v. Bowden, 56
 v. Maxwell, 655
 v. Oliver (App. 2173)
 v. People, 640
 v. Plow Works, 739
 v. Syracuse, 343, 369
 v. West Lumber Co., 206
 v. White, 146
Avey v. Galveston, etc. R. Co., 73a
Avilla v. Nash, 202
Aycock v. Raleigh, etc. R. Co., 108, 678
 v. Wilmington, etc. R. Co., 99, 427, 429
Ayerigg v. N. Y. & Erie R. Co., 147, 148
Ayer v. Starkey, 671
 v. Western U. Tel. Co., 542
Ayers v. Richmond, etc. R. Co., 233b
 v. Russell, 303, 612
Ayles v. Southeastern R. Co., 517
Aylesworth v. Chicago, etc. R. Co., 407, 419, 425, 451a, 455
Ayrault v. Chamberlin, 577
 v. Pacific Bank, 582, 585
Ayres v. City of Chicago, 332
 v. Delaware, etc. Ry. Co., 501, 743
 v. Hammondsport, 363
 v. Norfolk, etc. Ry. 476
 v. Pittsburg, etc. Ry. Co., 476
 v. Wabash, etc. Ry. Co., 457
 v. Western R. Co., 210
Azneau v. Fitchburg, etc. R. Co., 501
Baggage v. Powers, 343, 703, 708
Babbitt v. Bumpus, 559

[References are to sections.]

- Babcock v. Fitchburg R. Co.**, 56,
 485, 673, 675, 676
 v. Gifford, 340
 v. Guilford, 373
 v. Los Angeles Tr. Co., 520
 v. Old Colony R. Co., 194*a*,
 223, 232, 241*b*
Babcock Lumber Co. v. Johnson, 192
Baber v. Broadway, etc. R. Co., 151
Babson v. Rockport, 86, 346, 370, 379
Bachelder v. Heagan, 57
Bachman v. Philadelphia, etc. Ry.
 Co. (App. 2090)
Bacon v. Benchley, 310
 v. Boston, 258, 262, 353, 358
 v. Kearney Vineyard Syndi-
 cate, 1, 728
 v. Pullman Co., 526*b*
Baddeley v. Granville, 62, 194
Bageard v. Cons. Trac. Co., 93
Bagley v. Consolidated Gas Co., 207*c*
 v. Mason, 742
 v. Wonderland Co., 203, 207*c*
Bagnall v. Northwestern R. Co., 728,
 736
Bahel v. Monning, 686
Bahr v. Lombard, 60, 223
Baikie v. Chandless, 559
Bailey v. Cascade, etc. Co., 232
 v. Chicago, etc. R. Co., 750
 v. City of Centerville, 741,
 759
 v. Dunaway, 70*a*
 v. Hartford, etc. R. Co., 426
 v. Lawrence county, 256
 v. Louisville, etc. Ry. Co., 512
 v. Meadows Co., 180, 187
 v. Merrell, 699
 v. New York, 285, 286, 291,
 295, 732
 v. O'Neal, 589
 v. Osborn, 291
 v. Prime, etc. Co., 207
 v. Rome, etc. R. Co., 53, 193,
 204, 223, 233
 v. Stix, etc. Dry Goods Co.,
 192, 231
 v. Swallow, 230
 v. Western Union Tel. Co.,
 542, 553, 754
 v. Wiggins, 303
Baile v. Augusta Savings Bank, 582
Baily v. Dunaway, 709*a*
Bain v. Northern Pac. R. Co. (App.
 2154)
Bainbridge v. Union Tr. Co., 524
Bair v. Heibel, 223*a*
Baird v. Citizens' Ry. Co., 485*b**c*
 v. Daly, 60*c*, 244
Baird v. New York Cent. etc. Ry.
 Co., 189
 v. Pettit, 234, 236, 237
 v. Ratcliff, 557
 v. Shipman, 243, 244
 v. Williamson, 717, 736
Bajus v. Syracuse, etc. R. Co., 195
Baker v. Allegheney, etc. R. Co., 197
 v. Allen, 734
 v. Atlanta, etc. Ry. Co., 164,
 169
 v. Baldwin, 625*a*
 v. Bolton, 124
 v. Byrne, 719
 v. Chicago, etc. R. Co., 188,
 222, 484
 v. Duwamish Mill Co., 203
 v. Eighth Ave. R. Co., 483
 v. Fall River, 338, 653*a*
 v. Flint, etc. R. Co., 73, 73*a*
 v. Greenfield, 337
 v. Hager, 758
 v. Hancock, 608
 v. Kansas City, etc. R. Co.,
 408, 458, 471
 v. Manhattan R. Co., 23, 508,
 519, 520
 v. Maryland Coal Co., 114
 v. Moeller, 120, 708
 v. Morris, 144
 v. Norfolk, etc. Ry. Co. (App.
 2084)
 v. North East, 355
 v. Pendergast, 92
 v. Portland, 93, 110, 379
 v. Robbins, 418
 v. Seaboard, etc. Ry. Co., 73*a*
 v. State, 249
 v. Tacoma, etc. Ry. Co., 478
 v. Tibbetts, 706
 v. Welsh, 614*a*
 v. Wentworth, 606
 v. Western Union Tel. Co.,
 542
 v. Western, etc. R. Co., 91
 v. Westmoreland, etc. Gas
 Co., 108, 696
 v. Wilmington, etc. Ry. Co.,
 99
Balch v. Grand Rapids, etc. R. Co.
 (App. 2070)
Balcom v. Dubuque, etc. R. Co., 99,
 419, 432
Balder v. Zenith Furnace Co. (App.
 2071)
Balderston v. Western Union Tel.
 Co., 543*a*
Baldwin v. American Paper Co., 218
 v. Bank of Louisiana, 585

[References are to sections.]

- Baldwin v. Barney, 104
 v. Calkins, 731
 v. Casella, 630
 v. Chicago, etc. R. Co., 197, 459
 v. Ensign, 365, 634
 v. Fairhaven, etc. R. Co., 490, 501, 512
 v. Grand Trunk R. Co., 493
 v. Green, 336
 v. Greenwood Turnp. Co., 85, 346
 v. People's Ry. Co., 758, 772
 v. St. Louis, etc. R. Co., 193, 195, 217, 230, 232
 v. United States Tel. Co., 503, 534, 544, 555, 741, 754
 v. Western R. Co., 739, 758
 v. Western U. Tel. Co., 755
 Balhoff v. Michigan Cent. R. Co., 197, 233a
 Baldrige Bridge Co. v. Cartrett, 346, 378
 Bales v. Wingfield, 619, 622
 Ball v. Chesapeake, etc. Ry., 526
 v. El Paso, 376
 v. Grand Trunk R. Co., 674
 v. Herbert, 333
 v. Mobile Light, etc. Co., 491
 v. Neosha, 367
 v. Vicksburg, etc. Ry. Co., 209a
 v. Winchester, 256, 291, 337, 338, 370
 v. Woodbine, 262
 Ballard v. Hamburg, 363
 v. Hitchcock Mfg. Co., 193, 195
 v. Kansas City, 367, 743
 v. Mississippi, etc. Co. (App. 2158)
 v. Tomlinson, 734
 v. Louisville, etc. Ry. Co., 190
 Ballard Ice Co. v. Lee's Admr., 164, 168, 195, 203
 Balle v. Detroit Leather Co., 203, 209a
 Ballou v. Chicago, etc. R. Co., 195, 459
 v. Farnum, 163, 413
 v. State, 251, 287
 Balsbaugh v. Frazer, 557
 Balsley v. St. Louis, etc. R. Co., 459
 Baltimore, The, 61
 v. Adams, 464
 v. Appold, 729, 735
 v. Brannon, 375
 v. Holmes, 85, 114, 376
 v. Marriott, 108, 262, 363, 371
 Baltimore v. Pendleton, 289
 v. Pennington, 257, 358
 v. Poultney, 261
 v. Baker, 257
 v. Schnitker, 287
 v. Warr, 190
 etc. Ass'n v. Grant, 548
 Baltimore Boot, etc. Co. v. Jamar, 195
 Baltimore Breweries Co. v. Ransstead, 701a
 Baltimore Elev. Co. v. Neal, 184a, 236
 Baltimore Rfg. Co. v. Kreiner, 56, 727a
 Baltimore Third Nat'l Bank v. Boyd, 12a
 Baltimore Tr. Co. v. Helms, 525
 v. Wallace, 485ab
 Baltimore, etc. Gas Co. v. Croker, 693
 Baltimore, etc. Ry. Co. v. Adams, 65, 463a, 464
 v. Amos, 207e
 v. Anderson, 463
 v. Baer, 765
 v. Bahrs, 57, 457
 v. Bambrey, 493
 v. Barger, 154, 513, 749
 v. Baugh, 217, 230, 232, 233, 233a
 v. Blocher, 749
 v. Boteler, 93, 114, 414, 760
 v. Brady, 178
 v. Camp, 190, 233a
 v. Colvin, 472
 v. County Commissioners, 769
 v. Countryman, 750
 v. Cox, 8
 v. Davis, 513
 v. Depew, 87, 476
 v. Dickey, 201, 434
 v. Fifth Baptist Ch., 274, 710a, 742
 v. Fitzpatrick, 479
 v. Friel, 65
 v. Fryer, 71
 v. Galway, 460
 v. Gault, 591
 v. Gettle, Admx. (App. 2104)
 v. Golway, 769
 v. Griffith, 478
 v. Hellenthal, 99, 483
 v. Henthorne, 189, 190, 206, 700
 v. Kane, 520, 521
 v. Kangas, 206
 v. Kemp, 742
 v. Kleespies, 66

[References are to sections.]

- | | |
|--|--|
| <p>Baltimore, etc. Ry. Co. v. Kreiger, 434, 455
 v. Lamborn, 418, 454
 v. Leathers, 207a, 207h
 v. Lee, 483
 v. Little (App. 2136, 2137)
 v. McClellan, 423, 478
 v. McDonnell, 13, 73, 74, 99
 v. McElroy, 423
 v. McOsker, 198
 v. Mackey, 195, 196, 197, 769
 v. Mallen, 508
 v. Meyers, 91
 v. Morgan, 742
 v. Mullen, 508, 518
 v. Mulligan, 99, 428
 v. Myers, 521, 522
 v. Noell, 516
 v. Norris, 151, 493
 v. Nugent, 497
 v. O'Brien, 674, 676
 v. O'Donnell, 74
 v. Parryman, 678
 v. Paul, 413
 v. Peterson, 223, 467
 v. Pierce, 150
 v. Ray (App. 2061)
 v. Read (App. 2136)
 v. Reaney, 94, 701
 v. Reed, 749
 v. Reynolds, 233a, 467
 v. Rowan, 187, 198
 v. Rifcowitz, 61
 v. Roming, 483
 v. Schwindling, 73, 481a
 v. Schumacher, 727a
 v. Sherman, 480
 v. Shipley, 58, 674, 762
 v. Stanley, 771
 v. State, 60a, 72, 73, 93, 100, 209a, 457, 480, 490, 520, 525, 769 (App. 2066)
 v. Strickler, 198
 v. Sulphur Spring, 39
 v. Swann, 498, 516, 517
 v. Then, 775
 v. Thomas, 426, 448
 v. Van Horn, 88a
 v. Voight, 488
 v. Walborn, 13, 478
 v. Warr, 190
 v. Welch, 215
 v. Weightman's Admr. (App. 2100)
 v. Wheedon, 591
 v. Whitacre, 108, 476
 v. Whittaker, 114
 v. Whittington, 113, 202
 v. Wightman, 51, 495, 516</p> | <p>Baltimore, etc. Ry. Co. v. Wilkin-son, 521, 523
 v. Wood, 437
 v. Woodruff, 672
 v. Worthington, 466
 v. Young, 476
 Traction Co. v. Appel, 485a, 485c
 v. Wallace, 481, 485c
 Trust Co. v. Atlanta Traction etc. Road v. Cason, 523
 etc. Turnp. Co. v. Bateman, 279, 346
 v. Boone, 749
 v. Cassell, 94, 257, 378, 386
 v. Crowther, 257, 386
 v. Leonhardt, 516
 v. Parks, 386
 v. State, 374, 771
 Baltzer v. Chicago, etc. R. Co., 89, 207a
 Bamberger v. Citizens' R. Co., 71, 73a, 485
 Bamford v. Turnley, 701a
 Bammell v. Kirby (App. 2098)
 Bancroft v. Boston, etc. R. Co., 65, 139, 208, 521, 767a
 v. San Diego, 373
 Bandekow v. Chicago, etc. Ry. Co., 12
 Bandler v. People's Gaslight Co., 696
 Banister v. Wakeman, 302, 303
 Bank v. Bossieux, 589
 v. Brainerd School District, 256
 v. Butler, 585
 v. Maines, 620
 v. Marston, 598
 v. Mott, 617
 v. Planters' Bank, 250
 v. Wood, 574
 Bank of Antigo v. Union Trust Co., 582
 Bay Biscayne v. Monongohela National Bank, 579
 California v. Western U. Tel. Co., 539a, 589
 Clarke Co. v. Gilman, 580a
 Hanover v. Kenan, 587a
 Haverlock v. Western Union Tel. Co., 539a, 753a
 Irwin v. American Express Co., 119
 Kentucky v. Adams Ex. Co., 210
 Kentucky v. Wister, 249
 Lindsborg v. Ober, 582, 584, 585</p> |
|--|--|

[References are to sections.]

- Bank of Louisville v. First Nat. Bank**, 582
Mobile v. Huggins, 580, 581
New Hanover v. Kenan, 581
Rochester v. Gray, 585
Rome v. Curtiss, 623
Scotland v. Dominion Bank, 580a
U. S. v. Goddard, 581
Utica v. McKinster, 579, 586
Van Diemen's Land v. Bank of Victoria, 580
Washington v. Triplett, 580, 582, 584
Banks v. Georgia Ry. Co., 413
v. Highland St. R. Co., 64
v. Wabash R. Co., 207g, 217
Bannagan v. Dist. of Col., 262, 287
Bannan v. New York, etc. Ry. Co. (App. 2011)
Banning v. Chicago, etc. Ry. Co., 94
Bannister v. Lake Shore, etc. Ry. Co., 476
Bannon v. Lutz, 54, 217, 223 (App. 2091)
v. Romiser, 750
Bantley v. Baker, 591
Barabasz v. Kabat, 151
Barada v. Carondelet, 313
Barbee v. Reese, 94
Barber v. Abendroth, 726
v. Essex, 108, 336, 358
v. Mensch, 655
v. Richmond, etc. R. Co., 406, 468, 482
v. Roxbury, 350
v. Southern Pacific Co., 449
Barbour v. Ellsworth, 266, 299
v. Horn, 256, 249a
County v. Brunson, 256
Barclay v. Abraham, 729
v. Hartman, 629
v. Southern, etc. Waste Co., 207g
Bard v. Penn. Tr. Co., 523
v. Yohn, 147
Barden v. Atlantic, etc. Ry. Co., 331
Bardwell v. Jamaica, 367, 390, 393, 741
v. Mobile, etc. R. Co., 520
v. Ziegler, 566
Barfield v. Southern Ry. Co., 460
Barger v. Barringer, 702
Baringer v. St. Louis, 508
Barker v. Chicago, etc. Ry. Co., 321, 516, 518
v. Loomis, 840
v. Ohio, etc. Ry. Co., 501
v. Paulson, 54
Barker v. Savage, 61, 114, 353, 654
v. Western Union Tel. Co., 754, 755
v. Worcester, 104
Barkley v. Missouri Pac. R. Co., 475, 485
v. Wilcox, 735
Barklow v. Avery, 626
Barksdale v. Charleston, etc. Ry. Co., 207
v. Seaboard Air Line Ry. Co., 137
Barley v. Chicago, etc. R. Co., 458
Barlich v. Baltimore, etc. Ry., 512, 516
Barlow v. Avery, 635
v. McDonald, 639
v. Scott, 179
Barmore v. Vicksburg, etc. Ry. Co., 154a
Barnard v. Leigh, 623
v. Poor, 665
v. Shirley, 734
v. Ward, 619
Berneich v. Mercy, 730
Barnes v. Chapin, 634
v. Chicopee, 356
v. City of Waterbury, 701
v. District of Columbia, 249, 253, 285, 289, 291, 296
v. Doreck, 334
v. Hannibal, 274
v. Hurd, 115, 644
v. Inhabitants of Rumford, 66
v. Keene, 763
v. Marcus, 375, 376
v. Martin, 115
v. Masterson, 31
v. Means, 606, 607
v. Newton, 53, 353
v. Shreveport R. Co., 73a, 457, 485c
v. Smith, 592
v. Snowden, 375
v. Ward, 343, 703
v. Western Union Tel. Co., 542, 753a, 756
v. Willett, 625
Barnett v. Johnson, 333
v. Matagorda, etc. Rice Co., 735
v. Metropolitan St. Ry. Co., 520
v. Northeastern R. Co., 203
Barney v. Hannibal, etc. R. Co., 481a, 705
v. Keokuk, 332
v. Lowell, 258, 291
v. Pinkham, 606

[References are to sections.]

- Barney v. Prentiss, 556
 Boat Co. v. New York, 291
 Barnhill v. Texas, etc. Ry. Co., 475
 Barnicle v. Connor, 231
 Barnowski v. Helson, 58
 Barnum v. Terpenning, 634, 639
 v. Vandusen, 627, 633, 635, 659
 Barowski v. Schultz, 719
 Barr v. Hannibal, etc. R. Co., 427
 v. Kansas, 287, 346, 368, 374, 375
 v. Southern Ry. Co., 479
 v. Stevens, 371
 Barracouta, The, 686
 Barre v. Cape Girardeau, 253, 291
 v. Reading, 64, 493
 Barrett v. Brooks, 257
 v. Dessy, 207g
 v. Dolan, 656, 664
 v. Hammond, 367, 369
 v. Lake Ontario, etc. Co., 709a
 v. Malden, etc. R. Co., 628, 635
 v. Market St. R. Co., 493
 v. Minneapolis, etc. Ry. Co., 151
 et al. v. Nelson (App. 2063)
 v. Smith, 646
 v. Southern Pac. R. Co., 1, 73
 v. Third Avenue R. Co., 31, 65, 66
 v. Walworth, 355
 v. Western Union Tel. Co., 555
 Barrie v. Western Union Tel. 552
 Barringer v. N. Y. Central R. Co., 474
 v. St. Louis, etc. Ry. Co., 520
 Barriskman v. Marion Oil Co., 692
 Barron v. Chicago, etc. R. Co., 417, 426
 v. Detroit, 193, 285
 Barron v. Lead, etc. Co. (App. 2075)
 v. Liedloff, 798a
 Barrow v. Lewis Lumber Co., 197, 218
 v. Gallardanne, 734
 S. S. Co. v. Mexican, etc. Ry. Co., 513c
 Barry v. Arnould, 313
 v. Hannibal, etc. R. Co., 207b
 v. Lowell, 287
 v. Midland R. Co., 145
 v. N. Y. Central R. Co., 73, 417a, 464, 481a, 705
 v. St. Louis, 168
- Barry v. Terkildsen, 343, 375
 Barsaloux v. Chicago, 485
 Barschow v. Lake Shore, etc. Ry. Co., 197
 Barstow v. Berlin, 86, 353, 477
 v. Old Colony R. Co., 112, 236
 Barth v. Kansas City Elec. Co. (App. 2076)
 Barthelmas v. Lake Shore, etc. Ry. Co., 472, 476, 478
 Barthold v. Philadelphia, 285
 Bartholomew v. Kemmerer, 207g
 v. N. Y. Cent. R. Co., 508
 Bartlett v. Baker, 726
 v. Boston Gas Co., 35, 695
 v. Clarksburg, 262
 v. Cicero Light, etc. Co., 163
 v. Crozier, 314, 340
 v. Dubuque, etc. R. Co., 417, 425, 434
 v. Harksett, 355
 v. Wabash, etc. Ry. Co., 457
 v. Western Union Tel. Co., 547
 Bartley v. Boston, etc. Ry. Co., 218
 v. Georgia, etc. Ry. Co., 433
 Barto v. Beaver Valley Tr. Co., 485a
 v. Iowa Telp. Co., 698
 Barton v. Goran, 608
 v. McDonald, 334a, 365
 v. Montpelier, 334, 351, 363, 388
 v. N. Y. Cent. R. Co., 477
 v. Pepin County Agricul. Soc., 705
 v. St. Louis, etc. R. Co., 56
 v. Springfield, 87, 89
 v. Syracuse, 274, 281, 287
 v. Reid, 178, 180, 235, 239
 Bartonshill Coal Co. v. McGuire, 46, 142, 218, 235, 236, 239
 Bartow v. Erie Ry. Co., 744
 Barwick v. English Joint Stock Bank, 145
 Basham v. Hmamond Packing Co., 742
 Bashinsky v. Western Union Tel. 754, 755
 Basnight v. Atlantic, etc. R. Co., 727a
 Bass v. Cantor, 588
 v. Chicago, etc. R. Co., 60a, 419, 672, 676
 v. Concord St. Ry. Co, 520
 v. Postal Tel. etc. Co., 755
 v. West, 701
 Admr. v. Norfolk, etc. Ry. Co., 485c
 Bassett v. Fish, 92, 256, 323, 329

[References are to sections.]

- Bassett v. Godschall, 310
 v. Los Angeles Tr. Co., 516
 v. St. Joseph, 289, 334
 Bassi v. Orth, 162
 Bastable v. Syracuse, 274
 Batchelder v. Heagan, 668, 669
 Batchelor v. Degnon, etc. Co., 73,
 73a
 v. Fortescue, 65
 v. Planters' Bank, 589
 Bateman v. Black, 333
 v. N. Y. Cent. etc. R. Co., 60c
 v. Western Union Tel. Co.,
 540a
 Bates v. Chicago, etc. Ry. Co., 501
 v. Fremont, etc. R. Co., 432
 v. Sylvester, 135b (App. 2074,
 2075)
 v. Horner, 291
 v. Nashville, etc. R. Co., 73
 v. N. Y. & New England R.
 Co., 468, 474
 v. Old Colony R. Co., 505
 v. Rutland, 291
 v. Warrick, 744, 750
 v. Westborough, 287
 Batla v. Goodell, 732
 Battersby v. New York, 363
 Batterson v. Chicago, etc. R. Co., 216
 Battishill v. Humphrey, 457, 467
 Battle v. Western Union Tel. Co.,
 756
 Battle v. Wilmington, etc. R. Co.,
 465
 Batto v. Chandler, 619
 Batton v. South, etc. Ala. R. Co.,
 512
 Battý v. Duxbury, 358
 v. Fout, 574
 Baudrot v. Southern Ry., 748
 Bauer v. Dubuque, 373
 v. Indianapolis, 60b
 v. Kansas Pac. R. Co., 468
 v. Richter, 769, 773
 v. Rochester, 298
 Baughman v. Shenango, etc. R. Co.,
 94, 408
 Baugus v. Atlanta, 258
 Baulec v. Harlem R. Co., 56, 189, 190
 v. New York Cent. Ry., 189
 Baum v. New York, etc. Ry. Co.,
 518
 Bauman v. Campau, 262
 Baumgartner v. Mankato, 408
 Baxendale v. McMurray, 734
 Baxter v. Auburn, etc. Elec. Co., 108
 v. Boston, etc. R. Co., 57, 422
 v. Camp, 58
 v. Chicago, 355
 Baxter v. Dominion Tel. Co., 534
 v. Roberts, 203
 v. Ry. Co., 485
 v. St. Louis Tr. Co., 99, 742,
 758
 v. Second Ave. R. Co., 654
 v. Taylor, 119
 v. Winooski Co., 8, 256, 258
 v. Winooski Turnp. Co., 371,
 387
 Bay City, etc. R. Co. v. Austin, 446
 Bayley v. Curtis, etc. Co., 706
 v. Eastern R. Co., 466
 v. Manchester, etc. R. Co., 64,
 145, 151
 Baylor v. Delaware, etc. R. Co., 198
 v. Stevens, 665
 Bay Shore, etc. R. Co. v. Harris, 73a
 Beach, The Wm. N., 737
 v. Bay State Steamboat Co.,
 124, 131
 v. Elmira, 274
 v. Furman, 303
 v. Leahy, 256, 267
 v. Parmeter, 652
 v. Sterling Iron, etc. Co., 734
 Beadle v. Paine, 615
 Beal v. Champion Fibre Co., 164
 v. Lowell, etc. R. Co., 523
 etc. Dry Goods Co. v. Carr,
 704
 Bealafeld v. Burrough of Verona,
 274
 Beale v. Old Colony St. Ry. Co.
 (App 2068)
 v. Railway Co., 748
 Beall v. Athens, 355
 v. Pittsburgh, etc. R. Co.,
 207b
 Beals v. See, 121
 Beaman v. Martha Washington, etc.
 Co., 772 (App. 2099)
 v. Stewart, 617
 Bean v. Oceanic Steam Nav. Co., 197
 v. Western N. C. R. Co., 186,
 193, 216
 Beaning v. South Bend Elec. Co.,
 29a, 122, 704
 Beanstrom v. Northern Pac. R. Co.,
 476
 Bear v. Allentown, 274
 v. Chicago, etc. Ry. Co., 448
 Beard v. Conn. R. Co., 410, 490, 502
 v. Murphy, 701, 728
 Beardsley v. Murray Iron Works,
 207b, 219a
 v. Smith, 256, 258
 v. Swann, 758
 Beardstown v. Smith, 375

[References are to sections.]

- Beasley v. Western Union Tel. Co., 756
 v. Western Union Tel. Co., 539, 541, 549, 554, 556a
 Beatrice v. Knight, 274
 v. Leary, 273, 274, 735
 v. Reid, 359
 Beattie v. Boston, etc. Ry. Co., 494, 516
 v. Detroit, etc. Ry. Co., 508
 Beatty v. Central Iowa R. Co., 410, 414
 v. Gilmore, 53, 61, 108 481b
 v. Metropolitan Bldg. Co., 719
 v. Lumber Co. Western Union Tel. Co., 753a, 755
 Beaucage v. Mercer, 66a
 Beauchamp v. Saginaw Mining Co., 11, 37, 688a, 742
 Beaulieu v. Finglam, 17, 665, 668
 v. Portland Co., 56, 57, 58, 222
 Beaumont Tr. Co. v. Happ, 518
 v. Dilworth, 769, 771
 etc. Ry. Co. v. Olmstead, 193
 Beaupre v. Pac., etc. Tel. Co., 754, 755
 Beauvais v. St. Louis, 376
 Beazan v. Mason City, 289
 Bechdolt v. Grand Rapids, etc. R. Co., 434
 Becht v. Corbin, 112
 Beck v. Carter, 98, 343, 703, 704, 705
 v. Dyson, 632
 v. German Klinik, 613
 v. Hood, 12, 12a
 v. Kitanning Water Co., 265
 v. Portland, etc. R. Co., 467
 v. Standard Cotton Mills, 219a
 Becke v. Missouri Pac. Ry. Co., 66, 460 (App. 2075)
 Becker v. Baltimore, etc. R. Co., 241
 v. First National Bank, 587a
 v. Keokuk Water-Works, 265
 v. Janinski, 604
 v. Lincoln, etc. Co., 719a
 v. Louisville, etc. Ry., 481a
 v. Railway, 85b
 v. Western Union Tel. Co., 556
 Beckerle v. Weiman, 651, 654
 Beckford v. Montague, 623
 Beckman v. Consolidation Coal Co., 209a
 v. Georgia Pac. R. Co., 139
 Beckwith v. N. Y. Central R. Co., 114
 v. Oatman, 691
 Organ Co. v. Malone, 216
 v. Shordike, 627
- Beckwith Organ Co. v. Whalen, 335
 Bedell v. Berkey, 704
 v. Long Island R. Co., 672, 676
 Bedford v. Hannibal, etc. R. Co., 58, 675
 v. Neal, 376
 R. Co. v. Brown, 114, 207
 etc. R. Co. v. Rainbolt, 516
 City v. Sitwell, 289, 337, 375, 376
 Quarries Co. v. Bough (App. 2136)
 etc. Co. v. Bough, 193
 Beebe v. Ayres, 493
 Beecher v. Derby Bridge Co., 749a
 Beehler v. Daniels, 705, 719
 Beekman v. Saratoga, etc. R. Co., 383
 Beeler v. Butte, etc. Co., 766, 769
 Beem v. Tama, etc. Elec. Ry. Co., 88a
 Beems v. Chicago, etc. R. Co., 92
 Beers v. Arkansas, 249
 v. Hendrickson, 573
 v. Housatonic R. Co., 53, 61, 86, 93, 99, 107, 114
 v. Isaac Prouty & Co., 190
 Beesley v. Wheeler Co., 195, 232
 Beeson v. Busenbark, 241c
 v. Green Mt. Min. Co., 764 (App. 2055)
 Beetz v. Brooklyn, 358
 Beggs v. Chicago, etc. R. Co., 666, 675
 Beghold v. Auto Body Co., 219
 Behan v. St. Louis Tr. Co., 508 (App. 2074)
 Behling v. Southwest Penn. Pipe Lines, 666
 Behm v. Armour, 197
 v. Western Union Tel. Co., 540, 754
 Beiber v. City of St. Paul, 353
 Beidler v. King, 702
 Beilfus v. New York, etc. Co., 233
 Beilke v. Carroll, 146, 150
 Besiegel v. N. Y. Central R. Co., 13, 56, 86, 417, 460, 466, 469, 477, 485
 v. Seymour, 373
 Belair v. Chicago, etc. R. Co., 91, 215, 222
 Belding v. Black Hills, etc. R. Co., 139, 767a
 v. Johnson, 128
 v. Lesure (App. 2152)
 Beldon v. Pullman Palace Car Co., 526
 Beleal v. Northern Pac. Ry. Co., 188
 Belford v. Canada Shipping Co., 188

[References are to sections.]

- Beliveau v. Amoskeag Mfg. Co., 573
 Belk v. People, 35, 654
 Belknap v. Boston, etc. R. Co., 749, 762
 v. Trimble, 729
 Bell v. Consol. Gas, etc. Co., 223
 v. Globe Lumber Co., 189
 v. Hannibal, etc. Ry. Co. (App. 2074)
 v. Henderson, 358, 367
 v. McClintock, 16, 732
 v. Rocheford, 25a
 v. Wayne, 346
 v. West Point, 289
 Bellamy v. Ames, 164
 v. Whitsell, 218
 Belle Alliance Co. v. Texas, etc. Ry. Co., 94
 Bellefontaine, etc. R. Co. v. Bailey, 53
 v. Hunter, 463, 475
 v. Reed, 419, 434
 v. Snyder, Sr., 71, 476
 v. Snyder, Jr., 28, 71, 77, 78
 Bellegarde v. Union, etc. Co. (App. 2171)
 Bellemire v. Bank of U. S., 582, 585, 598
 Belleview v. England, 375, 376
 Belleville Stone Co. v. Comben, 223
 Belling v. Hamilton, 354
 Bellinger v. Craigue, 606, 607
 v. N. Y. Cent. R. Co., 733
 Bellows v. Pennsylvania, etc. Canal Co., 203
 v. Sackett, 721
 Bellune v. Wallace, 119
 Belmer v. Boyne City, etc. Co., 231
 Belt v. Gulf, etc. R. Co., 131
 Ry. Co. v. Banicki, 151
 Belton v. Baxter, 114, 375, 475, 652, 654
 v. Southern Pac. Ry. Co., 476
 Oil Co. v. Duncan, 182
 Beltz v. Yonkers, 367, 369, 375
 Belvidere Bldg. Co. v. Bryan, 497, 719a
 Belyea v. Minneapolis, etc. R. Co., 759
 v. Port Huron, 376
 Bemis v. Arlington, 355
 v. Connecticut, etc. R. Co., 46, 429, 449, 463
 v. Temple, 354, 367
 Bemiss v. New Orleans, etc. R. Co., 523
 Bemus v. Howard, 613
 Benage v. Lake Shore, etc. R. Co., 207b
- Bendekovick v. Omaha, etc. St. Ry. Co., 520
 Bender v. New York Glucose Co., 218
 Benedict v. Goit, 385
 v. Wilhoite, 573
 Pineapple Co. v. Atlanta, etc. Ry. Co., 33, 34
 Benfield v. Vacuum Oil Co., 195
 Bengtson v. Chicago, etc. R. Co., 207c, 209a
 Benjamin v. Eldridge (App. 2055)
 v. Holyoke R. Co., 485b
 v. Metropolitan R. Co., 359, 703
 Benmore, The, 57
 Benn v. Null, 180, 195
 Benner v. Atl. Dredging Co., 688a
 Livery, etc. Co. v. Busson 491, 514
 Bennet v. Moita, 172
 Bennett v. Brooklyn R. Co., 73a
 v. Brooks, 104
 v. Chicago, etc. R. Co., 418, 436
 v. Chicago City Ry. Co., 237, 238
 v. Concord, etc. Ry., 203
 v. Crystal, etc. Co., 207h
 v. Detroit, etc. R. Co., 485c
 v. Dutton, 487
 v. Fifield, 355
 v. Greenwich, etc. R. Co., 197
 v. Ives, 244
 v. Kelly, 343
 v. Lockwood, 28
 v. Louisville, etc. R. Co., 704
 v. Lovell, 355
 v. Marion, 749a
 v. Mount Vernon, 298
 v. N. Jersey Transp. Co., 66
 v. New Orleans, 262
 v. N. Y. Central R. Co., 472, 473
 v. N. Y., New Haven, etc. Co., 521
 v. Northern Pac. R. Co., 207a, 216, 223
 v. Peninsula Steam P. Co., 487
 v. Seattle Elec. Co., 93
 v. Scutt, 669
 v. Standard Glass Co., 193
 v. Syndicate Ins. Co., 54
 v. Truebody, 164
 v. Wabash, etc. R. Co., 425
 v. Western Union Tel. Co., 753a
 v. Whitney, 313, 314
 v. Woodworking Co., 203

[References are to sections.]

- Bennison v. Walbank, 609
 Benoit v. Troy, etc. R. Co., 647
 Bensel v. Lynch, 625
 Benson v. Altoona, etc. Ry. Co., 760
 v. Baltimore Traction Co., 705
 v. Central Pac. R. Co., 483
 v. Chicago, etc. R. Co., 729, 735
 v. Malden, etc. Gas Co., 744
 v. Suarez, 708
 v. Wilmington City Ry. Co., 516
 Benthall v. Seifert, 735
 Bentham v. Philadelphia, 299
 Benthin v. New York, etc. Ry. Co., 201
 Bentley v. Atlanta, 341
 v. Georgia Pac. R. Co., 480, 484
 v. P. elps, 313
 v. Rothschild Bros. Hat Co., 375
 Benton v. Boston Hospital, 266
 v. Central R. Co., 107, 476
 v. Chicago, etc. R. Co., 64
 v. Craig, 569
 v. Johncox, 729
 v. Trustees of Boston City Hospital, 331
 Benware v. Pine Valley, 373
 Benzing v. Steinway, 31, 192, 197, 204
 Bequette v. People's Tr. Co., 86
 Berberich v. Ebach, 169
 Berea Stone Co. v. Kraft, 233b
 Beresford v. Am. Coal Co., 191, 230
 Berg v. Berg's Admr. (App. 2064)
 v. Boston, etc. Min. Co., 230
 v. Great Northern Ry. Co., 85c
 v. Milwaukee, 87, 377
 v. Parsons, 61, 168, 175, 688a
 v. United States Lumber Co., 223
 Bergan v. Central, etc. Ry. Co., 513a
 Bergen County Tr. Co. v. Heitman's Admr., 485bc
 v. Demarest, 494, 516
 Berger v. Mandel, 164, 703
 v. Minneapolis Gas Co., 701a
 v. St. Paul, etc. R. Co., 207c
 Berglund v. Illinois Cent. Ry. Co., 214a, 221 (App. 2155)
 Bergman v. Hendrickson, 151
 v. St. Louis, etc. R. Co., 471
 Bergquist v. Chandler Iron Co., 185a.
 v. Minneapolis, 239
 Bergstrom v. Staples, 231
- Bering Mfg. Co. v. Femelat, 207h
 Berkeley v. Chesapeake, etc. Ry. Co., 463
 Berkery v. Erie, etc. R. Co., 471
 Berkey v. Berwind, etc. Min. Co., 716
 Berley v. Seaboard, etc. Ry. Co., 741
 v. Western Union Tel. Co., 203
 Berlin v. Gorham, 281
 Mills Co. v. Croteau, 705
 Bernadsky v. Erie Ry. Co., 758
 Bernhard v. Richmond, etc. R. Co., 672
 Bernardi v. N. Y. Central R. Co., 203
 v. Northern Pac. Ry. Co., 429, 435
 Bernauer v. Hartman Steel Co., 165
 Berndt v. City of Cudahy, 373
 Bernhard v. Reeves, 709
 v. Rensselaer, etc. R. Co., 53, 54, 463
 v. Western Pa. R. Co., 516
 Bernheimer v. Bager, 204, 208, 209a
 Bernina, The, 66
 Berrigan v. N. Y., Lake Erie, etc. R. Co., 202
 Berry v. City of Greenville, 339, 354, 741
 v. Kansas City, etc. R. Co., 413
 v. Lake Erie, etc. Ry. Co., 644a
 v. Louisville, etc. Ry. Co., (App. 2061)
 v. Missouri, Pac. R. Co., 523
 v. Northeastern R. Co., 65
 v. Pennsylvania R. Co., 114, 476
 v. St. Louis, etc. R. Co., 73, 73a, 449
 v. Schaad, 625a
 v. Utica Belt Line St. Ry., 520
 Bertha Zinc Co. v. Martin's Admr., 47, 195, 205 (App. 2102)
 Berthelson v. Gabler (App. 2171)
 Besel v. N. Y. Central R. Co., 202, 241
 Beseman v. Pennsylvania Ry. Co., 407
 Bess v. Atchison, etc. Ry. Co., 481a
 v. Chesapeake, etc. R. Co., 151
 Bessant v. Gt. Western R. Co., 424
 Bessemer Coal, etc. Co. v. Doak, 688a
 Bessex v. Chicago, etc. R. Co., 108, 192, 205
 Best v. Great Northern, etc. Ry. Co., 429
 v. Staple Co., 206

[References are to sections.]

- Bethea v. Raleigh, etc. R. Co., 451a
 Bethel v. Mellor, etc. Co., 747
 v. Otis, 686
 Bethje v. Houston, etc. R. Co., 57
 Bethlehem v. Haus, 287
 Betterly v. Scranton, 287
 Bettis v. Chicago, etc. Ry. Co., 765
 Betts v. Gloversville, 274, 363
 v. Norris, 620
 v. Wilmington City Ry. Co., 520
 Betz v. Limingi, 343
 Beuhning v. Chesapeake, etc. R. Co., 241
 Bevard v. Hoffman, 303, 310
 Bevier v. Delaware, etc. Canal Co., 57
 Bevins v. Ramsey, 591
 Bevis v. Vanceburg Tel. Co., 108
 Beyel v. Newport News, etc. R. Co., 482
 Beyer v. Hamburg-American S. S. Co., 1
 v. Sigel, 618
 Beynon v. Garrat, 623
 v. Pennsylvania R. Co., 478
 Bial v. Interurban St. Ry. Co., 518
 Bibb v. Norfolk, etc. R. Co., 166, 168, 181
 Co. v. Reese, 256
 Bibby v. Carter, 713
 Bice v. Wheeling Elec. Co., 73a
 Bickel v. Pennsylvania, etc. Ry. Co., 460
 Bickford v. Darcy, 569
 v. Richards, 22
 Bickham v. Kosminsky, 618, 622
 Biddle v. Hestonville, etc. R. Co., 6a
 Bidelman v. State, 251, 334a
 Bidwell v. Murray, 338, 380
 Bielenberg v. Montana Union R. Co., 422
 Bieling v. Brooklyn, 254, 291, 354
 Bier v. Jeffersonville, etc. R. Co., 241
 Bierbach v. Goodyear Rubber Co., 114, 654
 Bierbauer v. N. Y. Central R. Co., 137, 769, 775
 Bierhaus v. Western U. Tel. Co., 540, 549, 754, 755
 Biering v. Gulf, etc. R. Co., 676
 Big Creek Stone Co. v. Wolf, 192, 203
 Big Five Tunnel, etc. Co. v. Johnson, 205 (App. 2126)
 Big Sandy, etc. Ry. Co. v. Blankenship, 519, 758
 Big Stone Gap, etc. Co. v. Ketron, 189
 Bigelow v. Nickerson, 132
 Bigelow v. No. Missouri R. Co., 421
 v. Randolph, 256, 258, 259, 267, 286, 337
 v. Reed, 61, 93, 96, 107, 654
 v. Rutland, 86, 107, 379
 v. Weston, 350, 351
 Biggers v. Catawba Power Co., 191, 208
 Biggs v. Cons. Barb-wire Co., 73
 v. Huntington, 289, 338, 351
 v. West Newton, 376
 Bigham Bros. v. Port Arthur, etc. Co., 399
 Bigley v. Mason, 758
 Bignell v. Clarke, 641
 Bigum v. St. Paul Sash, etc. Co., 204
 Bijorsen v. Saccone, 164
 Bilbee v. Brighton, etc. R. Co., 466
 Biles v. Seaboard, etc. Ry. Co., 202, 207b
 Bileu v. Paisley, 146, 588
 Bill v. Norwich, 367
 v. Smith, 111
 Billings v. Fitchburg R. Co., 675, 678
 v. Lafferty, 591
 v. Worcester, 363, 367
 Billman v. Indianapolis, etc. R. Co., 30, 426
 Billows v. Moors, 183
 Bills v. Ottumwa, 86
 v. Salt Lake City, 339, 375
 Bilton v. Southern, etc. Ry. Co., 464, 476, 478
 Binbental v. Street, 3
 Bindell v. Kenton County Ins. Co., 121
 Binford v. Johnston, 27a, 36, 686, 739
 Bingham v. Boston, 369
 County v. Fidelity, etc. Co., 625a
 Binion v. Georgia, etc. Ry. Co., 262
 Binks v. South Yorkshire R., etc. Co., 403
 Binns v. Richmond, etc. R. Co., 193
 Birch v. Charleston Light, etc. Co., 351
 v. Pittsburg, etc. Ry. Co. (App. 2091)
 v. City of New York, 1, 25, 705
 Bird v. Flint, etc. R. Co., 479
 v. Great Northern R. Co., 517
 v. Hannibal, etc. R. Co., 39
 v. Holbrook, 97, 705, 720
 v. Long Island R. Co., 193a, 499
 v. United States Leather Co. (App. 2173)

[References are to sections.]

- Bird v. Utica Gold Min. Co., 207g
 v. Western Union Tel. Co.,
 753a, 755
 Transfer Co. v. Krug, 65
 Birdsong v. Mendenhall, 376
 Birge v. Gardiner, 64, 73, 78, 97, 703,
 705
 Birkbeck v. Stafford, 569
 Birket v. Williams, 655
 Birkett v. Knickerbocker Ice Co., 70,
 73, 137, 645, 772
 v. Western U. Tel. Co., 534,
 553, 555
 v. Whitehaven, etc. R. Co.,
 459, 503
 Birmingham v. Cincinnati, etc. Ry.
 Co. (App. 2101)
 v. Dorer, 115, 763
 v. Gordon, 289, 337, 375
 v. Lewis, 356, 374, 761
 v. McCary, 298
 v. Rochester, etc. R. Co., 497,
 499
 v. Starr, 369, 375, 376
 v. Tayloe, 362, 367
 Light, etc. Co. v. Chastain,
 763
 v. Dickerson, 520
 v. Glover, 520
 v. Hinton, 26, 35
 v. Jung, 64, 520
 v. Mosley, 236, 773
 v. Parker, 513
 v. Selhorst, 64, 110
 Ore, etc. Co. v. Grover, 688a
 R. Co. v. Allen, 197, 207h,
 241b
 v. Clay, 520
 Ry. etc. Co. v. Baker, 56
 v. Baird, 497, 512, 516
 v. Bair, 154
 v. Brannon, 520
 v. Brown, 485ab
 v. Girod, 508, 520
 v. Hale, 60a, 508, 516
 v. Smith, 508
 St. Ry. Co. v. Oldham, 485c
 v. Anderson, 741
 etc. R. Co. v. Bowers, 88, 483
 v. Hale, 508, 516
 v. Jones, 64, 73a, 485c
 v. Jung, 508, 513
 v. Landrum, 525
 v. Lee, 508
 v. Lintner, 475
 v. McGinty, 508
 v. Mattison, 73a
 v. Moseley (App. 2121)
 v. Oldham, 525
- Birmingham, etc. R. Co. v. Parsons,
 424
 v. Parker, 512
 v. Seaborn, 509
 v. Selhorst, 485
 v. Williams, 485a
 etc. Co. v. Wright, 760
 Mineral R. Co. v. Harris, 432,
 451a
 Water Works Co. v. Hubbard,
 146, 689
 Union R. Co. v. Alexander,
 359
 Birney v. N. Y. & Washington Tel.
 Co., 534, 537, 547, 548, 555
 Birrell v. Great Northern Ry. Co.,
 704
 Birsch v. Citizens' Electric Light
 Co., 16b, 39, 122
 Bisailon v. Blood, 78
 Bisbing v. Asbury Park, 262
 Bishoff v. Illinois, etc. Ry. Co., 447,
 466a
 v. People's R. Co., 495
 Bishop v. Bedford Charity, 708
 v. Chicago, etc. R. Co., 429
 v. Ely, 122, 644
 v. Goshen, 353, 363
 v. Illinois Central Ry. Co.,
 485d
 v. North, 672
 v. St. Paul R. Co., 742
 v. Williamson, 321
 Bissell v. Greenleaf, etc. Co., 197
 (App. 2172)
 v. Michigan Southern, etc. R.
 Co., 706
 v. N. Y. Cent. R. Co., 492,
 504, 505, 551
 Bitner v. Utah Cent. R. Co., 468
 Bittle v. Camden, etc. R. Co., 426
 Bixby v. Dunlap, 749
 Bizzell v. Booker, 670
 Bjbjian v. Woonsocket Rubber Co.,
 241
 Bjorman v. Ft. Bragg Redwood Co.,
 214
 Black v. Aberdeen, etc. Ry. Co., 668,
 678
 v. Carrollton R. Co. (App.
 2064)
 v. Charleston, etc. R. Co., 517
 v. Chicago, etc. R. Co., 16
 v. Columbia, 265, 289
 v. Linn, 303
 v. Minneapolis, etc. Ry. Co.,
 747, 750
 v. Maitland, 708
 v. Mainstee, 376

[References are to sections.]

- Black v. New York, etc. Ry. Co. (App. 2069)
 v. Third Ave. R. Co., 508
 Diamond, etc. Co. v. Price, 197
 Blackburn v. Southern Pac. Ry. Co., 476, 482
 Blackman v. Gardiner Bridge, 758
 v. Simmons, 39
 Blackmore v. Toronto R. Co., 488, 492
 Blackwell v. Lynchburg, etc. Ry. Co., 406, 407a
 Blackstock v. N. Y. & Erie R. Co., 14, 154, 155, 243, 547
 Blackwell v. Lynchburg, etc. R. Co., 89, 688a, 775
 v. St. Louis, etc. R. Co., 482
 Milling, etc. Co. v. Western Union Tel. Co., 540a
 v. Wiswall, 144
 v. O'Gorman Co., 420
 etc. Co. v. Western Union Tel. Co., 547
 Blades v. Des Moines City Ry. Co., 520
 Bladton v. Dold, 223
 Blaechinska v. Howard Mission, etc. 115, 703, 760
 Blagrove v. Bristol Water Co., 8
 Blaine v. Chesapeake, etc. R. Co., 419
 Blair v. Deakin, 734
 v. Erie R. Co., 178, 492, 505
 v. Grand Rapids, etc. R. Co., 472
 v. Milwaukee, etc. R. Co., 421
 v. Perpetual Ins. Co., 254
 Blaisdell v. Portland, 335
 Blaiser v. N. Y., Lake Erie, etc. R. Co., 95
 Blake v. Ferris, 168, 173, 174, 699
 v. Kimball
 v. Lowell, 368
 v. Maine Cent. R. Co., 180, 189, 235, 241
 v. Midland R. Co., 766, 773
 v. Newfield, 352, 356
 v. Pontiac, 260, 291
 v. St. Louis, 289
 v. Thirst, 167
 Blakely v. Devine, 274
 Blakeley v. Troy, 363, 369
 Blakemore v. Bristol, etc. R. Co., 637
 Blaker v. N. J. Midland R. Co., 476
 Blakeslee v. Consolidated R. Co., 585c
 Blakeslie's Exp. Co. v. Ford, 644
 Blamires v. Lancashire, etc. R. Co., 9
- Blanchard v. Baker, 729, 733
 v. Lake Shore, etc. R. Co., 467, 480, 482
 v. New Jersey, etc. R. Co., 93
 v. Savarese, 701
 v. Stearns, 310
 v. Young, 58
 Bland v. Mobile, 373
 v. Shreveport, etc. Ry. Co., 206, 217
 Blank v. Illinois, etc. Ry. Co., 505
 v. Livonia, 367, 369
 Blanton v. Dodd, 185a
 Blatt v. McBarron, 705
 Blaustein v. Guindon, 362
 Blazenic v. Iowa, etc. Coal Co., 223
 Blenkiron v. Gr. Central Gas Co., 696
 Bleakley v. Prescott, 354
 Blerins v. Erwin Cotton Mills Co., 223
 Blessington v. Boston, 358
 Blew v. Philadelphia R. Tr. Co., 516
 Bleyl v. N. Y. Central R. Co., 417
 Bliewise v. Penn. etc. Ry. Co., 497
 Bligh v. Biddeford, etc. Co. (App. 2065)
 Bliss v. Baltimore, etc. Tel. Co., 539
 v. Deerfield, 334, 335
 v. Johnson, 729
 v. Rice, 730
 v. South Hadley, 72, 73a, 370
 v. Wilbraham, 53, 378
 v. Wolcott, 653b
 Blizzard v. Danville, 287
 Block v. Fond du Lac, 373
 v. Milwaukee, etc. Ry. Co., 54, 60a
 Blocker v. City of Owensboro, 384
 Blodgett v. Bartlett, 520
 v. Boston, 370, 379, 258
 v. Central Vermont Ry. Co., 472
 v. Royalton, 334
 Blomquist v. Chicago, etc. R. Co., 233
 v. Great Northern Ry. Co. (App. 2154)
 Blood v. Nashua, etc. R. Co., 733
 v. Sayre, 303
 v. Spaulding, 661
 v. Tyngsborough, 86, 379
 Balm Co. v. Cooper, 117
 Bloomingdale v. Duffy, 701
 Bloomington v. Annett, 367, 369
 v. Bay, 333
 v. Illinois Central Ry. Co., 415
 v. Legg, 367, 369

[References are to sections.]

- Bloomington v. Perdue, 86
 v. Rogers, 376
 Bloomquist v. Chicago, etc. Ry. Co.,
 758
 Bloor v. Delafield, 86, 355
 Blossom v. Dodd, 210, 552
 Blount v. Grand Trunk R. Co., 481b
 Bloxham v. Florida Cent. R. Co., 249
 Bloyd v. St. Louis, etc. R. Co., 203a,
 228, 233, 233a
 Blue v. Aberdeen, etc. R. Co., 666,
 678
 v. Briggs, 244
 Bluedorn v. Missouri Pac. R. Co., 13,
 55, 213
 Blue Grass Tr. Co. v. Ingles, 485ab
 Blum v. So. Pullman Car Co. 526
 v. Weatherford, 73
 Blumb v. Kansas City, 167, 173, 298
 Blumenthal v. Boston, etc. Ry. Co.,
 476
 Blunck v. Chicago, etc. Ry. Co., 406
 Blunt v. Aiken, 708
 Blust v. Pacific States Tel. Co., 187,
 195
 Bly v. Whitehall, 368, 375, 377
 Blyhl v. Waterville, 272
 Blyth v. Birmingham Water Co., 1,
 2, 11, 16, 19, 407, 728
 v. Topham, 703
 Blythe v. Denver, etc. R. Co., 16
 Board of Commissioners, Cloud
 County v. Board of Com-
 missioners of Mitchell
 County, 393
 Park County v. Prinz, 253
 of Park County v. Sappen-
 field, 16h
 Councilmen of Frankford v.
 Commonwealth, 262
 Education v. Mobile, etc., R.
 Co., 417
 Hudson County v. Woodcliffe,
 etc. Co., 709a
 Supervisors of Clark County
 v. Mississippi Lbr. Co., 729
 Trade Building Co. v. Cralle,
 151, 157, 162, 513
 Boatwright v. Northeastern R. Co.,
 180, 233, 233a
 Bochino v. Cook, 244
 Bock v. Grooms, 666
 Boden v. Demwolf, 188
 v. Scholtz, 708a
 Bodge v. Philadelphia, 285
 Bodie v. Charleston, etc. Ry. Co., 186
 Bodkin v. W. U. Tel. Co. 739
 Boehm v. Duluth, etc. R. Co., 493,
 513a
- Boehm v. Mace, 719a
 Boer v. Brooklyn Wharf, etc. Co.,
 706
 Boering, etc. R. Co. v. Chesapeake,
 etc. R. Co., 491
 Boettger v. Scherpe, etc. Iron Co.,
 217 (App. 2076)
 Bogan v. Ry. Co., 99
 Bogard v. Louisville, etc. R. Co., 241
 Bogart v. Delaware, etc. R. Co., 16b,
 406
 Boge v. Albert Lea, 253
 Bogeman v. Amer. Dock, etc. Co.,
 164
 Bogenschutz v. Smith, 209a, 221
 Boggess v. Chesapeake, etc. R. Co.,
 493, 513a
 Boggs v. Alabama Consol. Coal, etc.
 Co. (App. 2119)
 v. Great Western R. Co., 476
 Bohan v. Avoca, 274
 Bohan v. Metropolitan Exp. Co., 162,
 359
 v. Milwaukee, etc. R. Co., 471
 v. Port Jervis Gas Co., 359,
 701a
 Bohanan v. Peterson, 561
 Bohon v. Waseca, 289, 354
 Bohl v. Carson, 580
 v. Dell Rapids, 356
 Bohn v. Havemeyer, 203
 Boick v. Bissell, 654
 Boikens v. New Orleans, etc. R. Co.,
 508
 Boin v. Spreckels Sugar Co., 232
 Boing v. Raleigh and Gaston R. Co.,
 752
 Boise City, etc. Co. v. Stewart, 729
 Bokamp v. Chicago, etc. Ry. Co., 191
 Bolan v. Williamson, 321
 Boland v. Missouri R. Co., 16, 73,
 73a, 99, 654 (App. 2075)
 Bolch v. Smith, 684
 Boldt v. Murray, 608, 611
 v. N. Y. Central R. Co., 239
 Bolen, etc. Coal Co. v. Williams, 217
 Boler v. Sorgenfrie, 626
 Bolger v. Boston, etc. Ry. Co., 773
 Bolick v. Southern Ry. Co. (App.
 2084)
 Bolin v. Chicago, etc. Ry. Co., 64
 Bolingbroke v. Swindon, 155
 Bolinger v. St. Paul, etc. R. Co., 461
 (App. 2071)
 Bolles v. Kansas, etc. Ry. Co., 493
 Bollinger v. Rader, 769
 Bollington v. Louisville, etc. Ry., 219
 Bolton v. Calkins, 666, 669
 v. Colder, 649, 652

[References are to sections.]

- Bolton v. Georgia Pac. R. Co., 207
 v. New Rochelle, 262, 287
 v. Western Union Tel. Co.,
 542
 Boltz v. Town of Sullivan, 351
 Bomar v. Louisiana, etc. R. Co., 196
 Bomberg v. International R. Co., 146
 Bomberger v. Citizens St. Ry., 140a
 Bonafous v. Walker, 616
 Bonce v. Dubuque, etc. R. Co., 107,
 516
 Bond v. Evansville, etc. R. Co., 417a,
 455
 v. N. Y. Central R. Co., 473
 v. Smith, 107, 376, 704
 v. United Rys., etc. Co., 766,
 772
 v. Ward, 620
 v. Wilder, 622
 Bone v. Irwin, 207h
 v. Ophir, etc. Min. Co., 203
 Bonebrake v. Huntington county,
 369, 380
 Boney v. Atlantic, etc. Ry. Co., 214a
 Boniface v. Relyea, 158, 169
 Bonham v. Citizens St. Ry. Co.,
 485bc
 Bonn v. Galveston, etc. Ry. Co., 191
 Bonneau v. North Shore, etc. Co.,
 494, 516, 758
 Bonnell v. Bowman, 619
 Bonner v. Bryant, 182
 v. Glen, 523
 v. Grumbach, 516
 v. Mayfield, 407
 v. Western Union Tel. Co.,
 540a
 v. Wingate, 39, 107
 Bonnet v. Galveston, etc. R. Co., 216
 (App. 2098)
 v. Foote, 606
 Bonney v. Bushwick R. Co., 508
 Bonsall v. Lebanon, 343
 Bonthron v. Phoenix, etc. Co., 134a
 Bookman v. Seaboard, etc. Ry. Co.,
 192
 v. Shipper, 197
 Boom v. Reed, 613
 v. Utica, 299
 Boomer v. Wilbur, 164
 Boon v. Allegheny, etc. P. R. Co., 54
 Boone Co. v. Jones, 313
 Co. v. Mutchler, 31
 Booth, The G. R., 26
 v. Boston, etc. R. Co., 122,
 185, 64, 186, 191, 204, 205
 v. Dorsey, 54
 v. Merriman, 120
 v. Merriam, 709
 Booth v. Rome, etc. R. Co., 407a,
 688a
 v. St. Louis, etc. Ry. Co.,
 120a, 413
 v. Woodbury, 254
 Boothby v. Grand Trunk R. Co., 55
 Boots v. Washburn, 340
 Borchardt v. Wausau Boom Co., 731
 Borggard v. Gale, 708, 709a
 Borgman v. Omaha, etc. R. Co., 233
 Bori v. Hess, 236
 Bormann v. Milwaukee, 207c
 Borman v. Sangren, 708
 Born v. Allegheny, etc. Plank-road
 Co., 389
 v. Spokane, 373
 Borneman v. Chicago, etc. Ry. Co.,
 429
 Borschart v. Tuttle, 61
 Borst v. Lake Shore, etc. R. Co.,
 426, 451, 473
 Borup v. Nininger, 582
 Bosozzi v. Harris, 629
 Bosqui v. Sutro Ry. Co., 516
 Boss v. Jarmulowsky, 708
 v. Litton, 654
 v. Northern Pac. R. Co., 499
 Boster v. Chesapeake, etc. R. Co.,
 486
 Boston v. Capital Tr. Co., 485bc
 Belting Co. v. Boston, 274
 v. Crowley, 285
 v. Gray, 708, 713
 etc. R. Co., v. Boston, 333
 v. O'Reilly, 60a, 760a
 Excelsior Co. v. Bangor, etc.
 Ry. Co., 680
 Woven Hose, etc. Co. v. Ken-
 dall, 690
 etc. R. Co. v. Brackett, 384
 etc. Ry. Co. v. Sargent, 31
 etc. Steamboat Co. v. Munson,
 738
 Boswell v. Barnhart, 181, 773, 775
 v. Hudson R. R. Co., 505
 Bostwick, *Ex parte*, 336
 v. Baltimore, etc. R. Co., 39,
 40
 v. Barlow, 340
 v. Minneapolis, etc. R. Co., 99,
 428, 655
 Bosworth v. Rogers, 225
 v. Swansey, 104
 v. Union Ry. Co., 513
 Bott v. Pratt, 13
 Bottomley v. United States, 317
 Bottoms v. Seaboard R. Co., 73a, 99,
 481a, 484
 Bottum's Admr. v. Hawks, 73

[References are to sections.]

- Boucher v. New York, etc. Ry. Co., 174, 176
 v. Oregon, etc. Ry. Co., 207b
 v. New Haven, 263, 353, 358, 367, 369
- Bougher v. Scobey, 566
- Boughner v. Bay City, 373
- Bouknight v. Charlotte, etc. R. Co., 413
- Bouillon v. Laclede Gaslight Co., 739
- Boulden v. Pennsylvania Ry. Co. (App. 2091)
- Boulder v. Fowler, 286
 v. Niles, 289
- Boulton v. Crowther, 283, 326
- Bound v. South Carolina Ry. Co., 163
- Bourdier v. Morgan's, etc. R. Co., 735
- Bourg v. Brownell, etc. Lbr. Co. (App. 2064)
- Bourget v. Cambridge, 346
- Bourgo v. White, 719a
- Bourke v. Butte, etc. Elec. Co., 758
- Bourne v. Diggles, 562, 566
- Bourque v. New Orleans, etc. Ry. Co., 508
- Bourrett v. Chicago, etc. Ry. Co., 457
 v. Ry. Co., 99
 v. Chicago, etc. Ry. Co., 61
 v. Ry. Co., 470
- Bouwmeester v. Grand Rapids, etc. R. Co., 458, 463, 480, 483
- Bovi v. Hess (App. 2171)
- Bowcher v. Noidstrom, 245
- Bowden v. Derby, 1a, 31
 v. Kansas City, 291
- Bowe v. Hunking, 708, 709
- Bowen et al. v. Adams, 203 (App. 2132)
 v. Chicago, etc. R. Co., 184a, 195
 v. Detroit R. Co., 408
 v. Flanagan, 645
 v. Huntington, 353
 v. Ill. Cent. R. Co., 150, 460
 v. N. Y. Central R. Co., 477, 517
 v. Pennsylvania R. Co., 208
 v. St. Paul, etc. R. Co., 676
 v. Southern Ry. Co., 94
 v. State, 251, 398, 401
- Bower v. Chicago, etc. R. Co., 478
 v. Peate, 176
 v. Holbrook, 197
- Bowers v. Connecticut River R. Co., 196, 197, 231, 241b (App. 2151)
 v. Star Logging, etc. Co., 223
- Bowers v. Union Pac. R. Co., 206
- Bowes v. Boston, 128, 338, 355
- Bowie v. Western Union Tel. Co., 540
- Bowles v. Chesapeake, etc. Ry. Co., 463, 471
 v. Lane, 767a
 v. Rome, etc. R. Co., 772
- Bowley v. Mangrum, 703
- Bowling v. Arthur, 585, 599
 Green Sav. Bk. v. Todd, 561
- Bowman v. Bowman, 729
 v. Cornell, 623
 v. Humphrey, 734
 v. Tallman, 558, 559, 565, 567
 v. Troy, etc. R. Co., 430, 433, 435
 v. Woods, 607, 609
- Bowne v. Hyde, 573
- Bowser v. Wellington, 654
- Bowsley v. Speer, 735
- Bowyer v. Burlew, 634
- Box v. Atchison, etc. R. Co., 455
 v. Jubb, 729
 v. Kelso, 680
 v. Postal, etc. Tel. Co., 547
- Boxford v. Essex, 348
- Boyce v. California Stage Co., 487, 516
 v. Cheshire R. Co., 675
 v. Fitzpatrick, 186
 v. Manhattan R. Co., 92, 506
 v. New York City Ry. Co., 485a, 485b
 v. Snow, 708a
 v. Tallerman, 485
 v. Wilbur Lbr. Co., 61
- Boyd v. Blue Ridge Ry. Co., 748
 v. Blumenthal, 108
 v. Conklin, 729, 735
 v. Harris, 207c
 v. Insurance Patrol, 123, 255, 331
 v. Oddous, 113
 v. St. Louis, etc. R. Co., 228
 v. Schreiner, 734
 v. Taylor, 223
 v. Western Union Tel. Co., 543a
- Boyden v. Fitchburg Ry. Co. (App. 2100)
- Boye v. Albert Lea, 291
 v. New York City Ry. Co., 140a
- Boylan v. Everett, 635
- Boyland v. New York, 262, 299
- Boyle v. Columbia Fire, etc. Co., 773
 v. Degnon McLane Const. Co., 92

[References are to sections.]

- Boyle v. Hazleton, 367
 v. N. Y., Lake Erie, etc. R. Co., 430
 v. N. Y. & N. England R. Co., 207c
 v. Southern Ry. Co. (App. 2083)
 v. Union Pac. Ry. Co., 207b
 Boyles v. Texas, etc. Ry. Co., 497
 Boynton v. Rees, 730
 Brabbitts v. Chicago, etc. R. Co., 206
 Brabham v. Hinds county, 256
 Brace v. N. Y. Central R. Co., 333, 435
 v. Yale, 730
 Bracey v. Carter, 559
 v. Northwestern Impr. Co., 518
 Brackenbury v. Pell, 572
 Brackenridge v. Fitchburg, 378
 v. McFarlane, 557
 Brackett v. Lubke, 165
 v. Norton, 573
 Bradbee v. London, 362
 Bradbury v. Benton, 334, 335
 v. Furlong (App. 2093)
 Bradford v. Anniston, 346, 368, 369
 v. Boston & M. R. Co., 90, 492a
 v. Downs, 95 (App. 2091)
 etc. Co. v. St. Mary's, etc. Co., 689
 Bradley v. Andrews, 16, 688
 v. Boston, etc. R. Co., 417, 463, 467
 v. Buffalo, etc. R. Co., 57, 434
 v. Central Vermont Ry. Co., 201
 v. Chicago, etc. Ry. Co., 207c
 v. Fisher, 303
 v. Forbes Tea, etc. Co., 209a
 v. Fort Wayne, etc. R. Co., 56, 508
 v. Grand Trunk R. Co., 506
 v. Nashville, etc. R. Co., 195, 233
 v. N. Y. Central R. Co., 91, 160, 180, 202, 207g
 v. Ohio R., etc. R. Co., 49, 66
 v. Sattler, 772
 v. Second Ave. R. Co., 516, 523
 Bradshaw v. Louisville, etc. R. Co., 207h, 209a
 Bradstreet v. Everson, 577, 582, 587a
 Bradt v. Walton, 563
 Bradwell v. Pittsburgh, etc. R. Co., 57, 87, 108, 359
 Brady v. Ball, 655
- Brady v. Chicago, 401
 v. Chicago, etc. Ry. Co., 196, 459b, 502
 v. Consol. Gas Co. (App. 2066)
 v. Klein, 708a
 v. Little Miami R. Co., 580
 v. Lowell, 258, 353
 v. Manhattan R. Co., 60b
 v. New York, 254
 v. Old Colony R. Co., 516
 v. Springfield Tr. Co., 508
 v. Toledo, etc. R. Co., 476
 Bragg v. Bangor, 367
 v. Metropolitan St. Ry. Co., 31
 v. Rutland, 287
 Brailey v. Southborough, 258, 338
 Brainard v. Nassau Elec. Ry. Co., 520
 Braine v. Spaulding, 566
 Braly v. Fresno, etc. Ry. Co., 108, 113, 151
 Brammer's Admr. v. Norfolk, etc. Ry. Co., 90 (App. 2102)
 Bramwell v. Lucas, 575
 Branch v. International, etc. R. Co., 154a
 v. Macon, etc. R. Co., 249
 Bank v. Knox, 580
 Brand v. Schenectady, etc. R. Co., 93, 96, 457, 463, 472
 Brandenburg v. Central of Georgia, etc. Ry. Co., 481b
 v. St. Louis, etc. R. Co., 449
 Brands v. St. Louis Car Co., 187, 203
 Brann v. Chicago, R. Co., 193, 205, 410
 v. Chicago, etc. R. Co., 410
 Brannan v. Kokomo, etc. R. Co., 66, 66a
 Brannock v. Elmore, 27a, 168, 175, 688a
 Branson v. Labrot, 705
 Bransom v. Labrot, 73, 97
 Brant v. Plumer, 371
 Brantner v. Chicago, etc. Ry. Co., 207a
 Brasel v. Oregon, etc. Co. (App. 2180)
 Brash v. Steele, 773
 Brandshears v. Western U. Tel. Co., 531, 540a
 Brasington v. South Bound Ry. Co., 748
 Braslin v. Somerville, 459
 Brass v. Maitland, 690

[References are to sections.]

- Brassell v. N. Y. Central R. Co., 477,
 501, 521, 525
 Braswell v. Garfield Mill Co., 763
 Braner v. Baltimore Heating Co.,
 362
 Braunberg v. Solomon (App. 2171)
 Braunstein v. People's Ry. Co., 758
 Brawn v. Laurens county, 393
 Bray v. Latham, 742
 v. Wallingford, 258
 Brayton v. Fall River, 258, 735
 Braxton v. Hannibal, etc. R. Co., 467
 Brazier v. Bryant, 561
 Braymer v. Seattle, etc. Ry. Co., 493
 Brazil, etc. Coal Co. v. Cain, 233
 v. Gaffney, 218
 v. Gibson, 207g
 Coal Co. v. Hoodlet, 185a
 Brazis v. St. Louis Tr. Co., 519
 Breaux, etc. Co. v. Hebert, 122
 Breckenfelder v. Lake Shore, etc. R.
 Co., 477
 Breckenridge v. Bennett, 705
 v. Hicks 215
 Breeden v. Seattle, etc. Ry. Co., 520
 Breen v. Field, 209a
 v. Hyde, 735
 v. N. Y. Cent. R. Co., 516
 v. St. Louis Cooperage Co.,
 195
 v. St. Louis Tr. Co., 761a
 Breese v. U. S. Tel. Co., 534, 537,
 547, 552, 553
 Brehm v. Great Western R. Co., 39,
 516
 Breig v. Chicago, etc. R. Co., 11, 215
 Brember v. Jones, 654
 Bremer v. Minneapolis Ry. Co., 137,
 766, 773 (App. 2071)
 v. Pleiss, 487
 v. St. Paul City Ry. Co., 485a
 485c
 Bremner v. Williams, 497
 Brendle v. Spencer, 64
 Brendlinger v. New Hanover, 363
 Brenisholtz v. Pennsylvania Ry. Co.,
 760
 Brennan v. Berlin Iron Bridge Co.
 (App. 2127)
 Brent v. Kimball, 628, 640
 v. Chicago, etc. Ry. Co., 773
 v. Delaware, etc. Ry. Co., 480
 v. Ellis, 176
 v. Fairhaven, etc. R. Co., 84,
 148
 v. Friendship, 110
 v. Front St. R. Co., 213
 v. Gordon, 219a, 233, 233a
 v. Limerick Union, 266
 Brent v. Michigan Cent. R. Co.,
 207b
 v. Molly Wilson Co., 133
 v. New York, 363
 v. St. Louis, 334
 v. Standard Oil Co. (App.
 2068)
 Brenstein v. Mattson, 90
 Brentner v. Chicago, etc. R. Co., 425,
 450
 Bresley v. Wheeler, 195
 Bresnahan v. Michigan Central, 64,
 480
 v. Gove, 644
 Brett v. Frank, 213
 Bretthauer v. Jacobson (App. 2080)
 Brevig v. Chicago, etc. Ry. Co., 513a
 Brewer v. Crosby, 628
 v. N. Y., Lake Erie, etc. R.
 Co., 492, 504
 Brewster v. Barker, 653c
 v. Davenport, 262
 v. Elizabeth City, 61
 v. Interborough R. Tr. Co.,
 513
 Brezee v. Powers, 92, 703
 Bria v. Westinghouse, etc. Co., 207e
 Briant v. Detroit, etc. Ry. Co., 61,
 678, 680
 Brice v. Bauer, 630
 Brick v. Atlantic, etc. Ry. Co., 526
 v. Bosworth, 212
 v. Rochester, etc. R. Co., 231
 Brickell v. N. Y. Central, etc. R. Co.,
 66a, 476, 477
 Brickman v. South Car. R. Co., 197
 v. Southern Ry. Co., 769, 773
 Bricker v. Phila, etc. R. Co., 486,
 488
 Bridge, Matter of, 334
 v. Grand Junction R. Co., 86,
 93
 v. Jackson, etc. Ry. Co., 516,
 520
 Co. v. Newberry, 232
 v. Williams, 397
 Proprietors v. Hoboken Co.,
 390
 Bridger v. Asheville, etc. R. Co., 73,
 73a, 410, 760
 v. North London R. Co., 57,
 59, 509, 520
 v. Perry, 621
 v. St. Louis, etc. R. Co., 193
 v. North London R. Co., 57, 59
 Briegel v. Philadelphia, 267, 287
 Brien v. Bennett, 490
 Briggs v. Boston, etc. Ry. Co., 466
 v. Brown, 739

[References are to sections.]

- Briggs v. Dearborn, 621
 v. Gleason, 622
 v. Guilford, 61, 348
 v. Klosse, 701
 v. Minneapolis St. R. Co., 28
 v. Newport News and M. V. Co., 219
 v. N. Y. Cent. R. Co., 765
 v. Oliver, 59
 v. Taylor, 606, 618
 v. Tennessee Coal, etc. Co., 207*h*
 v. Titan, 232, 233
 v. Union R. Co., 520
 v. Wardell, 303
 Brigham v. Foster, 557
 Bright v. Barnett Co., 216
 Brighthope R. Co. v. Rogers, 674, 675
 Brightman v. Bristol, 261
 v. Grinnell, 641
 Brignoli v. Chicago, etc. R. Co., 758
 Brill v. Eddy, 99
 Brine v. Great Western R. Co., 359
 Brinegar v. Louisville, etc. Ry. Co., 518
 Brininstool v. Michigan, etc. Ry. Co., 743
 Brinkerhoff v. Bostwick, 589
 Brinkley Mfg. Co. v. Cooper, 705
 v. Wilmington, etc. Ry. Co. (App. 2084)
 Brinkman v. Bender 113
 v. Pacholke, 653*b*
 Brinkmyer v. Evansville, 255, 265
 Brisbin v. Boston Elec. Ry. Co., 518
 Briscoe v. Alfrey, 626
 v. Bank, 249
 v. Henderson Light, etc. Co., 25
 v. Metropolitan St. Ry. Co., 516
 v. Southern, etc. Ry. Co., 459
 Bristol, etc. R. Co. v. Collins, 243, 503
 v. Johnson, 256
 etc. R. Co. v. Tucker, 416
 British Cast Plate Co. v. Meredith, 326
 Mutual Inv. Co. v. Cobbold, 574
 Britt v. Carolina, etc. Ry. Co., 214*a*, 215
 Brittingham v. Stadiem, 144, 151
 Britton v. Atlanta, etc. R. Co., 512
 v. Cent. Union Telp. Co., 207*e*
 v. Cummington, 99, 356, 370, 378
 v. Grand Rapids R. Co., 508
 v. Great Western, etc. Co., 685
- Britton v. Great Western Cotton Co., 9, 62, 214
 v. Green Bay Water Co., 118, 265
 v. Nicolls, 585
 v. Street R. Co., 760
 Broadwell v. Kansas City, 298
 v. Swigert, 61
 v. Wilcox, 663
 etc. Dist. Co. v. Lawrence, 735
 Broburg v. Des Moines, 353, 369
 Brock v. Barnes, 566
 v. Copeland, 639
 v. Connecticut, etc. R. Co., 424
 v. Gale, 745
 v. Hopkins, 591
 Brockbank v. Whitehaven, 115
 Brockert v. Central R. Co., 120*a*
 Brod v. St. Louis Tr. Co., 495, 516
 Broderick v. Detroit Union Depot Co., 188, 192, 207*i*
 Brodeur v. Valley Falls Co., 226, 235
 Brodie v. Carolina Midland R. Co., 510, 521
 Brogan v. Hanan, 120
 Brohl v. Lingeman, 144
 Bromley v. Birmingham, etc. R. Co., 108
 v. New York, etc. Ry. Co. (App. 2069)
 Bronson v. Coffin, 419 443
 v. Southbury, 72, 73, 78, 356, 393
 Brooke v. Chicago, etc. R. Co., 197
 v. Ramsden, 209*a*
 v. Winters, 734
 Brookfield v. Remsen, 623
 Brooklyn v. Brooklyn, etc. R. Co., 341, 408, 414
 Brooks v. Boston, 332, 370, 739
 v. Boston, etc. R. Co., 114
 v. Brooks, 639
 v. Buffalo, etc. R. Co., 469
 v. Day, 574
 v. Hart, 649, 651
 v. Lincoln St. R. Co., 485*c*
 v. Morgan, 303
 v. N. Y. & Erie R. Co., 434, 436, 455
 v. Northern Pac. R. Co., 207*b*
 v. Ramsden, 214
 v. Schwerin, 115, 654, 760
 v. Somerville, 298, 358, 368
 v. Taylor, 628
 v. Western Union Tel. Co., 553, 754
 Brookville v. Arthurs, 122, 289, 384
 Turnp. Co. v. Pumphrey, 386

[References are to sections.]

- | | |
|--|---|
| <p>Brooksville v. Pumphrey, 346
 Broom v. Western Union Tel. Co.,
 543, 554
 Broschart v. Tuttle, 104, 654
 Brosnan v. Sweetzer, 706, 719, 759
 Brosnan v. Lehigh Val. R. Co., 198,
 216
 Brossard v. Morgan, 729
 Brotherton v. Manhattan Beach
 Imp. Co., 704
 Brotzki v. Wisconsin Granite Co.,
 216
 Broughel v. Southern Telp. Co., 139
 Brouillette v. Con. River R. Co., 110
 Broult v. Hanson, 652
 Brouseau v. Kellogg, etc. Co., 215
 Brow v. Boston, etc. R. Co., 160
 Brower v. Locke, 189, 223
 v. New York, 285
 v. Northern Pac. Ry. Co., 245
 Brown v. American Tel. etc. Co., 749
 v. American, etc. Co., 35, 56
 v. Armstrong, 735
 v. Atlantic Coast Line Ry.,
 494, 516
 v. Atlanta, 367
 v. Atlanta, etc. R. Co., 676
 v. Bachman, 376
 v. Barnes, 520
 v. Bockman, 358
 v. Boston Ice Co., 151, 480
 v. Boston, etc. Ry. Co., 457,
 481b, 484
 v. Bowen, 731
 v. Brooks, 92, 679
 v. Brown, 209a
 v. Buffalo, etc. R. Co. 13, 139,
 467, 675, 676, 678
 v. Byroads, 207
 v. Cayuga, etc. R. Co., 413,
 709a
 v. Central Pac. R. Co., 111
 v. Chattanooga, etc. R. Co.,
 207c
 v. Chicago, etc. R. Co., 135,
 463, 467, 475, 497, 516, 731,
 742, 745 (App. 2105)
 v. City of Bentonville, 253,
 262
 v. Citizens of Durham, 56
 (App. 2085)
 v. Collins, 16, 17, 701
 v. Congress St., etc. R. Co., 1,
 57
 v. Dean, 734
 v. Dist. of Columbia, 289
 v. Duplisses, 359
 v. Elliott, 723</p> | <p>Brown v. European, etc. R. Co., 74,
 114
 v. Fairhaven, 122, 301, 394
 v. Giles, 627
 v. Glasgow, 334
 v. Goffe, 606, 614a
 v. Gold Coin, etc. Co., 733
 v. Great Western R. Co., 114
 v. Green, 628, 630
 v. Guyandotte, 260, 291
 v. Hannibal, etc. R. Co., 408,
 413, 417
 v. Howard, 574, 575
 v. Howe, 121
 v. Illius, 93, 696, 734
 v. Interurban, etc. Co., 508
 v. Jefferson, 376
 v. Jefferson County, 257
 v. Kendall, 16
 v. Kistler, 729, 733
 v. Lent, 247
 v. Lester, 591
 v. Louisville, etc. R. Co., 207b,
 481, 484
 v. Lynn, 61, 92, 97
 v. McAllister, 701a
 v. Mallett, 738
 v. Manhattan, etc. Ry. Co.,
 508
 v. Marshall, 691, 742
 v. Maxwell, 61, 180
 v. Milwaukee, etc. R. Co.,
 112, 425, 476
 v. Missouri Pac. R. Co., 676
 v. Musser, etc. Co., 214a
 v. New England, etc. Telph.
 Co., 207i
 v. N. Y. Cent. R. Co., 93, 408,
 463, 477, 495, 520 (App.
 2172)
 v. N. Y. Gas Co., 692
 v. Nichols, 562
 v. Oregon Lumber Co., 211a
 v. Postal Cable Co., 553
 v. Providence, etc. R. Co., 412
 v. Purdy, 612
 v. Purviance, 147
 v. Quincy, etc. Ry. Co., 449
 v. Raleigh, etc. R. Co., 513a
 v. Rapid Ry. Co., 493
 v. Robins, 701
 v. Rome Machinery, etc. Co.,
 61
 v. Rome, etc. Co., 191
 v. Russell, 302
 v. St. Louis, etc. R. Co., 484
 v. Salt Lake City, 73, 286,
 704, 705
 v. Schintz, 588</p> |
|--|---|

[References are to sections.]

- Brown v. Scofield, 395
 v. Seruggs, 262
 v. Sennett, 241a
 v. Sharpouser, 208
 v. Sherer, 73a
 v. Skowhegan, 388, 251, 370
 v. Smith, 310
 v. South Kenebeck Soc., 104
 v. Southern Ry. Co., 203,
 207a, 769 (App. 2085, 2183)
 769 (App. 2085, 2183)
 v. Southern Pac. Ry. Co., 437
 v. Sullivan, 93, 99
 v. Susquehanna Boom Co., 11
 v. Thorne, 653b
 v. Toronto Hospital, 708a
 v. Union Pac. Ry. Co., 481b,
 518
 v. Wallis, 618
 v. Watson, 371, 749a
 v. Weaver, 617
 v. West Riverside Coal Co.,
 16b, 65, 122, 140a
 v. Western U. Tel. Co., 540a,
 542, 543a, 545, 754
 v. White, 789a
 v. Winona, 205
 v. Wyson, 343
 v. Vinal Haven, 266
 v. Yazoo, etc. Ry. Co., 494,
 516
 Store Co. v. Chattahoochie,
 26a, 119
 Brownell v. Missouri Pac. R. Co., 60a
 Browning v. Hanford, 621
 v. Owen county, 299
 v. Springfield, 256, 289
 v. Wabash R. Co., 186, 775
 (App. 2075)
 Brownlee v. Alexis, 369
 Brownlow v. Metropolitan Board,
 359
 Brownsfield v. Chicago Ry. Co., 184a
 Brownstein v. People's Ry. Co., 742
 Brownwood Oil Mill Co. v. Stubble-
 field, 203
 Broyles v. Central of Georgia Ry.
 Co., 488
 v. Priscock, 60a
 Brozek v. Steinway R. Co., 654
 Bruce v. Baxter, 566
 v. Central M. E. Church, 331
 v. Cincinnati, etc. R. Co., 132,
 133 (App. 2063, 2064)
 Bruff v. Illinois, etc. Ry. Co., 488
 Bruggeman v. Illinois, etc. Ry. Co.,
 99
 Brunger v. Pioneer Roll Paper Co.,
 223
- Bruker v. Covington, 110
 Brumberger v. Joline, 518
 Brumble v. Brown, 587a
 Brumfield v. Western U. Tel. Co.,
 540a
 Brummit v. Furness, 669
 Brunell v. Hopkins, 671
 Brunner v. American Tel. Co., 148,
 365
 v. Blaisdell, 57
 Brunette v. Chicago, etc. R. Co., 475
 Brunker v. Cummins, 703
 Bruns v. North Iowa, etc., Co., 215
 Brunson v. Southwestern Devel. Co.,
 197
 Brunswick v. White, 138
 v. Braxton, 289
 Gas, etc. Co. v. Brunswick,
 299
 etc. Co. v. Rees, 702, 713
 etc. Ry. Co. v. Bostwick
 etc. R. v. Clem, 207b
 etc. Ry. Co. v. Moore, 490
 etc. Ry. Co. v. Ponder, 511,
 516
 Brunswig v. White, 690, 772
 Brusch v. St. Paul R. Co., 523
 v. Long Island R. Co., 672
 Elec Light, etc. Co. v. Le-
 fevere, 97, 698
 Brusso v. Buffalo, 175, 176, 298, 373,
 654
 Bruswitz v. Netherlands Steam Nav.
 Co., 39, 39a, 502
 Bryan v. Chicago, etc. Ry. Co., 57
 v. International, etc. Ry. Co.,
 187
 v. Missouri Pac. R. Co., 505
 v. Western Union Tel. Co.,
 543a, 554
 Bryant v. American Tel. Co., 555,
 754, 755
 v. Biddeford, 104, 334, 351,
 388
 v. Central, etc. R. Co., 680
 v. Chicago, etc. R. Co., 488
 v. Merritt, 735
 v. Randolph, 345, 359, 373
 v. Rich, 146, 154, 513
 v. St. Paul, 266
 v. Southern Ry. Co. (App.
 2053)
 v. Western Union Tel. Co.
 v. Westbrook, 299
 Lumber Co. v. Strastney, 187,
 203
 Bryce v. Burlington, etc. Ry., 211a
 Brydges v. Walford, 623
 Brydon v. Stewart, 185, 192, 197

[References are to sections.]

- Brymer v. Southern Pac. R. Co., 184, 193, 223
- Bryson v. Chicago, etc. R. Co., 480
v. McCone, 744
v. Philadelphia Erew. Co., 143
v. Southern Ry. Co., 90, 476
- Buchanan v. Barre, 285
v. Chicago, etc. R. Co., 473
v. Duluth, 287
v. Philadelphia, etc. Ry. Co., 463, 473
v. West Jersey R. Co., 85
- Bucher v. Cheshire R. Co., 104
v. Fitchburg, etc. R. Co., 104
v. N. Y. Central R. Co., 89, 509, 520
v. Northumberland County, 256
- Buehholtz v. Radcliffe, 108
- Buchmeier v. Davenport, 373
- Buchner v. Richmond, etc. Ry. Co. (App. 2158)
- Buch v. Ball, 625a
v. Biddeford, 338, 351, 352, 367
v. Brady, 628
v. Glens Falls, 363
v. Louisville, etc. Ry. Co., 750
v. N. J. Zinc Co., 235
v. Webb, 493
- Buckalew v. Tennessee Coal Co., 181, 767 (App. 2052)
- Buckbee v. Brown, 725, 726
- Bucker's Irr., etc. Co. v. Farmers', etc. Co., 729, 733
- Bucki v. Cone, 157
- Buckland v. Conway, 557
- Buckley v. Beinbauer (App. 2172)
v. Gee, 639
v. Cunningham, 723
v. Gould, etc. Mining Co., 241
v. Gray, 562
v. Gutta Percha Mfg. Co., 218, 219
v. Knapp, 762
v. Leonard, 626, 628, 629, 632
v. New Bedford, 274
v. Old Colony R. Co., 490
v. Westchester, etc. Co., 698a
- Buckman v. Missouri, etc. Ry. Co., 419, 428
- Buckmaster v. Great Eastern R. Co., 504
- Buckner v. Richmond, etc. R. Co., 222 (App. 2157)
v. Stock Yards, etc. Co., 29a, 31, 207h, 214a
- Budd v. United Carriage Co., 516
- Buddenberg v. Cnouteau Trans. Co. (App. 2075)
v. Chouteau Tr. Co., 129
- Buddin v. Fortunato, 115
- Buddington v. Bradley, 729
v. Shearer, 628, 635, 638
- Budge v. Morgan's, etc. Ry. etc. Co., 196
- Buechner v. New Orleans, 108, 113, 367
- Bueck v. Lindsay, 654
- Buel v. N. Y. Central R. Co., 89, 519
- Buelow v. Chicago, etc. R. Co., 476
- Buenemann v. St. Paul, etc. R. Co., 506
- Buesching v. St. Louis Gas Light Co., 58, 108, 362, 481b, 703, 712
- Buey's Admx. v. Chess, 192, 207h
- Buffalo, The, 758
v. Holloway 174, 301, 356, 384
v. N. Y., Lake Erie, etc. R. Co., 467
County v. Keaney County, 394
etc. Turnp. Co. v. Buffalo, 299
Grain Co. v. Sowerby, 727a
- Buffit v. Troy, etc. R. Co., 486, 490, 503
- Buffum v. Harris, 735
- Buford v. Grand Rapids, 274
v. Houtz, 419, 656
- Bukowski v. Milwaukee Elec. Ry. Co., 485ab
- Bulger v. Albany Ry. Co., 485bc
- Bulkley v. N. Y. & N. Haven R. Co., 57, 422, 451a
- Bull v. Mobile, etc. R. Co., 241
- Bullard v. Boston, etc. R., 518
v. Ry. Co., 526
v. Southern Ry. Co., 457
- Bullington v. Newport News, 751
- Bullitt v. Clement, 303
- Bullock v. Babcock, 121
v. Durham, 368, 374
v. New York, 346, 376
v. Porter, 665, 668, 669, 750
v. Wilmington, etc. R. Co., 92
- Bulmer v. Gilman, 558, 565
- Bulpit v. Matthews, 655
- Bumpas v. Wabash Ry. Co., 455
- Bunch v. Edenton, 289, 346, 356
- Buncombe Turp. Co. v. Baxter, 385
- Bunderson v. Burlington, etc. R. Co., 735
- Bundschuh v. Mayer, 635
- Bungea v. Metropolitan Ry. Co., 770
- Bunker v. Hudson, 291
v. Union Pac. Ry. Co., 187

[References are to sections.]

- Bunnell v. Berlin Iron Bridge Co., 10, 361
 v. Rio Grande W. R. Co., 451a, 452
 v. St. Paul, etc. R. Co., 190
 Bunt v. Sierra, etc. Co., 207, 207e
 Bunting v. Central Pac. R. Co., 64, 476
 v. Hogsett, 66
 v. Pennsylvania R. Co., 417a
 Bunyan v. Citizens' R. Co., 480, 485c
 Burbank v. Illinois Cent. R. Co., 410, 492a
 v. Pillsbury, 443
 v. West-Walker Ditch Co., 105
 Burch v. Hardwicke, 291
 v. Southern Pac. Co., 206, 214a, 221
 Burchfield v. Northern Cent. R. Co., 445
 Burdick v. Babcock, 323
 v. Cheadle, 708a, 709
 v. Chicago, etc. R. Co., 750
 v. Missouri Pac. R. Co., 197
 v. Worrall, 649, 651, 654
 Burford v. Grand Rapids, 262
 Burg v. Chicago, etc., R. Co., 457, 467, 480, 483
 Burger v. Missouri Pac. R. Co., 463a, 467, 479
 v. Philadelphia, 368
 v. St. Louis, etc. R. Co., 433
 Burges v. Wickham, 497
 Burgess v. Davis Sulphur Ore Co., 60b, 215, 223
 v. Gray, 165
 v. Humphrey Bookcase Co., 187, 192, 214a, 221
 v. Stowe, 719a
 Burgraf v. Byrnes, 573
 Burghart v. Gardner, 562
 Burgin v. Richmond, etc. R. Co., 520
 Burian v. Seattle Elec. Co., 54
 v. Seattle Elec. Co., 114
 Burk v. Campbell, 623
 v. Citizens' St. Ry. Co., 108
 v. Creamery Packing Co., 26a, 27a, 31
 v. Delaware, etc. Canal Co., 464
 v. Foster, 606
 Burkard v. Leschen, etc. Co., 206, 207h, 215, 238
 Burke v. Broadway, etc. R. Co., 71, 73
 v. City and County Cont. Co., 168
 v. Daley, 664
- Burke v. Davis, 207h
 v. De Casto, etc. Co., 162
 v. Elliott, 313
 v. Ireland, 164
 v. Louisville, etc. R. Co., 680, 750
 v. Manhattan Ry. Co., 188
 v. N. Y. Central etc. R. Co., 110, 472, 485
 v. Paper Co., 187
 v. Parker, 207c
 v. Shaw, 148
 v. State, 518
 v. Syracuse, etc. R. Co., 190, 207
 v. Treavitt, 322
 v. Witherbee, 60b, 187, 195, 673
 Burkett v. Bond, 111
 Burleigh v. St. Louis Tr. Co., 65a
 Burleson v. Reading, 367
 Burley v. Bethune, 303
 v. Hines, 645
 v. Ry. Co., 202
 Burling v. Ill. Central R. Co., 463
 Burlington, etc. R. Co. v. Crockett, 191, 207, 233, 233b
 v. Franzen, 419
 v. Koonce, 417
 v. Liehe, 214a, 215
 v. Webb, 451a
 v. Westover, 30, 666, 676, 678, 679
 Burnard v. Haggis, 121
 Burnell v. West Side R. Co., 207c
 Burner v. Hingman, etc. Co., 710, 712
 Burnet v. Burlington, etc. R. Co., 99, 483
 Burnett v. Contra Costa County, 256
 v. Western U. Tel. Co., 531
 v. Ft. Worth Light, etc. Co., 62, 97
 Burnham v. Butler, 645
 v. Byron, 253
 v. Strother, 635, 637
 v. Wabash R. Co., 509
 Burns v. Asheboro etc. Ry. Co., 769
 v. Boston, etc. Ry. Co., 519
 v. Bradford, 367, 369
 v. Chicago, etc. R. Co., 195
 v. Cork, etc. R. Co., 45, 51, 497
 v. Dunham, etc. Co., 760
 v. Elba, 114, 258, 289, 367, 374
 v. Glens Falls, etc. R. Co., 493
 v. Grand Rapids, etc. R. Co., 132
 v. Johnston Pass. Ry. Co., 523

[References are to sections.]

- | | |
|--|--|
| <p>Burns v. Kansas City, etc. R. Co., 413
 v. McDonald 16<i>f</i>, 168
 v. Metropolitan St. Ry. Co., 108, 485<i>c</i>
 v. Michigan Paint Co., 168
 v. Missouri, etc. Oil Co. (App. 2098)
 v. North Chicago, etc. Mill Co., 466
 v. Norton, 303
 v. Ocean S. S. Co., 197
 v. Pennsylvania Ry. Co., 773
 v. Pethcal, 245
 v. Poulson, 146, 147
 v. Ruddock, Orleans, etc. Co., 193
 v. St. Louis, etc. Ry. Co., 475
 v. Sennett, 195, 224, 232, 241
 v. Vesta Coal Co., 203
 v. Washburn, 241<i>b</i>
 v. Yonkers, 356
 Buron v. Denman, 322
 Burnside v. City of Everett, 287
 v. Smith, 353, 375
 Burr v. Beers, 118, 543
 v. Pennsylvania Ry. Co., 523
 v. Plymouth, 351, 363
 v. Plymouth, 351
 Burrall v. Acker, 625<i>a</i>
 Burrell v. Uncaphor, 367
 v. Uncapher, 31, 367
 Burrill v. Augusta, 265
 v. Eddy, 225
 Burroughs v. Housatonic R. Co., 672
 Burrows v. Erie, etc. R. Co., 61, 520
 v. Lake Crystal, 369
 v. Lowndale, 747
 v. March Gas Co., 31, 35, 65, 695
 v. Ozark White Lime Co., 231 (App. 2122)
 Burruss v. Hines, 744
 Burson v. Louisville, etc. Ry. Co., 483
 Burt v. Douglas Co. R. Co., 524
 v. Horner, 587
 v. Wrigley, 699
 Burton v. Chattanooga, 274
 v. Fulton, 310, 313
 v. McClellan, 671
 v. No. Missouri R. Co., 421
 v. Philadelphia etc. Co., 426
 v. Tannehill, 119
 v. West Jersey Ferry Co., 515
 v. Wilmington, etc. R. Co., 766
 Busch v. Interborough, etc. Ry. Co., 22, 490</p> | <p>Buscher v. New York Trans. Co., 653<i>c</i>
 Bush v. Barnett, 516
 v. Brainard, 433, 720
 v. Delaware, etc. Ry. Co., 416
 v. Geneva, 363, 368
 v. Portland, 274
 v. Steinman, 168, 173, 699
 v. Union, etc. Ry. Co., 66, 476, 477
 v. Wathen, 639
 v. West, etc. Co., 215
 v. Wood, 209<i>a</i>
 Bushby v. N. Y., Lake Erie, etc. Co., 192, 205, 207<i>g</i>
 Bushway v. New York, etc. Ry. Co., 194
 Busse v. Rogers, 343, 370
 Bussell v. Steuben, 256
 Bussey v. Charleston, etc. Ry. Co. (App. 2183)
 v. Gulf, etc. Ry. Co. (App. 2072, 2158)
 Bussian v. Milwaukee, etc. R. Co., 426
 Bussy v. Donaldson, 172
 Busteed v. Parsons, 303
 Butchel College v. Martin, 704, 705
 Butcher v. Hyde, 704
 v. Providence Gas Co., 693
 v. Vaca, etc. Ry. Co., 30
 v. West Virginia, etc. R. Co., 482
 Butcher's National Bank v. Hubbell
 Bute v. Potts, 614
 Butelli v. Jersey Cty, etc. Elec. Ry. Co., 485<i>a</i>
 Butler v. Ashworth, 258, 340
 v. Bank, 584<i>a</i>
 v. Chicago, etc. R. Co., 241<i>c</i>, 424, 705 (App. 2140)
 v. Cushing, 59, 702
 v. Frazee, 207<i>c</i>, 208, 215
 v. Kent, 371, 739
 v. Malvern, 368
 v. Manhattan R. Co., 60<i>a</i>, 764
 v. Metropolitan St. Ry. Co., 485<i>b</i><i>c</i>
 v. Milwaukee, etc. R. Co., 408, 463, 464
 v. Moberly, 262, 291
 v. Oxford, 369, 378
 v. Peck, 735
 v. Pittsburgh, etc. R. Co., 519, 523
 v. Rockland, etc. Ry. Co., 485<i>ab</i>
 v. Rhode Island Co., 485
 v. St. Paul, etc. R. Co., 520</p> |
|--|--|

TABLE OF CASES.

lxxiii

[References are to sections.]

- Butler v. State, 625a
 v. Townsend, 143
 v. Steinway R. Co., 493
 v. Townsend, 195, 197, 224, 239, 699
 Butman v. Hussey, 733
 Butner v. Western U. Tel. Co., 543, 756
 Butterfield v. Forrester, 86, 379
 v. Western, etc. R. Co., 476, 481
 Butteris v. Mifflin etc. Min. Co., 207b
 Button v. Frink, 57, 107, 647, 649
 v. Hudson River R. Co., 61, 65, 94, 99, 102, 110
 v. Kinnitz, 747
 Butts v. Atlantic, etc. R. Co. (App. 2085)
 v. St. Louis, etc. R. Co., 476
 Buxendin v. Sharp, 629
 Buxton v. Ainsworth, 644, 649
 v. Northeastern R. Co., 418, 459, 466a, 503
 Buzzell v. Laconia Mfg. Co., 107, 184, 192, 197, 222
 Byerly v. Anamoso, 334, 356
 Byers v. Steel Co., 205
 Byrd v. Southern Exp. Co., 769 (App. 2085)
 Byington v. City of Merrill, 338
 Byne v. Mayor, etc. of Americus, 384
 Byrd v. Southern Express Co.
 Byrne v. Anderson, 622
 v. Boadle, 59, 60, 158, 159
 v. Brooklyn City R. Co., 184a
 v. Farmington, 274
 v. N. Y. Central R. Co., 73, 414, 464
 v. Kansas City, etc. R. Co., 61, 144, 464a, 483
 v. Knickerbocker Ice Co., 644, 649
 v. Minneapolis, etc. R. Co., 729, 750
 v. N. Y. Central R. Co., 463a, 464, 468, 471, 481a
 v. Syracuse, 341, 375, 377
 Byrnes v. Cohoes, 274
 v. N. Y. Lake Erie, etc. R. Co., 195, 202
 v. Palmer, 574
 Cabin Branch Min. Co. v. Hutchinson's Adm., 189
 Cable v. Cooper, 303
 Cablett v. St. Louis, etc. R. Co., 97
 Caddagon v. Chicago, 367
 Cadden v. American Steel Co., 195
 Cadwell v. Arnheim, 56, 647
 Cahaba, etc. Mining Co. v. Pratt, 766
 Cahill v. Chicago, etc. R. Co., 481, 484, 526
 v. Cincinnati, etc. R. Co., 66, 464, 470, 477, 484
 v. Eastman, 17, 477, 484
 v. Hilton, 207a, 223
 v. Illinois, etc. Ry. Co., 103 (App. 2141)
 v. Layton, 97
 Cahn v. Western U. Tel. Co., 538, 753a, 755
 Cahoon v. Chicago, etc. R. Co., 426
 Cain v. Atlantic, etc. Ry. Co., 497
 v. Hugh Mann Cont. Co., 151
 v. Minneapolis etc. R. Co., 493
 v. Syracuse, 262, 281, 354
 v. Vintersteen, 654
 Cairncross v. Pewaukee, 355, 376
 Cairns v. City of Chester, 287
 Cairo, etc. R. Co. v. Murray, 451a, 453
 v. Stevens, 735
 v. Woolsey, 453
 Cake v. Cannon 619
 Calder v. Chapman, 335
 v. Hackett, 303
 v. Smalley, 120, 709a
 v. Walla Walla, 363
 Calderwood v. North Birmingham R. Co., 520
 Caldon v. Meredith, etc. Lumber Co., 193
 Caldwell v. Atlanta, etc. Ry. Co., 164
 v. Murphy 495, 523
 v. N. J. Steamboat Co., 45, 51, 57, 60, 495, 497, 515
 v. Shepherd, 557
 v. Slade, 713, 719
 v. Brown, 772
 v. Missouri, etc. Ry. Co., 207
 v. New Jersey, etc. Co., 51
 v. North Carolina (App. 2116)
 v. Slade
 v. Southern Pac. Ry. Co., 749
 Calhoun v. Gulf, etc. Ry. Co., 467
 v. Little, 302
 California, etc. Co. v. Yuma Valley, etc. Co., 751
 Calkins v. Barger, 16, 666, 669
 v. Hartford, 60b
 Call v. Buterick, 734
 v. Mitchell, 303
 Callagan v. Delaware, etc. R. Co., 91
 Callaghan v. Lake Hopatcong Ice Co., 763

[References are to sections.]

- Callahan** v. Bean, 73*a*, 74
 v. Burlington, etc. R. Co., 160
 v. Eel River R. Co., 73
 v. Gilman, 362
 v. Morris, 258
 v. St. Louis, etc. Ry. Co.
 (App. 2160)
 v. Warne, 54, 61, 112, 690
Callaway v. Mellett, 493
Callatt v. St. Louis, etc. R. Co., 523
Calloway v. Agar Packing Co., 108,
 207*g*
Calumet Iron Co. v. Martin, 107,
 113
Calvert v. Springfield Elec. Light,
 etc. Co., 175, 769
 v. Spring, etc. Co., 704
 County v. Gibson, 257
Calwell v. Boone, 291
Camblin v. Philadelphia, etc. Ry.
 Co., 174
Cambridge v. Foster, 625*a*
Camden Co. v. Belknap, 210
Camden, etc. R. Co. v. Baldauf, 550
 v. Hoosey, 523
 etc. Ry. Co. v. Broom, 485*bc*
Cameron v. Bryan 630, 748
 v. Great Northern Ry. Co., 65,
 481*b*
 v. Lewiston, etc. Ry. Co., 497,
 516
 v. N. Y. etc. Y. Co., 190
 Mill Co. v. Anderson, 176
 & Co., Wm., v. Realmuto
 v. Reynolds, 618
 v. Reynolds, 618
 v. Union Tr. Line, 743, 525
Cammett v. Des Moines, 339
 v. Haverhill, 339, 354, 358
Camp v. Barney, 163
 v. Hartford, etc. Stmb. Co.,
 505
 v. Western U. Tel. Co., 550
 v. Wood, 704, 709, 710
Campbell v. Abbott, 704
 v. Atlantic, etc. R. Co., 57
 v. Bear River Co., 16, 47
 v. Boyd, 705
 v. Bridwell, 419
 v. Brown, 628
 v. Cluff, 343
 v. Cook, 230, 233*b*, 241*c*
 v. Dreher 653
 v. Duluth, etc. Ry. Co., 1, 495,
 518
 v. Eveleth, 219*a*
 v. Goodwin, 676
 v. Harris, 181, 764
 v. Iowa, etc. R. Co., 751
Campbell v. Jones, 164
 v. Kalamazoo, 239, 338
 v. Kansas City, etc. R. Co.,
 483
 v. Kincaid, 562
 v. Los Angeles Tr. Co., 742
 v. Louisville, etc. R. Co., 192
 v. Lunsford, 207, 701
 v. Montgomery, 261, 289, 295
 v. Missouri Pac. R. Co., 675,
 676
 v. N. Y. Central R. Co., 474,
 485
 v. Northern Pac. R. Co., 150
 v. Page, 637
 v. Perkins, 486
 v. Phelps, 248, 618
 v. Portland Sugar Co., 122,
 248, 492*a*, 704, 725
 v. Pullman Car Co., 513, 526
 v. Railway Trans. Co., 196*a*
 v. Richmond, etc. R. Co., 475
 v. Rogers (App. 2088)
 v. St. Louis, etc. Ry. Co., 485*c*
 v. Seaman, 701*a*
 v. Somerville, 301
 v. Stakes, 121
 v. Stillwater, 346, 355, 358,
 647
 v. Trimble 635
 v. U. S. Foundry Co., 675
 v. Walker, 644, 654
 v. Webb, 303
 v. Wings, 190
 v. Wood 644
 Co. v. Roediger, 190
 etc. Mining Co. v. Smith, 205,
 206
Canada Cent. R. Co. v. McLaren, 676
Canadian Pac. R. Co. v. Johnston,
 233*a*
Canandaigua v. Foster, 384
Canavan v. Stuyvesant, 707
Candee v. Kansas City, etc. R. Co.,
 483
 v. Penn. R. Co., 503
 v. Western U. Tel. Co., 547,
 553, 754
Candelaria v. Atkinson, etc. R. Co.,
 480
Candiff v. Louisville, etc. R. Co.,
 150, 513*a*
Candler v. Washoe, etc. Co., 750
Canefox v. Crenshaw 657
Canfield v. Chicago, etc. R. Co., 150,
 359, 749, 760
Caniff v. Blanchard Nav. Co., 404
Cannavan v. Conklin, 120, 725
Cannelton v. Bush 287

[References are to sections.]

- Canney v. Rochester, etc. Ass'n, 164
 Canning v. Williamstown, 749a, 761
 Cannon v. Cleveland, etc. Ry. Co., 457, 480
 v. Midland, etc. R. Co., 506
 City, etc. Co. v. Oxtoby, 728
 Cannons v. Western U. Tel. Co., 754
 Canterbury v. Attorney-General, 665
 v. Kansas City, 363
 Cantlon v. Eastern R. Co., 672, 674, 676
 Cantwell v. Appleton 375
 Capen v. Foster, 310
 Capital Tr. Co. v. Apple, 485c
 v. Crump, 97
 v. Lusby, 485c
 Capitol Gas, etc. Co. v. Davis' Admr., 698a
 Capper v. Louisville, etc. R. Co., 233, 239
 Carbine v. Bennington, etc. R. Co., 198
 Card v. Case, 629
 v. Eddy, 207a
 v. Ellsworth, 89, 355
 v. N. Y. and Harlem R. Co., 100, 428, 484
 Carey v. Baxter, 164, 168
 v. Berkshire, etc. R. Co., 65, 124
 v. Chicago, etc. R. Co., 451a
 v. Hubbardston, 351
 v. Lawless, 321
 v. Morrison, 688a
 Cargill v. Duffy, 162
 Carhart v. Auburn Gas Co., 692
 Cark v. Lebanon, 355
 Carland v. Western Union Tel. Co., 532, 540, 552, 753a
 Carle v. Bangor, etc. R. Co., 241a
 Carleton v. Caribou, 338, 346
 v. Franconia Iron, etc. Co., 704, 726
 Carley v. Jennings, 731
 Carlile v. Parkins, 622
 Carlin v. Chicago, etc. R. Co., 94, 107, 480
 Carlisle v. Brisbane, 66
 v. Sheldon, 67
 Carlson v. City Savings Bank, 708
 v. Greenfield, 351
 v. Ireland, 20
 Carlson v. Chicago, etc. Ry. Co., 476
 v. James Forestall Co., 231
 v. North West. Tel. Co., 203a, 228, 232, 233
 v. Oregon, etc. R. Co., 207c, 406, 775 (App. 2089)
 v. Phenix Bridge Co., 195
 Carlson v. Sioux Falls, 207c
 v. Stocking, 164
 v. Wilmington, etc. R. Co., 428, 429
 Carlyon v. Lovering, 734
 Carman v. New York, 155, 299
 v. Steubenville, etc. R. Co., 175
 Carmany v. West Jersey, etc. Co., 460
 Carmi v. Ervin, 66
 Carmichael v. Bank of Penna., 597
 Carmody v. Boston Gas Co., 693
 Carner v. Chicago, etc. R. Co., 750
 Carney v. Chicago, etc. R. Co., 90, 476
 v. Concord St. Ry. Co., 73a
 v. Marseilles, 374
 Caron v. Boston, etc. Ry. Co. (App. 2151)
 Carpenter v. Blake, 605, 606, 607, 612, 614
 v. Boston, etc. R. Co., 459, 503
 v. Buffalo, etc. Ry. Co. (App. 2082)
 v. Central Park, etc., R. Co., 408
 v. Chicago, etc. Ry. Co., 460
 v. Cohoes, 8, 334a, 392
 v. Eastern Trans. Line, 49
 v. Laswell, 60a
 v. Latta, 639
 v. Mexican Nat. R. Co., 217
 v. N. Y., New Haven, etc. R. Co., 526
 v. Penn. R. Co., 761a
 v. Reliance Realty Co., 701
 v. Town of Rolling, 375
 v. Washington, 493
 Carples v. N. Y. & Harlem R. Co., 739
 Carpue v. Brighton, etc. R. Co., 45
 Carr v. Ashland, 373
 v. Eel River, etc. R. Co., 508, 520
 v. Glovers, 568
 v. Northern Liberties, 262, 274
 v. North River Const. Co., 471
 v. Sheehan, 704
 v. United States, 249
 v. West End R. Co., 110
 Carraher v. Allen, 244
 v. San Francisco Bridge Co., 426, 463, 464, 466
 Carrico v. West Va., etc. R. Co., 93, 99, 176, 499, 516, 519 (App. 2104)

[References are to sections.]

- Carrier v. Missouri, etc. Ry., 481
 v. Dorrance, 56
 v. Union Pac. Ry. Co., 207
 (App. 2142)
 Carrierre v. McWilliams, 218
 Carrigan v. Stillwell (App. 2065)
 Carrington v. Louisville, etc. R. Co.,
 64, 484
 v. Mueller, 193, 218
 v. St. Louis, 285, 368
 Carroll v. Boston, etc. Ry. Co., 518
 v. Chicago, etc. Ry. Co., 60,
 480
 v. East Tennessee, V. & G.
 Ry. Co., 207
 v. Grand Rhonde Elec. Co.,
 698, 704
 v. Interstate Tr. Co., 523
 v. Marcoux, 626
 v. Minnesota, etc. R. Co., 64,
 476
 v. Missouri Pac. Ry. Co.
 (App. 2074)
 v. New Haven R. Co., 522,
 523
 v. Rigney, 713
 v. St. Louis, 262
 v. Staten Island R. Co., 13,
 45, 51, 92, 93, 104, 486, 494,
 497, 515
 v. Weiler, 636, 638
 v. Willcutt, 241b
 v. Williston, 195
 Carruthers v. Chicago, etc. R. Co.,
 195
 Carskaddon v. Mills, 705
 Carron v. Standard Refrigerator
 Co., 214a, 215
 Carson v. Chicago, etc. Ry. Co., 72
 v. Federal St. R. Co., 485c
 v. Hastings 373
 v. Hayes, 729
 v. Leathers, 157, 510
 v. Quinn, 243
 v. Southern Ry. Co., 207b
 (App. 2117)
 Carstairs v. Taylor, 16, 708
 Carsten v. Nor. Pacific R. Co., 761a
 Carswell v. Macon, etc. Ry. Co., 488
 v. Western Union Tel. Co., 756
 Carter v. Baldwin, 207g, 218
 v. Bennett, 557
 v. Boston, etc. R. Co., 359
 v. Central, etc. Ry. Co., 476
 v. Columbia, etc. R. Co., 108,
 688
 v. Cooper, 573
 v. Fulgham, 57
 v. Ill. Cent. R. Co., 748
 Carter v. Kansas City Cable Co., 497
 v. Kansas City R. Co., 497
 v. Louisville, etc. R. Co., 61,
 64
 v. McDermott, 189, 195
 v. Maryland, etc. Ry. Co.,
 674, 678
 v. North Carolina R. Co.
 (App. 2085)
 v. Oliver Oil Co., 193, 213
 v. Rahway, 258, 289
 v. Tallcott, 559, 573
 v. Towne, 34, 56, 686
 v. Village of Nunda, 88a
 v. Wabash, etc. Ry. Co., 739,
 750
 v. Western Union Tel. Co.,
 540a, 542
 v. West Jersey, etc. Ry. Co.,
 769
 v. Wilds, 256
 Adm. v. Village of Winooski
 (App. 2100)
 Carterville v. Cook, 346
 Cartledge v. Pierpont Mfg. Co., 217
 Carthage v. Garner, 354
 Carthage Turnp. Co. v. Andrews, 760
 Cartter v. Cotter, 219a
 Cartwright v. Chicago, etc. R. Co.,
 521
 Carver v. Detroit, etc. Plank-road
 Co., 54
 Carville v. Westford, 356
 Cary v. Chicago, 298
 v. Cleveland, etc. R. Co., 503
 v. Curtis, 249
 v. St. Louis, etc. R. Co., 421
 Case v. Chicago, etc. R. Co., 407
 v. Hoffman, 734
 v. N. Y. Central R. Co., 452,
 466
 v. Northern Central R. Co.,
 58, 676
 v. Perew, 18, 404
 v. St. Louis, etc. R. Co., 425
 v. Terrell, 249
 v. Waverly, 289, 369
 Casement v. Brown, 166, 168, 737
 Casey v. Chicago, etc. R. Co., 218
 v. Fitchburg, 376
 v. Louisville, etc. R. Co., 233b,
 238
 v. Malden, 375
 v. N. Y. Central R. Co., 110
 v. New York, etc. Ry. Co., 485
 v. Reedy Elec. Mfg. Co., 207c
 v. Smith, 74
 v. Tama County, 257, 390

[References are to sections.]

- Casey v. Union Pac. Ry. Co. (App. 2075)
 Cashill v. Wright, 49
 Cashman v. Chase (App. 2151)
 Cason v. Ottonuna, 354
 v. Western Union Tel. Co., 753a
 Casparey v. Portland, 291
 Cass v. Boston, etc. R. Co., 53
 v. Dicks, 735
 Cassaday v. Boston & Albany R. Co., 216, 241b (App. 2152)
 Cassida v. Oregon R. etc. Co., 457, 484
 Cassidy v. Angell, 108
 v. Stockbridge, 350, 351
 v. Angell, 108 (App. 2093)
 v. Le Fevre, 744, 750
 v. Maine Central R. Co., 91, 233
 v. Old Colony R. Co., 735
 v. Poughkeepsie, 287
 Castalia Trout Club Co. v. Castalia Sporting Club, 733
 Casterton v. Amer. Blower Co., 223
 Castino v. Ritzman, 744, 758
 Castle v. Duryee, 318, 322, 686
 v. Parker, 718
 Castro v. Bennet 568
 Caswell v. Boston Elev. Ry. Co. (App. 2069)
 v. Boston, etc. R. Co., 473
 v. Chicago, etc. R. Co., 680
 v. St. Mary's etc. Road Co., 363
 v. Worth, 62, 685
 Catawissa R. Co. v. Armstrong, 52, 64, 99, 225, 480
 Cates v. Western Union Tel. Co., 756
 Catharine, The, v. Dickenson, 61
 Catlett v. Young, 62
 Catron v. Nichols, 669
 Cattano v. Metropolitan St. Ry. Co., 523
 Catterson v. Boston, etc. Ry. Co., 309
 Cauley v. Pittsburgh etc. R. Co., 73
 Caulfield v. Bullock, 310
 Cavagnaro v. Soule, 207c
 Cavanagh v. Boston, 299
 v. Dinsmore, 147, 147a
 v. Ocean Steam Nav. Co., 131
 v. Central, etc. Ry. Co., 207b (App. 2172)
 Caven v. Bodwell, etc. Co., 208
 Cavender v. Charleston, 367, 390
 Caverly v. McOwen, 559
 Cavillaud v. Yale, 562
 Cawfield v. Asheville R. Co., 508
 Cayzer v. Taylor, 46, 65, 186, 192, 197
 v. Taylor, 65
 Cazneau v. Fitchburg, etc. Ry. Co., 501
 Cecchi v. Lindsay, 73a, 644, 653a
 Cecil v. Pacific R. Co., 436
 Cedartown v. Brooks, 353
 Cederson v. Oregon, etc. Ry. Co., 408
 Ceffarelli v. Landino, 701
 Ceigler v. Hopper, etc. Co., 763
 Center v. Finney, 645
 Creek, etc. Co. v. Lindsay, 729
 Centerville v. Woods, 93, 289, 346, 384
 Central Bridge Cor. v. Butler, 58
 City v. Marquis, 392
 Coal Co. v. Wilson 207b
 Coal & Coke Co. v. Hartman, 744
 Consumers Co. v. Booher, 375, 377
 Ill. etc. Co. v. Lloyd, 65a
 Kentucky Tr. Co. v. May, 748
 of Georgia Ry. Co. v. Alexander, 769
 v. Butter, etc. Co., 747
 v. Forshee, 483
 v. Hall, 745
 v. Henderson, 207c
 v. Lippman, 503
 v. Minor, 769
 v. Mullins, 183
 v. Perkerson, 769
 v. Georgia Ry. Co. v. Ray, 769
 v. Stowell, 748
 v. Morgan, 741
 v. White, 741
 R. Co. v. Attaway, 92
 v. Brantley, 187
 v. Brewer, 145
 v. Brunswick, etc. R. Co., 13, 104, 467
 v. Chapman 207
 v. Coggin, 56
 v. Combs, 504
 v. Curtis, 13
 v. De Bray, 233, 233a
 v. Dixon, 479
 v. Feller, 88, 477, 481
 Ry. Co. v. First Nat'l Bank, 584a
 v. Freeman, 114
 v. Glass, 463, 483
 v. Gleason, 103, 408
 v. Golden, 481a
 v. Green, 520
 v. Ingram, 429
 v. Keegan, 192, 193, 232

[References are to sections.]

- Central Ry. Co. v. Kent, 16
 v. Lanier, 61
 v. Lee, 431
 v. Letcher, 492*a*
 v. Matson, 107
 v. Miles, 522
 v. Mitchell, 103
 v. Moore, 54, 61, 64, 762
 v. Morris, 120*a*
 v. Murray, 750
 v. Nash, 103
 v. Newman, 64, 103
 v. Passmore, 207*f*
 v. Peacock, 154
 v. Perry, 87, 488, 510
 v. Phinazee, 93
 v. Raiford, 470, 480
 v. Roberts 486
 v. Rouse 773
 v. Rylee, 73, 464
 v. Ryles, 187, 192
 v. Sears, 60*a*
 v. Serfass, 761
 v. Sims, 207*c*
 v. Small, 58
 v. Smith, 103, 480, 508
 v. State, 368
 v. Stoermer, 225
 v. Summerford, 428
 v. Thompson, 103, 769, 775
 v. Thomas, 519
 v. Van Horn, 93, 509
 v. Vaughn, 484
 v. Denson, 484
 Branch R. Co. v. Andrews, 371
 Branch etc. R. Co. v. Hotham, 53, 54
 Branch R Co. v. Lea, 453
 Pass R. Co. v. Chatterton, 749
 v. Kuhn, 122
 v. Rose, 520
 v. Stevens 96
 Ohio R. Co. v. Lawrence, 419, 429, 460
 Texas, etc. Ry. Co. v. Gibson, 408, 463*a*
 Texas R. Co. v. Nycum, 485
 Trust Co. v. East Tennessee R. Co., 207*b*
 v. Texas, etc. R. Co., 183
 v. Wabash, etc. R. Co., 407, 410
 Union Tel. Co. v. Swoveland, 536, 556*c*, 753*a*
 v. Conneau, 358
 v. Falley, 556*c*
 v. Fehring, 556*c*
 v. Swoveland, 753*a*
- Central Union Tel. Co. v. Blackburn, 518
 v. Brown, 516, 520
 v. Carleton, 524
 v. Crosby (App. 2131)
 v. Denson (App. 2131)
 v. Fuller, 426
 v. Geopp, 494, 516
 v. Gibson, 461, 466
 v. Henderson (App. 2131)
 v. Lippman, 513*a*
 v. Mackey, 493
 v. Madden, 508
 v. Motes, 513
 v. Storrs, 490
 v. Williams, 460
 v. Wood, 459*a*
 Centralia v. Baker, 375
 v. Krouse, 88, 376
 v. Scott, 86, 378
 Cerrillos Coal R. Co. v. Deserant, 221 (App. 2081)
 Cesar v. Karutz, 709
 Chacey v. Fargo, 36, 346, 369
 Chadbourne v. New Castle, 261
 v. Springfield St. Ry. Co., 65*a*
 Chaddock v. Plummer, 34
 v. Tabor, 686
 Chadeayne v. Robinson, 735
 Chadron v. Glover, 334*a*, 373
 Chadwick v. McCausland, 334
 Chaffe v. Consolidated Ry Co., 490, 494, 502, 516
 Chaffee v. Boston, etc. R. Co., 477, 525, 654
 v. Old Colony R. Co., 56, 483, 519, 526
 Chalkley v. Richmond, 287
 Chalmers v. United Railways Co., 508
 Chamberlain v. Enfield, 60*b*, 346, 350, 355
 v. Milwaukee, etc. R. Co., 180
 v. Missouri Pac. R. Co., 99, 484
 v. Oshkosh, 363
 v. Southern Ry. Co., 197, 202
 v. Waymire, 223*a*
 v. West, 115
 v. Wheatland, 378, 647
 Chamberlin v. Morgan, 615
 Chambers v. Amer. Tin Plate Co., 195
 v. Carroll, 35
 v. Kupper-Benson Co., 719*a*, 769
 v. Matthews, 657, 659
 v. Milner, 689
 v. Roanoke Industrial Co., 365

[References are to sections.]

- Chambers v. Woodbury Mfg. Co., 25, 219
 Champaign v. Forrester, 287
 v. Patterson, 334, 353
 Champion v. Crandon, 271, 274
 v. Seaboard, etc. Ry. Co., 463, 471
 Champlain v. Pen Yan, 354
 Champlin v. Pen Yan, 281
 Chandler v. Amer. Car, etc. Co., 208
 v. Fremont County, 257
 v. Howland, 730
 v. Kansas City, etc. Co., 56
 v. Lazaras, 721
 v. New Haven, etc. R. Co., 133
 v. New Haven, etc. R. Co., 132
 Chaney v. Louisville, etc. Ry. Co., 523
 Channon Co. v. Hahn, 191
 Chapel v. Smith, 733
 Chapin v. Walsh, 707
 v. Young Men's Christian Ass'n, 331
 Chaplin v. Hawes, 649, 651
 v. Illinois Term Ry. Co., 232
 Chapman v. Chapman, 564
 v. Cook, 351, 356
 v. Copeland, 733
 v. Erie R. Co., 189, 190
 v. Macon, 369
 v. Milton, 334a, 338, 367
 v. New Haven R. Co., 31, 102
 v. N. Y. Central R. Co., 425
 v. Rochester, 255, 274, 734
 v. Rose, 20
 v. Rothwell, 704
 v. Southern Pac. R. Co., 206
 v. State, 249, 725
 v. Strong, 653b
 v. Thornburgh, 617
 v. W. U. Tel. Co., 756, 761
 Charlebois v. Gogebie, etc. R. Co., 137, 168
 Charles v. Taylor, 167, 235
 County v. Mandanyohl, 376
 Charleston, etc. Ry. Co. v. Pope, et al. 429
 Charlie's Transfer Co. v. Malone, 708
 Charliss v. Rankin, 701
 Charlock v. Freel, 166, 298, 359
 Charlottesville v. Stratton's Admr., 376
 Charlton v. St. Louis, etc. Ry. Co., 207a
 Charlwood v. Greig, 632
 Charman v. Lake Erie, etc. Ry. Co., 245
 Charming v. Toxaway Mills, 183
 Charrier v. Boston, etc. Ry. Co., 203
 Charron v. Union Carbide Co., 203, 204
 Chartiers v. Phillips, 378
 Gas Co. v. Lynch, 168
 etc. Turnp. Co. v. Nester, 343
 Chase v. American Steamboat Co. (App. 2093)
 v. Atchison, etc. Ry. Co., 501
 v. Burlington and N. R. Co., 207a
 v. Cabot etc. Bridge Co., 397
 v. Chase, 419, 657
 v. Heaney, 574, 592
 v. Knabel, 150
 v. Lowell, 350, 354, 368
 v. Maine Central R. Co., 107, 111, 485
 v. Miller 591, 592
 v. Nelson, Admr. (App. 2060)
 v. N. Y. Central R. Co., 61, 95, 750
 v. Oshkosh, 262, 351
 v. W. U. Tel. Co., 756
 Chasemore v. Richards, 729
 Chataign v. Bergeron, 686
 Chastain v. Johns, 144
 Chatel v. Schonlaud, 653b
 Chatfield v. Wilson 700
 Chatsworth v. Ward, 369
 Chattanooga v. State, 332
 Light, etc. Co. v. Hodges, 85c
 Elec. Ry. Co. v. Johnson (App. 2095)
 Tr. Co. v. Venable, 488, 490
 etc. R. Co. v. Brown, 412
 v. Clowdis, 472, 769, 775
 etc. R. v. Daniel, 431
 v. Huggins, 51, 495
 v. Liddell, 502, 748
 v. Owen, 108
 v. Wilson, 429
 v. Whitehead, 159
 Chatterton v. Frankfort, 384
 Chavanne v. Frizola, 581
 Cheatham v. Hogan, 197
 v. Union R. Co., 494, 516, 518
 Cheboygan Lbr. Co. v. Delta Tr. Co., 672
 Chedsey v. Canton, 258
 Cheeney v. Ocean S. S. Co., 203, 233
 Cheaves v. Southern R. Co. (App. 2158)
 Cheetham v. Hampson, 120, 708
 Cheeves v. Danielly, 37, 735
 Chenall v. Palmer Brick Co., 59
 Chenango Bridge Co. v. Lewis, 395
 Cheney v. N. Y. Central R. Co., 463, 471

[References are to sections.]

- Chenery v. Fitchburg R. Co., 97, 457, 464
 Chenoweth v. Chamberlin, 597
 Cherokee Nation v. Southern Kans. R. Co.,
 etc. Coal Co. v. Britton, 1, 717
 Coal Mining Co. v. Limb, 772
 etc. Co. v. Western Union Tel. Co., 755
 Packet Co. v. Hilson, 492a
 Cherry v. Kansas City, etc. R. Co., 503
 v. Louisiana, etc. Ry. Co. (App. 2064)
 Chesapeake, etc. Ry. Co. v. Austin, 714
 v. Ball, 457, 464, 484
 v. Bank's Admr., 769
 v. Barbour's Admr., 485
 v. Barnes' Admr., 202
 v. Borders, 508
 v. Clowes, 524
 v. Conley, 61, 94, 94b
 v. Corbin's Admr., 99, 464, 484
 v. Cowley, 217
 v. Farrow, 90
 v. Dandridge, 417
 v. Dixon, 248
 v. Dodge, 749
 v. Donahue, 475
 v. Dyer County, 415
 etc. Ry. Co. v. Farrow, 457
 v. Fortune, 485d
 v. Friel, 520
 v. Hall's Admr., 85a, 476
 v. Hawkins, 472, 476
 v. Hoffman (App. 2194)
 v. King, 490, 525
 v. Foster, 62, 482
 v. Hoffman, 195
 v. Hafner, 198
 v. Lang's Admx., 207c, 773
 v. Meyer, 501
 v. Osborne, 413
 v. Paris, 114, 485d
 v. Patrick, 472
 v. Reeves, 508
 v. Riddle, 463
 v. Robinson, 501, 508, 518
 v. Rodgers, 457
 v. Venable, 193
 v. Rowsey's Admr., 198
 v. Saulsberry, 493
 v. Smith 520
 v. Wells, 493
 v. Whitlow (App. 2102)
 v. Wilson, 470
- Chesapeake, etc. Ry. Co. v. Yost, 62
 Chesley v. Mississippi, etc. Boom Co., 47
 v. Rocheford, 705
 v. Thompson, 115
 Chess, etc. Co. v. Cohagan, 219
 Chesson v. Roper Lumber Co., 233a
 v. Walker, 224, 231
 Chevallier v. State, 249
 Chewning v. Ensley R. Co., 476
 Chicago v. Apel, 356
 v. Babcock, 375
 v. Bixby 353
 v. Bordon, 334
 v. County, 256
 v. Crooker, 353
 v. Crosby, 343
 v. Dalle, 369
 v. Gallagher, 272, 356
 v. Gothman, 143
 v. Herz 353
 v. Hesing, 71, 356
 v. Hessing 70,
 v. Hoy, 355, 367
 v. Joney, 167
 v. Johnson, 356
 v. Keefe, 137, 370
 v. Kelly, 749a
 v. Langlass, 353, 749a
 v. McCarthy, 353, 369
 v. McDonald, 356
 v. McGiven, 53, 353, 367
 v. McGraw, 299
 v. McLean, 761
 v. Major, 71, 73a, 134, 135, 137, 368, 766, 775
 v. Martin, 289, 334a, 749a
 v. Morse, 375
 v. Murdock, 298
 v. Norton Mill Co., 271
 v. O'Brennan, 709a
 v. O'Brien, 343
 v. Powers, 369
 v. Robbins, 24a, 168, 175, 285
 v. Schmidt, 346
 v. Selz & Co., 291
 v. Starr 73a
 v. Stearns, 102
 v. Turner, 299
 v. Williams, 253
 v. Wright, 356, 393, 396
 Bottling Co. v. McGinnis, 147
 Brick Co. v. Reinneiger, 219
 v. Sobkowiak, 215, 230
 v. Nelson, 719a
 Bridge, etc. Co. v. LaMantia (App. 2060)
 Cab Co. v. McCarthy, 645
 etc. Coal Co. v. Peterson, 207g

[References are to sections.]

- Chicago Economic, etc. Co. v. Myers, 175
 City Ry. Co. v. Anderson, 748, 761
 v. Carroll, 760
 v. Cooney, 741
 v. Henry, 758
 v. Manger, 748
 v. Nelson, 56
 v. Robinson, 54
 v. Saxby, 742, 758
 v. Tuohy, 485*bc*
 v. Wilcox, 65
 Coal Co. v. Norman, 221, 222
 etc. Coal Co. v. Peterson, 241*d*
 Forge Co. v. Van Dam, 215
 Packing Co. v. Rohan 209*a*
 etc. Smelting Co. v. Collins, 207
 Economic, etc. Co. v. Myers, 175
 House Wrecking Co. v. Birney, 760
 Tel. Co. v. Com. Union Ass'n, 92
 Screw Co. v. Weiss, 207*g*
 Veneer Co. v. Walden, 207*c*
 etc. Co. v. Nelson, 187
 etc. Elec. Co. v. Ulrich, 743
 v. Tr. Co. v. Giese, 1
 v. South 749
 v. May, 742, 758
 v. McGinnis, 73*a*
 v. Mahoney, 151
 v. Mee, 494, 516
 v. Newmiller, 516, 519
 v. Sawusch, 186
 etc. Term. Ry. Co. v. Reddick, 231
 v. Schmelling, 490
 v. Vandenberg, 225, 459*a*
 v. Walton, 408, 453
 v. Young, 502
 etc. R. Co. v. Adams, 493
 etc. Ry. Co. v. Albrecht, 522
 v. American Strawboard Co., 672, 673
 v. Andreeson, 412
 v. Andrews, 476, 478
 v. Armes, 508
 v. Armstrong, 195
 v. Arnol, 513*a*
 v. Artery, 188 (App. 2141)
 v. Austin, 771
 v. Averill, 464*a*
 v. Avery, 49, 196, 410
 v. Bailey, 61
 v. Baldwin, 61
 v. Baltz, 673
- Chicago, etc. Ry. Co. v. Barker, 204, 231, 236 (App. 2138)
 v. Barrett, 501
 v. Barrie, 100, 425, 428, 430, 436
 v. Bayfield, 203*a*, 207*h*, 207*i*, 219, 233
 v. Beatty, 217
 v. Beaver, 769
 v. Becker, 71, 73 (App. 2060)
 v. Bednorz, 485
 v. Bell, 110, 472, 476, 490
 v. Bennett, 94
 v. Bert, 480
 v. Bills, 64
 v. Bixby, 100
 v. Blevins, 206
 v. Blumenthal, 516
 v. Bockoven, 705
 v. Boggs, 13, 463
 v. Bolton, 521
 v. Bradfield, 429
 v. Brannegan, 451*a*
 v. Bryant, 489
 v. Bunch, 485
 v. Bunker, 460
 v. Burger, 680
 v. Byrum, 495, 520
 v. Cain, 517
 v. Camp, 485*c*
 v. Campbell, 434
 v. Carpenter, 467
 v. Carroll, 494, 516
 v. Casey, 148
 v. Cauffman, 100, 419, 427, 455, 483
 v. Caulfield, 457, 761
 v. Chambers, 61, 180, 417*a*
 v. Chambers, 464*a*
 v. Champion 207*g*
 v. Chicago, etc. R. Co., 113
 v. Chugen, 87
 v. Clampit, 58, 676
 v. Clark, 53, 102, 111, 181, 214*a*, 429
 v. Clarkson, 471
 v. Clements, 518
 v. Cleminger, 759
 v. Clough, 473, 477
 v. Cobler, 207
 v. Cook, 52, 114, 680
 v. Cooney, 741, 742, 758
 v. Corson, 85*a*
 v. Coss, 479
 v. Crisman, 27, 62, 478
 v. Cross, 525
 v. Dannel, 451
 v. Davis, 750
 v. Delcourt, 520

[References are to sections.]

- | | |
|--|---|
| <p>Chicago, etc. Ry. Co. v. Dewey, 479
 v. Dickson, 154, 193, 426, 485, 513a, 523
 v. Diehl, 423
 v. Dillon, 417
 v. Dinus, 197
 v. Doherty, 493
 v. Donahue, 86, 99
 v. Donnelly, 61
 v. Donovan, 189
 v. Dougherty, 460, 468
 v. Doyle, 241 (App. 2072)
 v. Drake, 508
 v. Driscoll, 773
 v. Dumser, 421
 v. Dunn, 426
 v. Dunleavy, 460
 v. Eaton, 192
 v. Eganolf, 85b
 v. Eininger, 73a, 466, 470
 v. Ely, 412
 v. Erwin, 429
 v. Fair Oaks, 415
 v. Fenn, 427, 626
 v. Fennimore, 460, 467
 v. Ferguson
 v. Few, 195
 v. Finch, 450 (App. 2137)
 v. Fisher, 49, 53, 457, 472, 478
 v. Flexman, 154, 513
 v. Florens, 463
 v. Flynn, 202, 207b
 v. Fox, 73
 v. Frazer, 490, 506
 v. Gardanier, 8
 v. George, 51, 516
 v. Gertsen, 476
 v. Gilbert, 675, 678
 v. Ginther, 140a
 v. Goebel, 471
 v. Gomes, 461, 475
 v. Gore, 518, 520
 v. Goss, 94
 v. Goyette, 673, 676
 v. Grablin, 99, 410, 457, 466a, 484
 v. Gregory, 70, 73, 199
 v. Gregory, Admr. (App. 2060)
 v. Gretzner, 463, 476, 485
 v. Grimm, 494, 516, 518
 v. Groner, 501, 760
 v. Gross, 233
 v. Groves, 735
 v. Gundeson, 472, 518
 v. Hague, 521
 v. Hale, 459c, 760
 v. Hamilton, 207, 476
 v. Hamler, 487, 505</p> | <p>Chicago, etc. Ry. Co. v. Hansen, 478
 v. Hans, 434, 435
 v. Harney, 71, 189
 v. Harris, 451a
 v. Hart, 413, 459
 v. Harwood, 90, 102 (App. 2060)
 v. Hatch, 475
 v. Hawk, 505
 v. Hazzard, 61, 498
 v. Healy, 140, 195
 v. Hedges, 64, 481b
 v. Heery, 114b
 v. Heil 741, 742
 v. Heinrich, 426
 v. Henderson, 427
 v. Hinds, 478, 481b
 v. Hines, 66, 113, 207g, 217, 222, 761
 v. Hogarth, 100, 463, 483
 v. Hotz, 27
 v. Houston, 111, 476, 482
 v. Howard, 187, 222, 241, 331
 v. Hoyt, 238
 v. Huggins, 427
 v. Hunerberg, 742
 v. Hunt, 673
 v. Ingraham, 485c
 v. Jackson, 192, 197, 204, 216
 v. Jacobs, 475
 v. James, 421
 v. Johnson, 198, 199, 484, 750
 v. Jones, 419, 429
 v. Keefe, 238
 v. Kellam, 419, 463
 v. Kellogg, 184a
 v. Kennedy, 455
 v. Kerr, 187, 195, 203
 v. Kneirim, 193, 217, 233a
 v. Kerr, 150
 v. Koehler, 513
 v. Krayenbuhl, 73 (App. 2078)
 v. Krueger, 465
 v. Kuckkuck, 635
 v. Lampman, 520
 v. Landauer, 114, 509, 517, 520
 v. Lane, 466, 476
 v. Latham, 518
 v. LaPorte, 135
 v. Leach, 190
 v. Leachman, 375
 v. Lee, 90, 93, 102, 216, 461, 478
 v. Legg, 428
 v. Levy, 107
 v. Lewis, 495, 499
 v. Lock, 483</p> |
|--|---|

[References are to sections.]

- Chicago, etc. Ry. Co. v. Logue, 481a
 v. Logue, 73a, 481a, 644a
 v. Lonergan, 197, 207c
 v. Lowell, 521, 525
 v. Luebeck, 477, 478
 v. Luddington 414
 v. Lundstrom, 203a, 233, 233b
 v. McAra, 500
 v. McArthur, 461
 v. McBride, 30, 660
 v. McCarthy, 413
 v. McGaughna, 522
 v. McCulloch, 772
 v. McDaniels, 113, 427, 468
 v. McGraw, 209a
 v. McKeon (App. 2060)
 v. McLallen, 52
 v. McLaughlin, 73, 241c, 484
 v. Marshall, 122
 v. Martin, 459b
 v. Matthews, 199
 v. May, 232, 233
 v. Mead, 516
 v. Means, 520
 v. Meech, 410
 v. Merriman, 194
 v. Metcalf, 417, 470, 751
 v. Miller, 88, 89
 v. Minneapolis, etc. Ry. Co.,
 1, 464a
 v. Mitchell, 459b
 v. Moon, 471, 478
 v. Moore, 12a
 v. Moranda, 232, 235, 238, 762
 v. Morris, 135, 137, 766
 v. Morse, 494, 516
 v. Morton, 425
 v. Munger, 472
 v. Murphy, 180, 241
 v. Murray, 73
 v. Myers, 524
 v. Nash, 428, 451a
 v. Nelson, 461, 478
 v. Netolicky, 467, 481b, 485
 v. Newell, 502, 522
 v. Newsome, 743
 v. Noblesville, 414
 v. O'Brien, 238, 184a
 v. O'Connor, 225
 Terminal Tr. Co. v. O'Donnell,
 488
 etc. Ry. Co. v. O'Leary, 85a
 v. Olson, 480, 520
 B., etc R. Co. v. Oleson, 54
 etc. R. Co. v. Ostrander, 673,
 675, 676
 v. Oyster (App. 2078)
 v. Parkinson, 89
 v. Patchin, 57, 419
- Chicago, etc. R. Co. v. Payne, 766
 v. Peacock, 493
 v. Pearson, 769
 R. Co. v. Pelletier, 493, 512
 etc. R. Co. v. Pennell, 666,
 676, 679
 v. Perkins, 466, 467
 v. Peterson, 185b
 v. Pillsbury, 512
 v. Pontius, 241c (App. 2142)
 v. Pratt, 195
 v. Posten, 459b, 505
 v. Pounds, 108
 v. Prescott, 91, 479
 v. Pritchard, 459c
 v. Prouty, 483
 v. Pulliam, 476, 482
 v. Pural, 516
 v. Quaintance, 673
 v. Randolph, 114b
 v. Ransom, 122, 464a
 v. Rathneau, 215, 231
 v. Rayburn, 7
 v. Reddock, 485bc
 v. Reid, 425
 v. Reinhart, 459a
 v. Riley, 203
 v. Roberts, 463
 v. Robinson, 463, 478, 485
 v. Rolvink, 123
 v. Ross, 39, 177, 178, 224, 232,
 233, 233a
 v. Rouse (App. 2136)
 v. Rung, 206
 v. Russell, 199, 406, 481a
 v. Ryan, 47, 74, 87, 99, 460,
 476, 501
 v. Ryon, 49
 v. Sanders, 464
 v. Sattler, 490
 v. Saxby, 741
 v. Scanlan, 195
 v. Scates, 520
 v. Scheinkoenig, 760
 v. Schmelling, 508, 525
 v. Schmidt, 523
 v. Schmitz, 459a
 v. Scott, 727a
 v. Seirer, 450
 v. Sevcek, 435
 v. Shannon, 137, 238, 457, 516,
 775
 v. Sharp 471, 477
 v. Simonson 680
 v. Simpson, 497
 v. Sims, 451a
 v. Smith, 64, 475, 680, 750
 v. Snyder, 237

[References are to sections.]

- Chicago, etc. R. Co. v. Spilker, 67,
87, 106, 460, 485
v. Spirk, 486
v. Sporer, 464
v. Spring, 473
v. Stabley (App. 2142)
v. Stafford, 180
v. Stahley, 241c
v. Starmer, 467, 478, 758
v. State, 249
v. Stepp, 485d
v. Stevens, 201
v. Stewart, 501
v. Still, 463, 481, 485
v. Stong, 215,
v. Stroud, 741
v. Stubbs, 760
v. Stumps, 73, 465, 484, 485
v. Sullivan, 189, 190
v. Swett, 65, 189, 192, 238,
769, 775
v. Sykes, 56, 91, 473
v. Taylor, 191, 197, 202, 238,
518
v. Tilton, 478
v. Thomas, 476, 481b
v. Thompson, 202
v. Thrasher, 460
v. Tice, 480
v. Triplett, 65, 88, 468, 483
v. Trotter, 11, 516
v. Troyer, 488
v. United States (App. 2117)
v. Utley, 419, 421, 424
v. Vandenburg, 485
v. Vester, 769
v. Voelker (App. 2116)
v. Walker, 490, 501
v. Walsh, 471
v. Warner, 51c, 410, 761
v. Weekes, 490, 704
v. Weeks, 476
v. West, 64, 151
v. Wheeler, 451, 476, 478
v. Whipple, 413
v. White, 408
v. Whitton, 132
v. Wicker (App. 2137)
v. Wilcox, 73a, 78, 218
v. Wilfong, 193
v. Wilgus, 54, 457, 484
v. Willard, 493
v. Williams, 478, 666, 668, 675
v. Wilson, 424a, 477, 472, 769
v. Wimmer, 495
v. Winfrey, 518
v. Winters, 91
v. Wisconsin, 759
v. Wise, 467
- Chicago, etc. R. Co. v. Woodworth,
419
v. Wymore, 1, 54, 99, 100, 484
v. Yorker, 215
v. Yost, 476
v. Young, 233a (App. 2077)
v. Youngs, 497
Chick v. Newbury County, 333
Chickering v. Robinson, 303
Chicopee Bank v. Philadelphia Bank,
580
Chidsey v. Canton, 337, 338, 749a
Child v. Boston, 287
Childers v. Louisville, etc. Ry. Co.,
412
Childress v. Southwest Missouri Ry.
Co., 485b
Childrey v. Huntington, 346
Childs v. Boston, 275
v. Comstock, 559, 567
v. Pennsylvania R. Co., 463
v. West Troy, 351
Chiles v. Drake, 686
Chilton v. Carbondale, 376
v. Union Pac. R. Co., 771
(App. 2099)
China v. Southwick, 16
Chipman v. Palmer, 123
Chisholm v. Atlantic Gas Co., 693
v. Northern Pac. R. Co., 455
v. Old Colony R. Co., 457
v. State, 111, 375, 398, 401
Chittenden, Matter of, 561
Chitty v. St. Louis, etc. Ry. Co., 519
Choate v. San Antonio, etc. R. Co.,
508
Choctaw, etc. Ry. Co. v. Alexander,
744
v. Doughty, 481a
v. Holloway, 31
v. Jones, 207c, 207g, 209a
v. McDade, 201
v. O'Nesky, 223
v. Thompson, 197
v. Wilker, 176
Chollette v. Omaha, etc. Ry. Co.,
502, 459
Cholmondeley v. Clinton, 577
Chope v. Eureka, 258, 289, 337
Chopin v. Badger Paper Co., 219
v. Combined Locks Paper Co.,
192
Chouteau v. Hannibal, etc. R. Co.,
421
v. Rowse, 313
Chown v. Parrott, 569, 573
Chretien v. New Orleans Ry. Co., 519
Chrismer v. Bell Telph. Co., 187, 195
Christanelli v. Saginaw Mining Co.,
207g

[References are to sections.]

- Christensen v. Florentine Pulp Co., 132
 v. Floriston Pulp etc. Co., 769
 v. Metropolitan St. Ry. Co., 56
 v. Oregon Short Line Ry. Co., 466, 495, 516, 518
 v. Union Tr. Line, 485
 Christi v. Louisville etc. Ry. Co., 426
 Christian v. Columbus, etc. R. Co., 150, 769
 v. Illinois Central R. Co., 99, 484
 v. Railway Co., 188
 Christiansen v. Graver Tank Works, 208
 Christianson v. Chicago, etc. Ry. Co., 739
 v. Pacific Bridge Co., 207*h*
 Christie v. Chicago, etc. R. Co., 410
 v. Griggs, 494, 497, 516
 v. Portland, 350
 Christman v. Bruce 310
 Christmann v. Mierhoffer, 703
 Christner v. Cumberland, etc. Coal Co., 13
 Christy v. Douglas 557
 v. Elliott, 66, 646, 653*b*
 Chrystal v. Troy, etc. R. Co., 13, 73*a*, 467
 Chunn v. City, etc. Ry. Co., 520
 Church v. Cherryfield, 57, 352, 363
 v. Chicago, etc. R. Co., 207, 493
 v. Mumford, 562
 of the Ascension v. Buckhart, 702
 of Ascension v. Buckhart, 343, 702
 Churchill v. Brooklyn Life Ins. Co., 572
 v. Fewkes, 323
 v. Holt, 24*a*, 65, 384
 v. Rosebeck, 93
 Chute v. Masser, 168
 Cicalese v. Lehigh Valley Ry. Co., 214*a*, 215, 221
 Cicero, etc. R. Co. v. Meixner, 102, 520
 Cliefeld v. Browning, 217
 Cincinnati v. Pennv. 274
 v. Stone, 166, 175, 291, 298
 etc. Elec. St. Ry. Co. v. Lohe, 485
 Gas, etc. Co. v. Johnston, 208
 St. Ry. Co. v. Altemeier, 773
 Tr. Co. v. Holzenkamp, 494
 etc. Ry. Co. v. Acrea, 464*a*
 etc. R. Co. v. Barber, 203
 Cincinnati, etc. R. Co. v. Barker, 666, 680
 etc. Ry. Co. v. Barkhardt, 518
 v. Bell, 508
 v. Bravard, 494, 516, 517, 518
 v. Butler, 92, 107, 460, 482
 v. Carper, 91, 148, 488, 520
 v. Cecil, 680
 v. Champ, 417, 463*c*, 463*a*, 467, 472
 v. Chester, 115, 766
 v. Claire, 414
 v. Clark, 233*a*
 v. Cook's Admr., 7, 73, 115, 184*a*, 518 (App. 2063, 2064)
 v. Conley, 188
 v. Cosh, 764
 v. Crawford (App. 2088)
 v. Criss, 459*a*
 v. Evans, 1, 60*a*
 v. Farra, 478
 v. Fortner, 206
 v. Gaines, 426
 v. Grames, 114, 215, 478
 v. Harrod's Admr., 56, 470, 475
 v. Hill's Admr., 232
 v. Hoffhines, 440
 v. Holzenkamp, 516
 v. Howard, 62, 87, 485
 v. Jackson, 516
 v. Kassen, 99
 v. Lang, 307*i*
 v. Lohe, 519
 v. Lorton, 497
 v. Lovell's Admr., 65
 v. McMullen, 58, 132, 204, 233*a*
 v. Madden, 207*i*
 v. Margrat, 233*a*, 241*c*
 v. Mealer, 197
 v. Mounts, 501
 v. Murphy, 483
 v. Palmer, 233*b*
 v. Parker, 436
 v. Ridge, 437, 455
 v. Robertson, 208
 v. Rose, 741
 v. Sadieville, etc. Co., 672, 673
 v. Sampson, 198, 198*a*
 v. Silvers, 202, 231, 758
 v. Smith, 53, 100, 428, 430
 v. Smock, 675, 680
 v. Snell, 525
 v. South Fork Coal Co., 59
 v. Sowder's Admr., 481*a*
 v. Stanley, 451*a*
 v. Stonecipher, 421

[References are to sections.]

- Cincinnati, etc. Ry. Co. v. Street, 451a
 v. Thiebaud (App. 2136)
 v. Waterson, 64, 419, 437, 658
 v. Whitcomb, 46, 485a, 485c
 v. Worthington, 520
 v. Wood, 451a
 v. Wright, 73, 73a, 144, 476
 v. Zachary's Admr., 197
 Cireleville v. Neuding, 176, 298
 Circus Cough v. Grand Trunk Ry., 488
 Ciriack v. Merchants' Woolen Co., 218
 Citizens' Bank v. Howell, 585, 598
 Coach Co. v. Camden, etc. R. Co., 485a
 Elec. Light Co. v. Bell, 73a
 Gas Co. v. O'Brien, 693
 Loan Ass'n v. Friedley, 559
 National Bank v. Third National Bank, 580a, 587a
 Rapid Tr. Co. v. Dew, 751
 v. Burke, 56b
 St. Ry. Co. v. Clark, 493, 513
 v. Howard, 485a
 v. Joly, 508
 v. Lowe, 485bd
 v. Steen, 485c, 746, 749
 v. Twiname, 495, 521, 764
 Tel. Co. v. Wakefield, 203
 etc. Ry. Co. v. Branham, 758
 v. Foxley, 54
 v. Helvie, 485c
 v. Hobbs, 741
 v. Ketcham, 359
 v. Johns, 408, 485, 758
 v. Lowe, 772
 v. Sinclair, 497
 v. Spahr, 520
 v. Willoebey, 493, 748, 749
 Citrone v. O'Rourke Const. Co., 215
 City Delivery Co. v. Henry, 150
 Elec. Ry. Co. v. Salmon, 516
 v. Shropshire, 493
 Nat. Bank v. Clinton County Nat. Bank, 581, 587a
 R. Co. v. Findley, 508
 v. Jones, 99
 v. Lee, 523
 etc. R. Co. v. Moores, 144
 & Suburban Ry. Co. v. Cooper, 485c
 v. Svedborg, 494, 518, 520
 of Auburn v. Union Water, etc. Co., 729
 of Baltimore v. State of Maryland, 65a, 66, 66a
 Bessemer v. Carroll, 334a, 338, 339
- City of Canton v. Shock, 729, 730
 Cedartown v. Brooks, 338
 Charlottesville v. Failes, 375
 Cherryvale v. Hawman, 261
 Chicago v. Carlin, 140a
 v. Jarvis, 743
 v. Major, Admr. (App. 2060)
 v. Manhattan Cement Co., 261
 v. Pittsburg, etc. Ry. Co., 392
 v. Rustin, 287
 v. Selz, 286, 291
 of Corsicana v. Tobin, 384
 of Dallas v. Meyers, 741, 742
 v. Munceton, 258, 760
 v. Webb, 287
 Danville v. Thornton, 698
 Denver v. Maurer, 339
 v. Sherret, 698
 Durham v. Eno Cotton Mills, 733
 Elwood v. Addison (App. 2061)
 Flemingsburg v. Fleming Co., 390
 Garrett v. Winterich, 741
 Georgetown v. Groff, 24a, 384
 Glasgow v. Gillenwaters, 341
 Grand Forks v. Paulsness, 24a, 384
 Greeley v. Foster, 183, 207h
 Greenville v. Pitts, 765
 Hagerstown v. Klotz, 262
 Harrodsburg v. Adam, 339
 Henderson v. Sizemore, 338
 Holyoke v. Hadley Water Power Co., 384
 Houston v. Reichardt, 751
 Huntington v. Stuver, 338
 Hutcheson v. Van Cleve, 759
 Joliet v. LaPla, 742, 758
 LaPorte v. Henry, 339
 LaPorte v. Osborn, 25, 338
 Los Angeles v. Los Angeles, etc. Co., 729
 v. Pomeroy, 729, 733
 Louisville v. Keher, 368, 369
 v. Tompkins, 760
 McCook v. McAdams, 287
 Macon v. Dykes, 378
 Madison v. Thomas, 698
 Mansfield v. Brister, 262
 Mayfield v. Hughley, 334
 Munice v. Hey, 353
 New York v. Corn, 24a
 v. Gorman, 617
 v. Pine, 729
 Oroville v. Indiana, etc. Co., 728
 Ottawa v. Black, 373

[References are to sections.]

- City of Paris v. Tucker, 750
 Pensacola v. Jones, 339
 Peoria v. Adams, 287
 Raleigh v. North Carolina Ry. Co., 384
 Richmond v. Wood, 274, 287
 Roanoke v. Shull, 73a
 Rochester v. Gray, 332
 Roswell v. Davenport, 742
 St. Paul v. St. Paul St. Ry. Co., 384
 Salina v. Trosper, 368
 San Antonio v. Ball, 393
 v. Smith, 13, 384
 v. Talerico, 13a, 384
 Seattle v. Northern Pac. Ry. Co., 24a
 v. Puget Sound Impr. Co., 384
 Shreveport v. Kansas City, etc., Ry. Co., 414
 Spring Valley v. Gavin, 87
 Toledo v. Fuller, 334
 Valparaiso v. Spaeth, 287, 291
 Vincennes v. Thuis, 66
 Winchester v. Carroll, 334
 Winona v. Botzet, 65a, 286, 339
 Council of Augusta v. Lombard, 286
 Montgomery v. Comer, 376
 Sheffield v. Harris (App. 120)
 Water Power v. City of Ferguson Falls, 728
 Clack v. Kansas City Elec., etc. Co., 60a
 Claffin v. Wilcox, 644
 Clague v. New Orleans, 291
 Claiborne v. Missouri, etc. Ry. Co., 513
 Clairain v. Western U. Tel. Co., 223
 Clampit v. Chicago, etc. R. Co., 464, 483, 485
 Clancy v. Byrne, 120, 708
 v. New York, etc. Ry. Co., 192
 v. Troy, etc. R. Co., 485c
 Clanin v. Fagan, 626
 Clapp v. Ellington, 367, 380
 v. Kemp, 160, 165
 v. Minneapolis, etc. R. Co., 185a, 775
 Clapper v. Waterford, 60a, 334, 374
 Clara, The, 61
 Clara Killam, The, 18
 Clardy v. St. Louis, etc. R. Co., 425
 Clare v. National City Bank, 159, 166
 Clarendon Land Co. v. McClelland, 633
- Clarey v. Wiley, 635
 Clarissy v. Fire Department, 265, 295
 Clarita, The, 18, 86, 160
 Claridge v. South Staffordshire Tr. Co., 115
 Clark v. Adair County, 256
 v. Adams, 640
 v. Allamon, 729
 v. Barnes, 209a
 v. Barrington, 378
 v. Binghamton, etc. Bridge Co., 283
 v. Boston, etc. R. Co., 451a, 467, 477
 v. Canadian Pac. Ry. Co., 113, 460, 467
 v. Cedar Rapids, 760
 v. Chambers, 34, 65, 73, 74, 684
 v. Chicago, 363
 v. Chicago, etc. R. Co., 371, 459b, 516
 v. Chicago Title, etc. Co., 588
 v. Chicago, etc. Ry. Co., 495
 v. Corinth, 348, 363
 v. Durham Tr. Co., 490, 508
 v. Easton, 253
 v. Eighth Ave. R. Co., 522
 v. Epworth, 289, 368
 v. Foot, 669
 v. Foxcroft, 623
 v. Fry, 175, 289
 v. Greer, 459b
 v. Hills, 58
 v. Holmes, 207c, 209a
 v. Hull, 334
 v. Koehler, 146
 v. Lebanon, 346
 v. Lincoln County, 256
 v. Liston, 195
 v. Lockport, 289
 v. Louisville, etc. Ry. Co., 65, 183, 489 (App. 2064)
 v. Manchester, 705, 767a
 v. Marshall, 574
 v. Merchants', etc. Trans. Co., 241b
 v. Metropolitan St. Ry. Co., 739
 v. Midland R. Co., 466
 v. Miller, 313, 314
 v. Missouri Pac. R. Co., 217, 468, 476
 v. Nevada Land, etc. Co., 743
 v. N. Y., Lake Erie, etc. R. Co., 207
 v. Northern Pac. R. Co., 478
 v. Pacific R. Co., 39
 v. Richmond, etc. R. Co., 198

[References are to sections.]

- Clark v. Rochester, 274
 v. St. Louis Ry. Co., 99, 476, 483
 v. St. Paul, etc. R. Co., 201, 241
 v. San Francisco, etc. Ry. Co., 672
 v. Shoe, etc. Co., 85
 v. Smith, 623
 v. Starin, 145
 v. State, 252
 v. Tremont, 373
 v. Tulare, etc. Co., 767, 772
 v. Vermont, etc. R. Co., 168, 423
 v. Waltham, 370
 v. Washington, 291
 v. Westcott, 761
 v. Western, etc. R. Co., 430
 v. Wilmington, 283
 v. Wilmington, etc. R. Co., 99 (App. 2084)
 v. Waltham, 285
 v. Zariko, 56
 Lumber Co. v. Johns, 215
 Mfg. Co. v. Western Union Tel. Co., 754, 755
 Clarke v. Anderson, 723
 v. Chicago, etc. R. Co., 678
 v. French, 734
 v. Holmes, 211, 215
 v. N. Y., Lake Erie, etc. R. Co., 64, 150
 v. Pennsylvania Co., 89
 v. Rhode Isl. El. Light Co., 705
 v. Richmond, 375
 Clarkin v. Biwabik Bessemer Co., 689, 705
 Clarksville, etc. Turnp. Co. v. Atkinson, 385
 Clatsop Chief, The, 232, 233
 Claus v. Chicago, etc. Ry. Co., 425
 Clay v. Central R. Co., 137
 v. Chicago, etc. Ry. Co., 201, 209a
 v. Western Union Tel. Co., 23
 v. Wood, 654
 Center v. Jones, 16b
 City v. Abner, 274
 Clayards v. Dethick, 86, 89, 92
 v. Forrester, 86
 Claybaugh v. Kansas City, etc. R. Co., 203, 207c
 Clayburgh v. Chicago, 118
 Claypool v. Wigmore, 35
 Clayton v. Brooks, 376
 Clear Creek, etc. Co. v. Carmichael (App. 2137)
- Clear Lumber Co. v. Duncan, 656
 Lake, etc. Co. v. Lake County, 261
 Cleary v. Phila., etc. R. Co., 475
 v. City Railroad Co. (App. 2055)
 Cleaveland v. Chicago, etc. R. Co., 429
 v. Grand Trunk R. Co., 676
 Clegg v. Dearden, 717
 v. Southern Ry. Co., 107, 481b
 Cleghorn v. N. Y. Central R. Co., 230, 749
 v. Taylor, 702
 v. Thompson 686
 Clemans v. Chicago, etc. Ry. Co., 457, 460
 Clemence v. Auburn, 272, 279, 353, 363
 Clemmens v. Hannibal, etc. R. Co., 55, 666
 Clement v. Canfield, 444, 445, 457
 v. Western U. Tel. Co., 549, 552, 555
 Clements v. Alabama, etc. Ry. Co., 193
 v. La. Electric Co., 13, 87, 111
 Clendinen v. Black, 557
 Clerc v. Morgan, etc. Ry. Co., 518
 Cleveland v. Bangor, 350
 v. Bangor St. R. Co., 408
 v. Central R. Co., 56
 v. King, 367
 v. N. J. Steamboat Co., 28, 367, 487, 488, 496, 511
 v. Payne, 368
 v. Spier, 12
 v. Washington, 392
 Provision Co. v. Lommeraiier, 719
 Rolling Mill Co. v. Corrigan, 219
 School Dist. v. Great Northern Ry. Co., 750
 etc. R. Co. v. Adair, 481, 481a, 484
 v. Ahrens, 431
 etc. Ry. Co. v. Baddeley (App. 2060)
 v. Baker, 419, 451 (App. 2116)
 v. Beckett, 493
 v. Bergschicker (App. 2137)
 v. Berry, 114b, 459b, 485
 v. Best, 489, 513a
 v. Bossert (App. 2062, 2138)

[References are to sections.]

- Cleveland, etc. Ry. Co. v. Brown, 192,
 195, 207*a*, 230, 425
 v. Carey, 468
 v. Cline, 8, 25
 v. Crawford, 65, 108, 114, 476,
 477, 478
 v. Corrigan, 73
 v. Curran, 492, 505
 v. De Bolt, 421
 v. Doerr, 485
 v. Drumm, 775
 v. Dukerman, 67
 v. Elliott, 94, 99, 419, 432,
 662, 476
 v. Foland, 231 (App. 2138)
 v. Gossett, 202, 207*a*, 207*b*,
 223*a*, 459*a* (App. 2138)
 v. Gay, 464*a*
 v. Hadley, 518
 v. Harrington, 13, 473
 v. Henry, 503
 v. Houghland, 52, 472
 v. Keary, 203*a*, 233, 233*b*
 v. Keeley, 644*a*
 v. Keely, 461, 473, 479
 v. Ketcham, 492
 v. Klee, 481*a*
 v. McConnell, 435
 v. Manson, 78
 v. Mara, 25, 60*a*
 v. Marsh, 485
 v. Martin, 188, 192
 v. Maxwell, 513*a*
 v. Miles, 463
 v. Morton, 476
 v. Newell, 516
 v. Osgood, 134*a* (App. 2061)
 v. Penketh, 90, 475
 v. Perry, 459*b*
 v. Powers, 683, 704, 706
 v. Rice, 427
 v. Rowan, 111, 770
 v. Scantland, 672, 680
 v. Shanower (App. 2178)
 v. Schneider, 91, 160
 v. Scudder, 451*a*
 v. Sloan, 60*a*, 193, 217
 v. Starks, 20, 466, 769
 v. Stephens, 680
 v. Stephenson, 484
 v. Sutherland, 760
 v. Swift, 425
 v. Tartt, 481*a*, 484
 v. Terry, 47, 61, 87, 88, 92, 94,
 457, 463, 481
 v. Ullom, 202
 v. Wade, 505
 v. Walrath, 526
 v. Walter, 198
- Cleveland, etc. Ry. Co. v. Ward, 497
 v. Wynant, 606, 426, 474
 v. Workman, 73*a*, 457 (App.
 2089)
 v. Wuest, 476, 478
 Cleves v. Willoughby, 708
 Clifford v. Atlantic Cotton Mills, 708
 v. Dam, 120, 359, 365, 368, 375
 v. Davis, 703
 v. Leroux, 744
 v. Old Colony R. Co., 180, 235,
 241
 Clifton v. Hooper, 619
 Cline v. Crescent City R. Co., 31, 289
 Clingan v. County, 367
 Clinger's Admr. v. Chesapeake etc.
 Ry. Co., 122
 Clinton v. Boston Beer Co., 73*a*, 77
 v. Brooklyn etc. Ry. Co., 520
 v. Cedar Rapids, etc. R. Co.,
 332
 v. Howard, 365
 Clio Gin Co. v. Western Union Tel.
 Co., 754
 Clisby v. Mobile, etc. Ry. Co., 672
 Clodfelter v. State, 249
 Clopp v. Mear, 706, 719
 Clothier v. Webster, 327
 Cloud v. Alexandria Elec. Ry. Co.,
 485*bc*
 Cloughessey v. Waterbury, 363, 373
 Clover v. Joplin, etc. Ry. Co., 485*ab*
 Olow v. Pittsburgh Traction Co., 516
 Clowdis v. Fresno, 628, 630
 Clulow v. McClelland, 380
 Clune v. Milwaukee, etc. R. Co., 674
 Cluney v. Cornell Mills, 207
 Clussman v. Long Island R. Co., 704
 v. Merkel, 573
 Clyde v. Richmond, etc. R. Co., 195
 Clyne v. Holmes, 708*a*
 Coal Belt Elec. Ry. Co. v. Young,
 146
 Coal Creek Min. Co. v. Davis, 187,
 195, 235, 238, 239
 Coal Co. v. Estievenard, 207, 209*a*
 v. Jones, 209*a*
 Coal Run Coal Co. v. Jones, 717
 Coale v. Hannibal, etc. R. Co., 58,
 675
 Coalgate v. Bross (App. 2180)
 v. Hurst, 207*e*
 Coan v. Marlborough, 287
 Coates v. Burlington, etc. R. Co., 110
 v. Canaan, 376
 v. Missouri, etc. R. Co., 666,
 676, 679
 Cobb v. Columbia, etc. R. Co., 154
 v. Gt. Western R. Co., 512

[References are to sections.]

- Cobb v. Kansas City, etc. R. Co., 423
 v. Portland, 291
 v. St. Louis, etc. Ry. Co., 497
 v. Semon, 145, 146
 v. Standish, 86, 351, 356, 379
 v. Western Union, etc. Co., 741, 756
 etc. Co. v. Knudson, 208
 Cobden v. Kendrick, 576
 Coburn v. Moline, etc. Ry. Co., 522
 v. Muskegon B. Co., 737
 Cochran v. Dinsmore, 57
 v. Miller, 748
 v. Springfield, 352
 Cochrane v. Frostburg, 262
 v. Little, 558
 v. Madden, 291
 Cockerham v. Nixon, 631, 632
 Cockle v. South Eastern R. Co., 521
 Cockrum v. Williamson, 340
 Cochran v. Mayor of Frostburg, 262
 v. Rice, 164
 v. Shanahan, 180
 v. Shirley, 376
 Cocking v. Wade (App. 2066)
 Coddington v. Brooklyn, etc. R. Co., 51, 495
 v. Davis, 585
 Codner v. Bradford, 334
 Codrington v. Adams, 580a
 Cody v. Longyear, 231 (App. 2155)
 v. Market St. Ry. Co., 516
 v. N. Y. & New England R. Co., 519
 Coe v. Louisville, etc. Ry. Co., 520
 v. Platt, 685
 v. Wise, 326
 Coffee v. Louisville, etc. Co., 486
 v. New York, etc. Ry. Co., 518 (App. 2151)
 v. N. Y., New Haven, etc. R. Co., 231, 241b
 Coffeeville Lighting, etc. Co. v. Carter, 716, 769 (App. 2063)
 Coffield v. Harris, 661
 Coffin v. Bruten, 594
 v. Palmer, 373, 377
 Cofield v. McCabe, 150
 Cogbill v. Louisville, etc. Ry. Co., 207h (App. 2121)
 Cogdell v. Western Union Tel. Co., 542, 546
 v. Wilmington, etc. Ry. Co., 111, 481b
 Cogdill v. Wilmington, etc. Ry. Co., 93
 Cogg v. Simon, 749
- Coggin v. Central R. Co., 160
 Coggs well v. Baldwin, 628
 v. West St. R. Co., 499, 502, 523
 Cogan v. Third Ave. R. Co., 82
 v. Dinsmore, 581
 Cogswell v. Concord, etc. Ry. Co. (App. 2079)
 v. Lexington, 351, 356
 v. N. Y., New Haven, etc. R. Co., 407a, 750
 v. Oregon, etc. R. Co., 88, 480
 Cohen v. Dry Dock, etc. R. Co., 150
 v. Eureka, etc. Ry. Co., 463
 v. Hamblin, etc. Mfg. Co., 218
 v. Hume, 333
 v. New York, 263, 358
 v. Philadelphia Rapid Tr. Co., 516
 v. Rittiman, 742
 v. Western Elec. Co., 164
 Cohens v. Virginia, 249
 Cohn v. Kansas City, 376
 v. N. Y. Central R. Co., 466
 Cohoes v. Delaware, etc. Canal Co., 333
 Coin v. John H. Talge Lounge Co., 184, 207c, 207i, 214a
 Coit v. Sheldon, 562
 v. Western Union Tel. Co., 537, 543, 547
 Coke Co. v. Roby, 230
 v. Wabash Ry. Co., 29
 Colbert v. Missouri, etc. Ry. Co., 448
 Colburn v. Richards, 729
 v. Wilmington, 353, 354, 376, 751
 Colby v. Mount Morris, 394
 v. Wiscasset, 758
 Colchester v. Brook, 100
 Colden v. Thurber, 334
 Cole v. Atlanta, etc. Ry. Co., 513
 v. Chicago, etc. R. Co., 207i
 v. East St. Louis, 373
 v. Fisher, 355, 686
 v. German Savings, etc. Co., 56
 v. Goodwin, 210, 550
 v. Gray, 761
 v. Louisiana Gas Co., 168
 v. Medina, 262, 289
 v. Metropolitan St. Ry. Co., 99, 704
 v. Muscatine, 283
 v. Nashville, 262, 263
 v. Newburyport, 355
 v. St. Louis, etc. Ry. Co., 425
 v. Warren Mfg. Co., 186
 Colegrove v. Harlem R. Co., 122

[References are to sections.]

- Colegrove v. New Haven R. Co., 31,
 93, 96
 Colelli v. N. J. Concentrating
 Works, 702
 Coleman v. Atlantic, etc. Ry. Co.,
 469
 v. Chester, 289
 v. Flint, etc. R. Co., 435
 v. Kansas City, etc. R. Co.,
 415
 v. Lytle, 313
 v. New York, 359
 v. Price, 258, 262
 v. Perry, 219a
 v. Second Ave. R. Co., 523,
 524
 v. Southeastern R. Co., 519
 v. Wilmington, etc. R. Co.,
 193, 233a
 Coles v. Burns, 634
 v. Clark, 119
 Colewell v. Manhattan R. Co., 519
 Coley v. City of Statesville (App.
 2085)
 Colf v. Chicago, etc. R. Co., 201, 216
 Colfax Coal Co. v. Johnson, 193
 Colgate Co. v. Hurst, 206, 208
 Colgrove v. Smith, 176, 359
 Collett v. London, etc. R. Co., 492
 v. Northwestern R. Co., 45
 v. Rebori, 151
 Colley v. Southern Cotton Oil Co.,
 235
 v. Westbrook, 367, 369
 Collier v. Chicago, etc. R. Co., 412
 v. Ft. Smith, 289
 v. Georgia R. Co., 414
 v. Great Northern Ry. Co.,
 459b
 v. Hyatt, 703
 v. Steinhardt, 204, 241
 v. Tennessee, etc. Co. (App.
 2121)
 Collins v. Alabama, etc. R. Co., 150,
 727a
 v. Bristol, etc. R. Co., 544
 v. Chatiers Valley Gas Co.,
 734
 v. Council Bluffs, 363, 742
 v. Crimmins, 195
 v. Davidson, 89
 v. Dillingham, 708a
 v. Dodge, 375, 758
 v. Dorchester, 60b, 356
 v. Gleason Coal Co., 716
 v. Illinois Cent. R. Co. (App.
 2072)
 v. Jonesville, 376
 v. Leafey, 356, 362
- Collins v. Louisville, etc. Ry. Co., 193
 v. Lindquist, 655
 v. McDaniel, 591
 v. Middle Level Com., 34
 v. Mineral, etc. Ry. Co., 207b
 v. Mooney, 704
 v. N. Y. Cent. R. Co., 673,
 675, 676, 679, 765
 v. N. Y., New Haven, etc. R.
 Co., 704
 v. New York, etc. Medical
 School, 331
 v. Philadelphia, 274, 287, 350
 v. St. Paul, etc. R. Co., 235,
 241
 v. So. Boston R. Co., 77
 v. Star Paper Mills Co., 223a
 v. Toledo, etc. R. Co., 506
 v. Waltham, 274
 v. West Jersey Express Co.,
 35
 Coal Co. v. Hadley (App.
 2061)
 Collis v. N. Y. Cent. R. R. Co., 481a
 Collyer v. Penn. R. Co., 180, 195, 204
 Colman v. Anderson, 303
 Coloman v. Georgia R. Co., 492a
 Colorado Coal Co. v. Carpita, 207
 Coal, etc. Co. v. Lamb, 230,
 772
 Electric Co. v. Lubbers, 207i
 Land Co. v. Hartman, 751
 Mortg. Co. v. Rees, 31, 60b,
 719a
 etc. Co. v. Fretz (App. 2126)
 Min. Co. v. Rees, 32
 etc. Ry. Co. v. Allen, 495
 etc. R. Co. v. Holmes, 61
 v. Naylor, 233, 233a
 R. Co. v. Ogden, 184, 186
 Central R. Co. v. Martin, 211
 Midland R. Co. v. O'Brien,
 212, 233
 etc. Ry. Co. v. Some, 410
 etc. Ry. Co. v. Thomas, 473
 Springs, etc. Ry. Co. v. Petit,
 501, 758
 Colrick v. Swinburne, 729, 733, 750
 Colt v. Noble, 581
 v. Sixth Ave. R. Co., 508
 Colton v. Beardsley, 313
 v. Onderdonk, 689a
 Columbia, The, 132
 etc. R. Co. v. Farrington, 672
 v. Woodbury, 289
 Creo. Co. v. Beard, 190
 Ry. Co. v. Woolfork, 150
 Water Power Co. v. Columbia
 St. Ry. Co., 250

[References are to sections.]

- Columbus v. Anglin, 353, 354
 v. Jacques, 334a
 v. Ogletree, 367, 368
 v. Sims, 356, 760
 v. Strassner, 367, 376, 759
 etc. R. Co. v. Arnold, 233
 v. Bradford, 113, 114, 213
 v. Bridges, 207, 769
 v. Stassmeyer, 368
 Ry. Co. v. Connor, 485ba
 v. Erick 193a, 241c (App. 2178)
 v. Farrell, 506, 509
 v. Powell, 146, 488
 v. Webb, 184, 204, 222, 241
 St. Ry. Co. v. Reap., 485bd
- Colusa Min. Co. v. Monahan, 207b
- Colvin v. Holbrook, 243
 v. Peabody, 688
 v. Sutherland, 702
- Colwell v. Waterbury, 253, 259
- Combs v. Delaware, etc. Tel. Co., 193
 v. Kirksville, 375, 376
 v. Purrington, 654
 v. Rountree Const. Co., 204
 v. Thompson, 688
- Comer v. Age-Herald Pub. Co., 748
 v. Consol. Mining Co., 222
- Comerford v. Dupuy, 656
- Comes v. Chicago, etc. R. Co., 678
- Comings v. Hannibal, etc. R. Co., 423
- Commerce Milling Co. v. Gowan, 218
- Commercial Bank v. Barksdale, 585, 597
 Bank v. Chatfield, 589
 v. Rowland, 580a
 v. Union Bank, 243, 580, 582, 584, 586
 v. Varnum, 585, 597
 Club, etc. v. Hilliker, 769
 U. Tel. Co. v. N. E. Telephone Co., 536
- Comminge v. Stevenson, 122, 689
- Commissioners v. Duckett, 340
 v. Martin, 337
 etc. v. Rose, 573
- Commonwealth v. Bartlett, 623
 v. Beals, 332
 v. Begley, 619, 625a
 v. Boston, 358
 v. Boston, etc. R. Co., 107, 128, 135, 466, 525
 v. Bowman, 333
 v. Bridge Co., 395
 v. Bush, 302
 v. Carter, 591
 v. Central Bridge Co., 356
 v. Charlestown, 334, 395
- Commonwealth v. Deerfield, 332, 374, 392
 v. Erie, etc. R. Co., 332, 359
 v. Fisk, 333
 v. Forrest, 653
 v. Green, 256
 v. Hopkinsville, 332, 337
 v. Hurt, 618, 625a
 v. Illinois Central Ry. Co., 335
 v. Josselyn, 104
 v. Kentucky Distilleries Co., 588
 v. Kingsbury, 653b
 v. Knox, 104
 v. Lightfoot, 620, 625a
 v. Louisville, etc. R. Co., 104
 v. Low, 334
 v. McCoy, 623
 v. Magee, 623
 v. Matlack, 249
 v. Milliman, 332
 v. Nashua, etc. R. Co., 332, 359
 v. New Bedford Bridge Co., 396
 v. Newbury, 334
 v. Newburyport, 332
 v. Old Colony, etc. R. Co., 332
 v. Passmore, 362
 v. Pennsylvania R. Co., 415
 v. Petersham, 334
 v. Rodes, 249
 v. Sampson, 104
 v. Springfield, 258
 v. Straton, 625a
 v. Thompson, 609
 v. Vermont, etc. R. Co., 332, 359, 488, 492
 v. Wilkinson, 385
 v. Worcester Turnp. Co., 38b
 v. Western Union Tel. Co., 536, 538
 v. Yost, 734
 Bank v. New York, 291
 Elec. Co. v. Melville, 698
 Elec. Co. v. Reese, 39
 Elec. Co. v. Rooney, 192
 Elec. Co. v. Rose, 16b
- Compagnie De Navigation Francaise v. Burley, 172
- Conestock v. Connecticut, 760
 v. Des Moines R. Co., 434, 436
 v. Eagleton, 302
 v. Georgetown Tp., 367
- Conant v. Griffin, 762, 766
- Conaty v. New York, etc. R. Co., 477, 485c

[References are to sections.]

- Condict v. Grand Trunk R. Co.**, 33, 40
 v. Jersey City, 258, 289, 295
Condiff v. Kansas City, etc. R. Co., 85
Condon v. Missouri, etc. Ry. Co., 205
 v. Sprigg, 709*a*
Condran v. Chicago, etc. R. Co., 489
Cone v. Delaware, etc. R. Co., 26, 186
Cones v. Benton county, 256, 257
Confer v. New York, etc. R. Co., 674
Conga v. Baltimore, etc. R. Co., 70
Congdon v. Central, etc. R. Co., 418
 v. Cooper, 618
 v. Norwich, 363, 376
Conger v. St. Paul, etc. R. Co., 513
Congrave v. Southern Pac. R. Co., 241*a*
Congress Spring Co. v. Edgar, 628, 629
Congreve v. Morgan, 175, 365, 367
 v. Smith, 14, 120, 175, 365, 367, 703
Conoetion Road v. Buffalo, etc. R. Co., 709*a*
Conine v. Olympic Log. Co., 186
Conkey Co. v. Larsen, 203
Conklin v. Central N. Y. Telph., etc. Co., 774
 v. Erie, etc. R. Co., 476
 v. School District, 256
 v. Staals, 725
 v. Thompson, 121, 262, 355, 688
Conlan v. N. Y. Central R. Co., 233
Conley v. Cincinnati, etc. R. Co., 458
 v. Portland, 233
Conlon v. N. Y. Central R. Co., 207*a*
 v. Oregon, etc. R. Co., 192
 v. St. Paul, 272
Conn v. Chicago, etc. Ry. Co., 407
 v. May, 671
Conneaut v. Naef, 376
Connecticut Life Ins. Co. v. New Haven R. Co., 28, 115, 124
Connell v. Chesapeake, etc. R. Co., 512
 v. New York, etc. Ry. Co., 513
 v. Western Union Tel. Co., 756
 v. Chesapeake, etc. Ry. Co., 495
Connelly v. Erie, etc. Ry. Co., 680
 v. Hamilton Woolen Co., 216
 v. Minneapolis, etc. R. Co., 241
 v. New England R. Co., 525
 v. N. Y. Central R. Co., 93, 112, 475
Connelly v. Paul, etc. Const. Co., 203
 v. Western Union Tel. Co., 756
Conner v. City of Nevada, 334, 377, 742
 v. Manchester, 299
 v. Nevada, 758
Connerly v. North Jersey St. Ry. Co., 180
Connors v. Burlington, etc. R. Co., 99, 139
 v. Hennessey, 173
Connerton v. Delaware, etc. Canal Co., 481*b*
Connerville v. Snyder, 367
Connolley v. Davidson, 237
Connolly v. Boston, 104
 v. Central Vt. Ry. Co., 455
 v. City of Waltham (App. 2152)
 v. Crescent City R. Co., 493
 v. Davidson, 237
 v. Eldredge, 207*c*
 v. Hall Const., etc. Co., 192, 204
 v. Knickerbocker Ice Co., 54, 73*a*, 104, 654
 v. Trenton R. Co., 475
 v. Waltham, 54, 222
Connor v. Citizens' R. Co., 114
 v. Electric Traction Co., 13, 61, 467
 v. Missouri Pac. Ry. Co., 22
 v. State, 750
 v. Wabash, etc. Ry. Co., 463, 476
Connors v. Adams, 314
 v. Morton, 190, 216
 v. New York, 262, 296
Connoughton v. Sun Printing Co., 772
Conover v. Commonwealth, 621
Conowiago Bridge Co. v. Hedrick, 359
Conrad v. Gray, 190
 v. Ithaca, 28, 289, 291, 328, 356
 v. Western U. Tel. Co., 544, 554
Conradt v. Clauve, 704
Conroe Tr. Co. v. Lamberton, 60*a*
Conroy v. Gale, 313, 325
 v. Iron Works, 91
 v. Vulcan Iron Works, 215
Consol. Baltimore, etc. Co. v. Coker, 696
 Barb Wire Co. v. Maxwell, 207*e*
 Coal Co. v. Bruce, 207*g*

[References are to sections.]

- Consol. Coal Co. v. Clay, 209*a*, 235
 v. Haenni, 207*i*
 Coal Co. v. Seginer, 189
 Coal Co. v. Shepherd, 765
 Coal Co. v. Wombacher, 113, 233
 Co. v. Morgan (App. 2061)
 Elec. Light Co. v. Healy, 73
 Fireworks v. Koehl, 162
 Gas, etc. Co. v. Connor, 692
 Gas Co. v. Crocker, 99, 693, 696
 Gas Co. v. Getty, 693, 696
 Gas Co. v. State, 773
 Ice Machine Co. v. Keifer, 122
 Mining Co. v. Clay, 195, 221
 Stone Co. v. Ellis, 235, 238
 Stone Co. v. Morgan, 773 (App. 2061)
 Stone Co. v. Staggs (App. 2061)
 Stone Co. v. Summit, 219*a*
 Tr. Co. v. Behr, 108
 Tr. Co. v. Hone, 770 (App. 2080)
 v. Reeves, 654
 Traction Co. v. Scott, 73*a*, 90, 485*c*
 Trac. Co. v. Thalheimer, 516
 etc. Ry. Co. v. Carlson, 485*b**c*
 Consumer's Cotton Oil Co. v. Jonte, 189, 235
 Elec. Light Co. v. Pryor, 485*ab*
 Gas, etc. Co. v. Corbaley, 693
 Gas Co. v. Perrego, 693
 etc. Co. v. Doyle, 485
 Paper Co. v. Eyer (App. 2137)
 Content v. New Haven, etc. R. Co., 207*c*
 Continental, The, 61
 etc. Co. v. Stead, 92, 463, 476
 Nat. Bank v. Nat. Bank Commonwealth, 555
 Converse v. Walker, 97, 705
 Bridge Co. v. Grizzle, 197
 Conway v. Furst, 168, 173, 207
 v. Grant, 639
 v. Illinois Cent. R. Co., 195
 v. Jefferson, 370
 v. Jett, 622
 v. Louisville, etc. Ry. Co., 467, 476
 v. Magill, 620
 v. New Orleans, etc. R. Co., 508
 Converse v. Postal Tel. Co., 531, 539
- Cook v. Anamosa, 368
 v. Anderson, 665
 v. Atlanta, 374, 376
 v. Central R. Co., 484
 v. Champlain Transp. Co., 53, 61, 85, 680
 v. Charlestown, 355
 v. Chehalis R. Lbr. Co., 203*a*, 231
 v. Clay Street, etc. R. Co. (App. 2055)
 v. Fogarty, 653
 v. Gourdin, 39
 v. Harris, 334
 v. Higgins, 617
 v. Houston Direct Nav. Co., 513*a*
 v. Macon, 291
 v. Metropolitan R. Co., 112
 v. Milwaukee, 258, 287, 353, 363
 v. Minneapolis, etc. Ry. Co., 448
 v. Montague, 355, 713
 v. Morea, 635
 v. N. Y. Central R. Co., 56
 v. Farham, 180
 v. Pickrel, 639
 v. Pittcock, etc. Co., 214*a*, 215
 v. Rhodes, 577
 v. St. Paul, etc. R. Co., 204, 214, 230
 v. Southern Ry. Co., 151, 428
 v. United States Smelting Co., 208
 v. Wilmington Electric Co., 359
 Cooke v. Baltimore, etc. R. Co., 485*a*
 v. Balt. Tr. Co. 485*b*, 485*c*
 v. Boston, etc. R. Co., 359
 v. Illinois Cent. R. Co., 154
 v. Waring, 626, 632, 633
 Coolbroth v. Maine Central R. Co., 207*c*
 Cooley v. Brainerd, 422
 v. Freeholders, etc. 256
 Coolidge v. Rome, etc. R. Co., 675
 v. New York, 353
 Coombs v. King, 748, 760, 761
 v. Mason 99
 v. New Bedford Card Co., 46, 74
 v. New Bedford Cordage Co., 203, 218, 219
 v. Purington, 353, 375
 v. Topham, 378
 Coomes v. Houghton, 148
 Coon v. Brownstone Tp., 747

[References are to sections.]

- Coon v. Syracuse, etc. R. Co., 180,
 241
 Coonce v. Nat'l Biscuit Co., 207
 Cooney v. Pullman Palace Car Co.,
 526
 v. Great Northern R. Co., 207
 Coonley v. Albany, 262
 Coontz v. Missouri Pac. R. Co., 193
 Cooper, Matter of, 303
 v. Atlantic, etc. R. Co., 485*d*
 v. Butler, 217
 v. Cedar Rapids, 274
 v. Central R. Co., 187, 202
 v. Century Bldg. Co., 487,
 719*a*
 v. Century Realty Co., 487
 v. Chicago, etc. R. Co., 60*a*
 v. Delavan, 557
 v. Georgia, etc. Ry. Co., 91,
 518
 v. Lake Erie, etc. R. Co., 489
 v. Lake Shore, etc. R. Co.,
 471, 477, 766, 772
 v. Lawson, 710
 v. Lowery, 157
 v. McJunkin, 323
 v. Milwaukee, etc. R. Co., 180
 v. North Carolina R. Co., 463,
 476 (App. 2085)
 v. Oelwien, 367
 v. Overton, 73
 v. The People, 590
 v. Pittsburgh, etc. R. Co., 193,
 204, 205, 233
 v. St. Paul R. Co., 520
 v. Shore Elec. Co., 135*a*
 v. Waterloo, 343
 Cooperage Co. v. Abernathy, 218
 v. Headrick, 213
 Cooperant Tel. Co. v. St. Clair, 203,
 209*a*
 Coops v. Lake Shore, etc. R. Co.,
 137, 207
 Coopwood v. Baldwin, 561
 Coorman v. Ry Co., 761*a*
 Coots v. Detroit, 185*a*, 265, 370
 Cope v. Hampton Co., 54, 56
 Copeland v. Draper, 637
 v. Seattle, 358, 361
 Copley v. New Haven, etc. R. Co.,
 107
 Coppins v. N. Y. Central R. Co.,
 186, 189, 190
 v. Town of Jefferson, 376
 Corbalis v. Newberry, 393
 Corbett v. Oregon, etc. R. Co., 480
 (App. 2099)
 v. Short Line R. Co. (App.
 2099)
 Corbett v. Troy, 363
 Corbin v. American Mills, 160, 165
 v. Grand Trunk, etc. R. Co.,
 472
 Corby v. Hill, 705
 v. Missouri, etc. Tel. Co., 758
 Corcoran v. Albuquerque, 60*a*
 v. Delaware, etc. R. Co., 202,
 241
 v. Gas Co., 215
 v. Holbrook, 192, 197, 226, 230
 v. Peekskill, 60*c*
 v. Wabash Ry. Co., 434, 436
 Cordele v. Jeter, 289
 Cordell v. N. Y. Central R. Co., 112,
 114, 468, 478
 v. Western Union Tel. Co.,
 537
 Core v. Ohio River R. Co., 189, 190
 Corey v. City of Am Arbor, 368
 v. Havener, 653*b*
 Corhart v. State, 398
 Corish v. North Jersey St. R. Co.,
 765
 Cork v. Blossom, 702
 Corlett v. Lavenworth, 89, 376, 379
 Corley v. Offutt, 727*a*
 Corlin v. West End R. Co., 520
 Corliss v. Keown, 164
 v. Smith, 631
 v. Worcester, etc. R. Co., 767*a*
 Corn Products, etc. Co. v. King, 193
 Corn, etc. Refining Co. v. King, 187
 Cornelius v. Appleton, 376
 Cornell v. Detroit R. Co., 474, 485*a*
 v. Skaneateles R. Co., 417*a*
 S. B. Co. v. Fallon, 766
 Corning v. Saginaw, 253
 v. Southland, 618, 623
 v. Troy Iron Works, 729
 Cornish v. Farm Building Ins. Co.,
 54
 Cornman v. Eastern Counties R. Co.,
 407, 410, 496, 506, 713
 Cornovski v. St. Louis Tr. Co., 485*bc*
 Cornwell v. Sullivan R. Co., 418
 v. Charlotte, etc. R. Co., 108
 Corona v. Galveston, etc. R. Co., 233*b*
 Corr v. City of New York, 339
 Correll v. Burlington, etc. R. Co., 58
 v. Railroad Co., 92
 Corrigan v. Elsinger, 164
 v. Hunter, 151
 v. Union Sugar Refinery, 150
 Corry v. Great Western R. Co., 419
 Corsi v. Maretzek, 609
 Corsicana v. Tobin, 356
 Corson v. Maine Cent. R. Co., 192
 Cortland Co. v. Herkimer Co., 60*a*

[References are to sections.]

- Corts v. Dist. of Columbia, 363, 376
 Corwin v. N. Y. & Erie R. Co., 62,
 421, 437, 440, 445, 449, 451a,
 452
 Cosby v. Commonwealth, 303
 Cosgrove v. Consolidated R. Co. 520
 v. Kennebec Light, etc. Co., 61,
 94
 v. N. Y. Cent. R. Co., 426,
 469, 474, 475
 v. Ogden, 74, 82, 146
 v. Pitman, 190
 Cosner v. Centerville, 376
 Cossett v. St. Louis, etc. R. Co., 501,
 509
 Cossitt v. St. Louis, etc. R. Co., 509,
 520
 Costa v. Yochim, 24a
 Costello v. District of Columbia, 747
 Coster v. Albany, 249
 Costikyan v. Rome, etc. R. Co., 523
 Cosulich v. Standard Oil Co., 16, 55,
 57, 665, 666, 683
 Cotant v. Boone, etc. R. Co., 501
 Cotchett v. Savannah, etc., R. Co.,
 523
 Cothran v. W. U. Tel. Co., 744, 753a
 v. Witham, 739
 Cott v. Lewiston R. Co., 415
 Cotter v. Cincinnati St. R. Co., 485bc
 v. Lindgren, 162, 298
 Cotterell v. Jones, 562
 Cotterill v. Chicago, etc. R. Co., 25,
 85c
 Cottle v. New York, etc. R. Co., 476
 Cotton v. N. Y., Lake Erie, etc. R.
 Co., 417a
 v. Wood, 8, 56, 645, 654
 v. Western Union Co., 556c
 Cotton Press Co. v. Bradley, 9b
 Cottrell v. Finlayson, 561
 v. Marshall Infirmary, 11
 Couch v. Charlotte, etc. R. Co., 233,
 233a
 v. Davidson, 625a
 v. Steel, 9
 v. Watson Coal Co., 60c
 Coughlan v. Philadelphia, etc., R.
 Co., 191, 195, 217
 Coughtry v. Globe Woolen Co., 141
 v. Williamette St. R. Co., 474
 Coullard v. Tecumseh Mills, 219a
 Coulter v. American Exp. Co., 89
 v. Great Northern R. Co., 460,
 467
 v. Pine, 380, 765
 Counsell v. Hall, 215
 Counter v. Couch, 104, 644
 Countryman v. East Tennessee, etc.
 R. Co., 61
 v. Fonda, etc., R. Co., 769
 (App. 2082-83)
 County of Brown v. County of Keya
 Paha, 392
 Coupe Co. v. Maddick, 148
 Coupe v. Platt, 709a, 710
 Coupland v. Hardingham, 120, 343
 Coursey v. Southern R. Co., 520
 Courson v. Chicago, etc. R. Co., 452
 Court v. Coroner, 256
 Courtney v. Baker, 146
 v. Cornell, 204
 Courvoisier v. Raymond, 762
 Cousins v. Hannibal, etc. R. Co., 147,
 421, 435
 v. Paddon, 559
 Coutts v. Neer, 702
 Covert v. Valentine, 733
 Covington v. Belser, 354
 v. Bollwinckle, 272, 353
 v. Bryant, 61, 356
 v. Mainwaring 375
 v. United States, etc. R. Co.,
 122, 334a, 406
 v. Western, etc. R. Co., 520
 Co., v. Kinney, 256
 etc. Co. v. Steinbrock, 176
 R. Co. v. Packer, 763
 Sawmill, etc. Co. v. Clark 195
 Transfer Co. v. Kelly, 66
 Cowan v. Chicago, etc. R. Co., 186,
 193
 v. Dietrick, 476, 483
 v. Inhabitants of Bucksport,
 373
 v. Sloan, 625a
 v. Umbagog Pulp Co., 231
 v. Union Pac. R. Co., 419
 v. Western Union Tel. Co.,
 532, 543, 739, 756
 Cowden v. Wright, 115
 Cowen Lumber Co. v. Western U.
 Tel. Co., 553
 v. Sunderland, 709
 Cowfield v. Asheville St. R. Co., 58
 Cowhill v. Roberts, 188
 Cowie v. Seattle, 376
 Cowles v. Balzer, 657, 663, 664
 v. Kidder, 731, 732
 v. Richmond, etc. R. Co., 197,
 222, 233
 Cowley v. Colwell, 672
 v. Sunderland, 285, 683
 Cowperthwaite v. Sheffield, 585
 Cox v. Adelsdorf, 573
 v. Atchison, etc. R. Co., 434
 v. Burbridge, 627, 628, 629, 634

[References are to sections.]

- Cox v. Central Vt. R. Co., 727a**
 v. Chicago, etc. R. Co., 434, 460
 v. Currier, 625a
 v. Delaware, etc. R. Co., 485
 v. Livingstone, 568, 577
 v. Louisville, etc. R. Co., 483
 v. Minneapolis, etc. R. Co., 434
 v. Norfolk, etc. Ry. Co. (App. 2085)
 v. South Shore, etc. St. Ry. Co. (App. 2068)
 v. Sullivan, 559
 v. Westchester Turnpike Co., 57, 375
 v. Wilmington City Ry. Co. (App. 2056)
Coxe Bros. v. Cunard S. S. Co., 285
 v. Robbins, 655, 664
Coxon v. Gt. Western R. Co., 243, 503
Coy v. Landers, 653b
 v. Missouri Pac. Ry. Co., 480
 v. Utica, etc. R. Co., 457
 Coyle v. Chicago, etc. R. Co., 633
 v. Conway, 633
 v. Long Island R. Co., 466
 v. Pierrepont, 162
Coyne v. Union Pac. R. Co., 213, 223
Crabb v. Wilkins, 689
Crabtree v. Missouri Pac. Ry. Co., 472, 476, 772
 v. Otterson, 645
Cracker v. Chicago, etc. R. Co., 513
Craddock v. Louisville, etc., R. Co., 475
Creasafulli v. Winston Bros. Co., 231
Craft v. Northern Pac. R. Co., 207a, 484 (App. 2090)
 v. Parker, 117
Crafter v. Metropolitan R. Co., 56, 502
Crafton v. Hanni', etc. R. Co., 433
Crafts v. Boston, 112
Cragg v. Los Angeles Tr. Co., 27a
Cragie v. Hadley, 589
Craig v. Chicago, etc. R. Co., 190
 v. N. Y., New Haven, etc. R. Co., 476
 v. Sedalia, 289, 334
 v. Watson, 575
Craighead v. Brooklyn R. Co., 496
Crain v. Petrie, 633
Craker v. Chicago, etc. R. Co., 154, 749
Cram v. Met. R. Co., 73, 520
Cramer v. Brooklyn etc. Ry. Co., 520
Crampton v. Ivie, 66
Cramer v. Burlington, 60c, 93, 114
 v. Oppenstein, 623
Cranch v. Brooklyn Hghts. Ry. Co., 475, 482
Crandall v. Goodrich Transp. Co., 25, 57, 666
 v. Lehigh Val. R. Co., 476
Crandall v. Loomis, 713
 v. McIlrath, 190
Crandell v. Bontell, 690
 v. Eldridge, 664
 v. Minneapolis, etc. Ry., 497
Crane v. Chicago, etc. R. Co., 207, 211 (App. 2060)
 Elevator Co. v. Lippert, 114, 742
 v. Mich. Cent. R. Co., 478
 v. Northfield, 53
 v. Warner, 624
Craney v. Schloeman, 683
 v. Union Stock Yards Co., 683, 704, 706
Cranson v. Snyder, 735
Cranston v. N. Y. Central R. Co., 470
Crapo v. Syracuse (App. 2083)
Crary v. Lehigh Valley Ry. Co., 516
Cratt v. Albemarle Timber Co., 674
Cratty v. Bangor, 104
Craven v. International, etc. Ry. Co., 520
 v. Smith, 180, 186, 212, 214
Crawford v. City of New York, 338
 v. Delaware, etc. R. Co., 478
 v. Georgia R. Co., 51
 v. N. Y. Central R. Co., 435, 451a
 v. West Side Bank, 588
 v. Williams, 634
 v. Kansas City Stockyards Co., 706
 v. Southern Ry. Co., 207b
 v. Wilson, etc. Mfg. Co., 370
 Co. v. Hathaway, 729
Crawfordsville v. Bond, 274, 368
 v. Smith, 355
Crawley v. Georgia R. Co., 429
Crawson v. W. U. Tel. Co., 756
Creager v. Illinois, etc. Ry. Co., 457, 481b, 485
Creamer v. Louisville, etc. Ry. Co., 758
 v. McIlvain, 647
 v. West End R. Co., 485c, 490
Crebarry v. National Transit Co., 207
Creech v. Wilmington Cotton Mills (App. 2085)
Creed v. Hartman, 14, 175, 375
 v. Kendall 72

[References are to sections.]

- Creed v. Pennsylvania, etc. R. Co., 61, 99, 488, 523
 Creeman v. International, etc. Ry. Co., 501
 Cregan v. Marston, 193, 195
 Cregin v. Brooklyn etc. R. Co., 764, 768, 713, 723
 Creighton v. Chicago, etc. Ry. Co., 675
 Creighton v. Kaweah Canal Co., 729
 Cremer v. Portland, 86
 Crenshaw v. St. Louis, etc. R. Co., 434
 v. Ullman, 166, 175
 Cresler v. Ashville, 363
 Cressley v. Northern, etc. Ry. Co., 418, 421, 451a
 Cressy v. Rep. Creosoting Co., 151
 Crest v. Erie R. Co., 675
 Crew v. St. Louis, etc. R. Co., 57
 Crilly v. Texas, etc. R. Co., 209a
 Crine v. East Tenn., etc. R. Co., 513a
 Crispin v. Babbitt, 177, 180, 203, 231, 233
 Criss v. Seattle Elec. Co., 485ab
 Crissey v. Hestonville, etc. R. Co., 508
 Cristinelli v. Saginaw Mfg. Co., 192, 202, 207g, 209a, 222
 Criswell v. Pittsburgh, etc. R. Co., 194, 203a, 233
 Crittenden v. Wilson, 731
 Crocheron v. North Shore, etc. Ferry Co., 496
 Crocker v. Knickerbocker Ice Co., 646
 v. McGregor, 606
 Crofford v. Atlanta, etc. Ry. Co., 359, 702
 Croft v. Alison, 146, 151, 153
 v. Chicago, etc. Ry. Co., 460
 Crofts v. Waterhouse, 494
 Crogan v. Schiele, 703
 Croll v. Atchison, etc. Ry. Co., 195
 Cromarty v. Boston, 353
 Cromeenes v. San Pedro, etc. Co., 480, 481b
 Crommelin v. Coxie, 89
 Crompton v. Ivey, 646
 v. Lea, 717
 Cronin v. Columbian Mfg. Co., 208, 218, 219
 v. Delavan, 86, 333
 Cronk v. Chicago, etc. Ry. Co., 47, 49, 672
 v. Wabash Ry., 516, 518
 Cronkite v. Wells, 546
 Crooker v. Bragg 733
 Crooker v. Hutchinson, 568, 570, 572, 753
 v. Pacific Lounge Co., 223
 Crookshank v. Kellogg, 56
 Croom v. Chicago, etc. R. Co., 510
 Crosby v. Cuba, etc. Co., 207a
 v. Hungerford, 619
 v. Lehigh Valley R. Co. (App. 2171)
 Cross v. California St. Cable R. Co., 485c
 v. Elmira, 373
 v. Kansas City, etc. R. Co., 761a
 v. Kent, 121
 v. Koster, 343, 702
 v. Kansas City, etc. R. Co., 488
 v. Kistler, 588
 v. Lake Shore, etc. R. Co., 521
 v. N. Y. Central R. Co., 451, 455
 v. State, 333
 v. Williams, 623
 Crossley v. Lightowler, 729, 734
 Crouch v. Charleston, etc. R. Co., 108, 396
 Crouse v. First Nat. Bank, 581, 587a
 Crow v. Mechanics', etc. Bank, 587
 v. Northern Pac. Ry. Co., 197
 v. State, 623
 Crowe v. Michigan, etc., Ry. Co., 51, 497, 501
 Crowell v. Cape Cod, etc. Canal Co., 399
 v. Sonoma County, 256
 Crowhurst v. Amersham Board, 17
 Crowley v. Appleton, 219a
 v. Cutting, 207g, 241b
 v. Groonell, 628
 v. Pacific Mills, 219a
 v. Panama R. Co., 124, 131
 v. Rochester Fire Wks. Co., 518, 688
 v. State, 398
 Crown v. Orr, 184, 207e, 216, 218
 Crown Cork, etc. Co. v. O'Leary, 209a
 Crowther v. Yonkers, 356, 375, 377
 Crozier v. Boston, etc. R. Co., 525
 v. Read, 634
 Cruden v. Fentham, 649, 654
 Crum v. Conover, 25, 655
 Crump v. Davis, 508, 520
 Crumpley v. Hannibal, etc. R. Co., 108, 129, 468
 Crusselle v. Pugh, 144, 709

[References are to sections.]

- Crutchfield v. Richmond, etc. R. Co., 65, 197, 208
- Crystal v. Des Moines, 352
Ice Co. v. Riley, 727*a*
Ice Co. v. Sherlock, 203*a*, 233
- Cudahy Pkg. Co., v. Anthes, 186
v. Hays, 206
v. Marcan, 218
v. Wesolowski, 207*a*
- Cuddeback v. Jewett, 408
- Cuddy v. Horn, 66, 122
- Cuff v. Newark, etc. R. Co., 26, 167, 173, 699
- Culberson v. Alexander, 361
- Culbertson v. Metropolitan St. R. Co., 477, 652
v. Milwaukee, etc. R. Co., 472 (App. 2104)
- Cullen v. Delaware, etc. Canal Co., 476, 482
v. Lord, 637
v. National Roofing Co., 207*b*
v. New York Telp. Co., 556*c*
v. Norton, 203*a*, 231
- Cullin etc. Co. v. Vulcan Iron Works, 573
- Cullman v. McMinn, 379
- Cullom v. McKelvey, 164
- Culp v. Atchison, etc. R. Co., 426
- Culver v. Streator, 291
- Cumberland v. Willison, 274, 291
Coal Co. v. Lee, 164
etc. Iron Co. v. Scally, 54, 56
etc. R. Co. v. Fazenbaker, 65
Valley R. Co. v. Hughes, 22, 406
Tel. Co. v. Brown, 540*a*
Tel. etc. Co. v. Hendon, 757
Telp. etc. Co. v. Hobart, 556*c*
Tel. etc. Co. v. Jackson, 757
Tel. etc. Co. v. Kelly, 536
Telp. etc. Co. v. Overfield, 760
Tel. etc. Co. v. Yeiser, 653*b*, 654
etc. Co. v. Martin's Admr., 698
- Cuming v. Brooklyn R. Co., 759, 763
- Cumisky v. Konosha, 375, 376
- Cumming v. Brooklyn R. Co., 79, 417, 463, 468
- Cummings v. Bannon, 574
v. Center Harbor, 379
v. Chicago, etc. R. Co., 122
v. Hartford, 368
v. National Furnace Co., 59, 93
v. Pittsburgh, etc. R. Co., 128
v. Riley, 635
- Cummings v. Worcester, etc. R. Co., 523
v. Presley 99
v. Seymour, 262, 272
v. Syracuse, 61, 377
- Cunard S. S. Co. v. Carey, 225
- Cunningham v. Belknap, 647
v. Blake, etc. Co., 180
v. Bucklin, 310
v. Castle, 151
v. Clay Tp., 375, 376
v. Denver, 367
v. Erie Ry. Co., 66*a*
v. Frey, 197
v. Neal (App. 2187)
v. International R. Co., 164, 173, 699
v. Lyness, 64, 102, 113
v. Macon, etc. R. Co., 249
v. Merrimac Paper Co., 207
v. Rogers, 708*a*
v. Union Pac. R. Co., 717
- Curl v. Chicago, etc. R. Co., 493
- Curley v. Harris, 189, 225
v. Illinois Cent. R. Co., 133, 466
- Curran v. Arkansas, 249
v. Boston, 260*a*
v. Merchants Mfg. Co., 218
v. City of St. Joseph, 334, 334*a*
v. Warren Chem., etc. Co., 57
v. Weiss, 723
- Curran v. Seattle, etc. Ry. Co., 103
- Currie v. Missouri, etc. Ry. Co., 209*a*
- Currier v. Boston Music Hall, 704
v. Lowell, 358
v. Ogdensburg, etc. R. Co., 359
- Curry v. Buffalo, 254
v. Chicago, etc. R. Co., 62, 421, 436
v. Erie, 375
v. Mannington, 289 (App. 2104)
- Curtain v. Somerset, 690, 702
- Curtin v. Metropolitan Ry. Co., 485*b*
v. Western Union Tel. Co., 756
- Curtis v. Avon, etc. R. Co., 110
v. Cleveland, etc. Ry. Co., 459
v. Dineen, 160
v. Kiley, 176
v. Leavitt, 579
v. Mills, 639
v. Southern Ry. Co., 516, 518
- Cusimano v. New Orleans 73*a*
- Curtis Blaisfell Co. v. Ross, 752
- Curtiss v. Ayrault, 733
v. Rochester, etc. R. Co., 53, 499, 516, 758

[References are to sections.]

- Cushing v. Adams 359, 361
 v. Bedford, 291
 v. Boston, 367
 v. The Fraser, 61
 Cushman v. Boston, etc. R. Co., 765
 Cusick v. Adams, 8, 705
 v. Norwich, 369
 Cussen v. So. Cal. Sav. Bk., 727*a*
 Custer v. Baltimore, etc. Ry. Co.,
 457, 463
 Cutcher v. City of Detroit, 369
 Cutcliff v. Birmingham Ry. etc. Co.,
 523
 Cutter v. City of Des Moines, 339
 v. Des Moines, 29*a*
 v. Hamlen, 709
 Cutting v. Marlbor, 589
 v. Shelburne, 356
 Cutts v. Boston, etc. Ry. Co., 519
 520
 Cuyler v. Rochester, 299
 Cytron v. St. Louis, etc. Ry. Co.
 485*bc*
 Czajkowski v. Robinson, 214*a*
 Czezewzka v. Benton-Bellefontaine
 Ry. Co., 74 (App. 2075)

 Dabbs v. Rome Ry., 485*bd*
 Dabney v. State Bank, 251
 Dacey v. New York, etc., Ry. Co., 108
 v. Old Colony R. Co., 54
 Daggett v. Cohoes, 274, 287
 Daffron v. Majestic Laundry Co., 223
 Dahl v. Milwaukee R. Co., 54
 Dahlstrom v. St. Louis, etc. R. Co.,
 13, 472, 479, 484
 Dahlin v. Walsh, 27*a*
 Dagle v. Lawrence Mfg. Co., 207*c*
 Dail v. Taylor, 690
 Dailey v. Burlington, etc. Ry. Co., 99
 v. Dismal Swamp Canal Co.,
 743
 Daily v. Fiberoid Co., 207*g*
 v. New York, etc. Ry. Co., 56,
 198, 201, 206
 v. Richmond, etc. R. Co., 483
 v. Worcester, 356
 Dalay v. Savage, 709*a*
 Dale v. Delaware, etc. R. Co., 60*c*,
 516
 v. Hill Constr. Co., 225
 v. Humfrey, 179
 v. St. Louis, etc. R. Co., 210,
 214, 215
 v. Syracuse, 358, 375
 v. Webster county, 350, 376
 Daley v. Boston, etc., R. Co., 128, 193
 v. Chicago, etc. Ry. Co., 488

 Daley v. Norwich, etc. R. Co., 71, 78,
 87, 93, 97
 v. Quick, 709
 v. Schaaf, 185, 207*h*
 Dallas v. Gulf, etc. R. Co., 241
 v. Jones, 367
 v. Meyers, 353, 368
 v. Moore, 376
 v. Munston, 354
 v. Webb, 287
 v. Schultz, 287
 City Ry. Co. v. Beeman, 485*bc*
 Coal Co. v. Rotenberry, 207*b*
 Con. Elec. Ry. Co. v. Cham-
 bers, 56
 Consol. Trac. Co. v. Hurley,
 461
 Rapid Tr. Co. v. Payne, 488,
 520
 etc. Ry. Co. v. Motwiller, 758
 etc. Ry. Co. v. Pettit, 513
 etc. R. Co. v. Spicker, 108
 Dally v. Maxwell, 144
 Dalrymple v. Meade, 333
 Dalton v. Denton, 725
 v. Favour, 686
 v. Receivers of Atlantic, etc.
 R. Co., 163
 v. Salem, 373
 v. Southeastern R. Co., 137,
 769, 770
 Daltry v. Media, etc. Elec. Co., 698
 Daly v. Butchers & Drover's Bank,
 582, 583
 v. Chicago, etc. R. Co., 676
 v. Detroit C. R. Co., 472, 480
 v. Hinz, 74
 v. New Jersey Steel Co., 137
 (App. 2151)
 v. New York City Ry. Co.,
 485*c*
 v. Norwich Ry. Co., 698
 v. Sang, 189, 192
 Dalyell v. Tyrer, 160, 162
 Dalzell v. New York, etc. R. Co., 25
 Dampman v. Penna. R. Co., 516
 Damon v. Boston, 356
 v. Scituate, 104, 379, 654
 Damont v. New Orleans, etc. R. Co.,
 89
 Damour v. Lyons, 92, 274
 Dana v. N. Y. Central R. Co., 202, 205
 Danaher v. Brooklyn, 255, 266
 v. Southwestern Tel., etc. Co.,
 556*c*
 Danbury, etc. R. Co. v. Norwalk, 299
 Dancy v. Walz, 708*a* (App. 2083)
 Dane v. Cochran, etc. Co. (App.
 2150)

[References are to sections.]

- Dane v. Gilmore, 625a
 Danenhoffer v. State, 323
 Danforth v. Fisher, 151
 Daniel v. Chesapeake, etc. R. Co., 233a, 241 (App. 2104)
 v. East Tennessee Coal Co. (App. 2095)
 v. Johnson (App. 2127)
 v. Metropolitan R. Co., 8, 25, 57, 91, 92, 417, 494, 500
 v. Petersburg R. Co., 154, 513
 v. Ry. Co., 490
 v. Western U. Tel. Co., 754
 Daniels v. Athens, 392, 393
 v. Ballentine, 40
 v. Bay City Tr. Co., 485a
 v. Clegg, 86, 379, 644, 649
 v. Denver, 289
 v. Florida etc. Ry. Co., 513
 v. Hart, 459
 v. Hathway, 340
 v. Lebanon, 377
 v. N. Y. & New England R. Co., 73
 v. Potter, 120
 v. Savannah, etc. R. Co., 137
 v. Staten Island, etc. R. Co., 13, 60c, 476
 v. Union Pac. R. Co., 193
 v. Western, etc. R. Co., 510
 Danner v. So. Carolina R. Co., 108, 419, 432
 Danolds v. State, 251
 Danskin v. Norfolk, etc., Ry. Co., 463a
 Dantzler v. De Bardeleben Coal Co., 24b
 Danville, etc. Ry. Co. v. Hodnett, 485bd
 Danville v. Makemson, 356
 etc. R. Co. v. Brown, 410
 etc. Turnp. Co. v. Stewart, 66, 375, 377, 386
 Danziger v. Pittsfield Shoe Co., 573
 Darby Candy Co. v. Hoffberger, 114
 Darden v. Atlanta, etc. R. Co. (App. 2085)
 Dardenelle Bridge Co. v. Croom, 393
 Darenburg v. Harris, 132
 Dargan v. Mobile, 291
 Darks v. Scudders, etc. Co., 690
 Darling v. Bangor, 274
 v. Boston, etc. R. Co., 430
 v. N. Y., Providence, etc. R. Co., 201
 v. Thompson, 732
 v. Westmorland, 369
 v. Williams, 2089
 Darlington v. New York, 254, 261, 285, 363
 Darlington v. Western U. Tel. Co., 756
 Darmstetter v. Moynahan, 176
 Darracott v. Chesapeake, etc. R. Co., 207b, 207e
 Darrigan v. N. Y. & New England R. Co., 205, 233, 233a
 v. N. Y., New Haven, etc. R. Co., 180
 Darrington v. State Bank, 250
 Dartmouth Spinning Co. v. Achord, 207c
 Dartnell v. Howard, 575
 Dascomb v. Buffalo, etc. R. Co., 469
 Dashields v. Moses, 704
 Dashner v. Mills county, 256
 Daub v. Northern Pac. R. Co., 232, 233
 Daube v. Tennison, 78
 Daubert v. Delaware, etc. Ry. Co. (App. 2091)
 v. Western Meat Co. (App. 2055)
 Daugherty v. Herzog, 702
 Daughtery v. Am. U. Tel. Co., 754, 755
 Dauntley v. Hyde, 569
 Dave v. Morgan's La. R. Co. 493
 Davenport v. Brooklyn R. Co., 521
 v. Chicago, etc. Ry. Co., 455
 v. Oceanic Amusement Co. 1a, 49
 v. Ruckman, 88, 120, 218, 365, 375, 481, 644a, 709a, 712
 Daves v. Southern Pac. Co., 232, 245
 Davey v. Chamberlain, 122
 v. Greenfield, etc. Ry. Co. 508
 v. Jones, 585
 v. London, etc. R. Co., 477
 v. Southwestern R. Co., 477
 Davi v. The Victoria, 225
 David v. Galveston, etc. Ry. Co., 518
 v. Southwestern R. Co., 771
 David v. Waters (App. 2090)
 Davids v. People, 518
 Davidson v. Cornell, 60a, 214
 v. Davidson, 57
 v. Delaware, etc. Ry. Co., 455
 v. Flour City, etc. Works (App. 2155)
 v. Hill, 134a
 v. Monkland R. Co., 61
 v. Nichols, 690
 v. Pennsylvania, etc. Ry. Co. (App. 2090)
 v. Pittsburgh, etc. R. Co., 484, 485
 v. Portland, 104
 v. St. Paul, etc. R. Co., 518

[References are to sections.]

- Davidson v. Southern Pac. Co., 758, 217
- Davies v. City of Boston, 259
- v. England, 219a
 - v. Heubner, 336
 - v. Mann, 99, 100, 646, 651
 - v. Pelham Hod Elevating Co., 207
- Davis, The, 249
- Admr. v. Brooklyn, etc. R. Co., 202
 - v. Ada Co., 256
 - v. Atchison, etc. Ry. Co., 503
 - v. Atlanta, etc. Ry. Co., 467
 - v. Atlantic, etc. Ry. Co., 520 (App. 2085)
 - v. Augusta Factory, 218
 - v. Baltimore, etc. R. Co., 207e
 - v. Bangor, 350
 - v. Burlington, etc. R. Co., 434
 - v. Button, 19d
 - v. California St. R. Co., 376
 - v. Campbell, 640
 - v. Central Congregational Soc., 706
 - v. Central R. Co., 193, 230, 233
 - v. Charleston, etc. Ry. Co., 485
 - v. Charlton, 355
 - v. Chesapeake, etc., Ry. Co., 463, 464, 488
 - v. Chicago, etc. R. Co., 26, 28, 65a, 85a, 97, 407, 457, 464, 484, 495, 499, 505, 516, 521
 - v. Clinton Water Works Co., 118, 265
 - v. Concord, etc. Ry. Co., 87, 111, 463a, 476
 - v. Corry, 369
 - v. Detroit, etc. R. Co., 180, 190, 221
 - v. Dudley, 370, 378
 - v. Durham Trac. Co. (App. 2085)
 - v. Eastern Steamboat Co., 540a
 - v. Evans, 701a
 - v. Forbes, 217
 - v. Fuller, 729
 - v. Galveston, etc. Ry. Co., 516
 - v. Garrett, 40
 - v. Getchell, 730
 - v. Graham, 215
 - v. Guarnieri, 690
 - v. Guilford, 378
 - v. Hannibal, etc. R. Co., 451a
 - v. Hill, 356
 - v. Holy Terror Min. Co., 207a, 223
 - v. Jackson, 334
- Davis v. Jerkins, 396
- v. Kansas City R. Co., 478, 520
 - v. Kingston, 363
 - v. Knoxville, 260
 - v. Lamoile Turnp. Co., 258
 - v. Lamoile Plank-road, 336, 386, 387
 - v. Leominster, 358
 - v. Louisville, etc. R. Co., 524
 - v. Michigan Bell Tel. Co., 365
 - v. Michigan, etc. Ry., 526
 - v. Montgomery, 262
 - v. New England R. Co., 132, 133
 - v. New Haven Ry., 207g
 - v. New York, 332
 - v. N. Y. Central R. Co., 93, 476, 477
 - v. N. Y., New Haven, etc. R. 207a, 207g, 241b
 - v. N. Y., Lake Erie, etc. R. Co., 223
 - v. Nuttallsburg Coal Co., 207b
 - v. Ohio Valley Banking Co., 146
 - v. Omaha, 358
 - v. Oregon, etc. R. Co., 94
 - v. Paducah, etc. Ry. Co., 494, 516
 - v. Ry. Co. (App. 2054, 2062)
 - v. Ringolsky, 704, 706
 - v. Smith, 708a, 709
 - v. Snyder Tp., 356
 - v. Summerfield, 701
 - v. Somerville, 104
 - v. Tacoma, etc. Power Co., 756
 - v. Tacoma, etc. Ry. Co., 748
 - v. Trade, etc. Min. Co., 232
 - v. Turner, 208
 - v. Vermont Central R. Co., 39, 204
 - v. Wabash R. Co., 429
 - v. Walker, 633
 - v. Western Union Tel. Co., 540a, 545, 756
 - v. John L. Whiting & Son, 175
 - v. Winslow, 730
 - Smith Co. v. Clauson (App. 2194)
- Davison v. Royal Amusement Co., 518
- v. Wilkes-Barre, etc. Tr. Co., 485bd
- Davoust v. City of Alameda, 291, 698
- Dawe v. Flint, etc. R. Co., 476
- Dawkins v. Gulf, etc. R. Co., 148
- Dawson v. Lawley, 563

[References are to sections.]

- Dawson v. Louisville, etc. R. Co.,** 749
 v. Manchester, etc. R. Co., 497
 v. Merchants' Bank, 619
 v. Metropolitan St. Ry. Co., 154
 v. Midland R. Co., 418, 449
 v. Sloane, 719*a*
 v. Trustees of New York, etc. Bridge, 501
Dax v. Ward, 569
Day v. Akeley Lumber Co., 60*c*, 672
 v. Boston, etc. Ry. Co., 472, 475, 476 (App. 2065)
 v. Brooklyn R. Co., 150
 v. Cleveland, etc. R. Co., 207
 v. Day, 340, 345, 394
 v. Flushing, etc. Ry. Co., 476
 v. Highland St. R. Co., 104
 v. Louisiana, etc. Ry. Co., 207*h*
 v. Milford, 350
 v. Mt. Pleasant, 356
 v. New Orleans R. Co., 419
 v. Reynolds, 117, 592
Dayharsh v. Hannibal, etc. R. Co., 230, 233
Dayton v. N. Y., Lake Erie, etc. R. Co., 449
 v. Pease, 274, 278, 281, 289, 291
 v. Robert, 729
 v. Rutherford, 733
Dayvis v. Western Union Tel. Co., 754
Deal v. St. Louis, etc. Ry. Co., 750
Dealey v. Muller, 73*a*
Dealy v. Noble, 151
DeAmado v. Friedman (App. 2053)
Dean v. Braithwaite, 644
 v. Brock, 243
 v. Chicago, etc. R. Co., 675
 v. Gridley, 313
 v. New Milford, 257
 v. Omaha, etc. R. Co., 449
 v. Oregon, etc. Ry. Co. (App. 2103)
 v. St. Paul Union Depot Co., 154
 v. Sullivan R. Co., 466*a*
 v. Tarrytown, etc. Ry. Co., 59
 v. Wabash, etc. Ry. Co., 758
Deane v. Clayton, 97, 640
 v. Roaring Fork Light Co., 222
Deans v. Wilmington, etc. R. Co., 484 (App. 2085)
Dearborn v. Dearborn, 566, 570, 572, 753
Dearborn v. Union Nat. Bank, 588
Dearden v. San Pedro, etc. Ry. Co., 494, 516
DeAtley v. Northern Pac. Ry. Co., 468
DeBaker v. Southern California Ry. 271, 273
Debevoise v. N. Y., Lake Erie, etc. R. Co., 131, 132
DeBock v. Amer. Bridge Co., 193, 195
Debolt v. Carpenter, 333
 v. Kansas City, etc. Ry. Co., 49
Debus v. Armour, etc. Co., 205
DeCamp v. Sioux City, 31, 346
Decatur v. Boston, 353
 Car Wheel Co. v. Terry, 218
Decker v. Erie, etc. Ry. Co., 459*a*
 v. Gammon, 365, 627, 634
 v. McSorley, 645
 v. Scranton, 363
Dederichs v. Salt Lake City R. Co., 473
Deeds v. Chicago, etc. R. Co., 99, 207*b*
De End v. Wilkson's Admr. (App. 2100)
Deep Min., etc. Co. v. Fitzgerald, 232
Deer v. Sheraden Borough, 283
Deering v. Wisherd, 625*a*
Deery v. Camden, etc. R. Co., 521
Defer v. Detroit, 272, 274
Defiance Water Co. v. Olinger, 154*a*, 701*a*, 721
Deford's Case, 298
Deford v. State, 168
DeForest v. Jewett, 207*e*, 209
DeForrest v. Wright, 168
DeFrance v. Spencer, 669, 671
De Frates v. Central Union Tel Co., 193
Defrieze v. Illinois, etc. Ry. Co., 470, 472, 475
Degg v. Midland R. Co., 181, 182, 183
DeGinther v. New Jersey Home, etc., 702*a*
Degnan v. Jordan, 207
Degonia v. St. Louis, etc. Ry. Co., 207 (App. 2161)
De Graff v. N. Y. Central, etc. R. Co., 57, 184, 217
DeGray v. Murray, 626, 628
De Groot v. United States, 249
De Ham v. Mexico R. Co., 131
De Haven v. Kensington Nat. Bank, 588

[References are to sections.]

- Dehman v. Beck (App. 2084)
 Dehority v. Whitcomb, 709
 Dehring v. Comstock, 60
 Deichmann v. Chicago, etc. Ry. Co., 477, 490
 Deickmann v. Chicago, etc. Ry. Co., 518
 DeIoia v. Metropolitan St. Ry. Co., 485*bc*
 Deisen v. Chicago, etc. R. Co., 760, 775
 Deitrich v. Baltimore, etc. R. Co., 73*a*
 Deitring v. St. Louis Tr. Co., 485*c*
 Dekalb County v. Cook, 341
 DeKallands v. Washtenaw, etc. Tel. Co., 209*a*
 De Kay v. Chicago, etc. R. Co., 525
 Delafield v. Illinois, 249
 Delahousaye v. Judice, 735
 Delamatyr v. Milwaukee, etc. R. Co., 509, 519, 520
 Delaney v. Framingham, etc. Co., 193
 v. Hilton, 206
 v. Milwaukee, etc. R. Co., 54, 90, 464
 v. Penna. R. Co., 725
 v. Rochereau, 705
 Delano v. Case, 589
 Delapin v. Kansas City, 742
 Delassus v. United States, 317
 Delatour v. Mackay (App. 2055)
 De la Vergne, etc. Co. v. Stahl, 215
 Delaware, etc. Canal Co. v. Carroll, 230
 v. Goldstein, 400, 735
 v. Lee, 399
 Iron Works v. Nuttall, 195, 203
 River v. Stilesville, 730
 etc. Canal Co. v. Goldstein, 399
 etc. R. Co. v. Ashley, 492, 513*a*, 523
 v. Chadow, 481
 v. Converse, 417, 458, 461, 485
 etc. Ry. Co. v. Devore, 77, 758
 v. Hefferan, 475
 v. Jones, 773
 etc. Ry. Co. v. Reich, 73, 700
 v. Salmon, 27, 31, 666, 678
 v. Shelton, 417, 464
 v. Toffey, 108
 v. Trautwein, 104, 486, 501, 506
 v. Walsh, 493
 v. Yarrington, 488
 Tel. Co. v. State, 556*c*
- DeLay v. Southern Ry. Co. (App. 2132)
 Delfs v. Dunsbee, 653*e*
 Delger v. St. Paul, 289
 Delhi v. Youmans, 735
 Delie v. Chicago, etc. R. Co., 742
 Delisle v. Bourriague, 626
 Dell Rapids, etc. Co. v. Dell Rapids, 287
 Dells v. Stollenwerk, 147
 Delmonico v. New York, 274, 291
 De Loge v. N. Y. Central R. Co., 54
 De Lozier v. Kentucky Lumber Co., 219
 De Lon v. Kokomo City Ry. Co., 94
 Del Monte v. Southern Pac. Co., 486, 761*a*
 Delorey v. Blogett, 160*a*
 Delphi v. Evans, 283
 Delphia v. Rutland, etc. Ry. Co., 449
 Del Rossi v. Cooney (App. 2091)
 Delude v. St. Paul R. Co., 186, 207*g*
 De Luna v. Union Ry. Co., 766
 DeLuna v. Union Ry. Co., 775 (App. 2083)
 Delzell v. Indianapolis R. Co., 408
 Demarest v. Forty-second St., etc. Ry. Co., 122
 Demase v. Oregon, etc. Nav. Co., 187
 Demato v. Hudson County, 217
 Demers v. Deering, 207*h*
 Deming v. Terminal Ry. Co., 176
 v. Grank Trunk R. Co., 40
 v. Merchants' Cotton Press Co., 40
 v. The Argonaut, 719
 Demitz v. Benton, 662
 De Montmorency v. Devereaux, 567
 Dempsey v. N. Y. Central R. Co., 410
 v. Rome, 369, 376
 Den v. Hill, 317
 Denby v. Miller, 362
 Deni v. Pennsylvania Ry. Co., 143*a*
 Deninger v. American Locomotive Works, 223, 772
 Denis v. Lewiston, etc. Ry. Co., 67, 485*ab*, 485*c*
 Denison v. Lincoln, 639
 v. Sanford, 376
 v. Seymour, 246
 v. Patton, 698
 St. Ry. Co. v. Carter, 489
 etc. Ry. Co. v. Johnson, 520
 v. Powell, 485*bd*
 Denker v. Wolff Mill. Co., 193, 195
 Denman v. Johnston, 646
 v. St. Paul, etc. R. Co., 99
 Dennett v. Wellington, 379
 Dennick v. Central R. Co., 132

[References are to sections.]

- Dennick v. Central Ry. etc. Co., 132
(App. 2091)
v. Railroad Co., 65
- Denning v. Gould, 197
- Dennis v. Atlanta, etc. Ry. Co.
(App. 2093)
v. Chapman, 625*a*
v. Harris, 679
v. Pittsburgh, etc. R. Co., 516
- Dennison v. Seymour, 515
- Denny v. Chicago, etc. Ry. Co., 7
v. City of Burlington, 164
v. Manhattan Co., 243
v. N. Y. Central R. Co., 40
v. North Carolina Ry. Co., 519
- Denslow v. New Haven, etc. R. Co., 733
- Denson v. Georgia, etc., Co., 698
- Denton v. Kernochan, 723
- Denver v. Aaron, 358, 368
v. Capelli, 274
v. Clements, 334
v. Dean, 368
v. Dunsmore, 281, 289
v. McGivney, 289 353, 367
v. Maurer, 354, 375
v. Porter, 253
v. Saulcey, 373
v. Solomon, 356, 699, 709*a*
v. Williams, 291
v. Stein, 353
City Tran. Co. v. Martin, 485*a*
City Tram. Co. v. Nicholas, 73, 73*a*
v. Wright, 99, 485*a*, 485*ab*
Cons. Tramway Co. v. Rush, 516
Consolidated Electric Co. v. Simpson, 359
Electric Co. v. Simpson, 60, 698
Consol. Elec. Co. v. Lawrence, 698
Tramway Co. v. Cloud, 486, 748
v. Dwyer, 488, 491
v. Nesbit, 207*c*
v. Reid, 46, 516, 523
etc. Ry. Co. v. Andrews, 517
v. Arrighi (App. 2116)
v. Buffehr, 7, 64, 99
v. Burchard, 201
v. DeGraff, 675
v. Divelbiss, 429
v. Dotson, 750
v. Driscoll, 233, 233*a*
v. Gunning, 775 (App. 2056)
- Denver, etc. Ry. Co. v. Gustafson, 160*a*, 161, 477
v. Harris, 742, 749
v. Henderson, 419
v. Lorentzen, 759
v. Morton, 60*c*, 666
v. Norgate, 685
v. Nye, 429, 433
Tran. Co. v. O'Brien, 232
v. Outcalt, 422
v. Pulaski, etc., Co., 739
v. Reid, 481*b*
etc. Ry. Co. v. Reiter, 187, 191
v. Robbins, 55
v. Robinson, 429
v. Roller, 502
v. Ryan, 13, 108, 476
v. Simpson, 197
v. Spencer, 485*d* (App. 2056)
v. Spicker (App. 2098)
v. Vitello (App. 2126)
v. Warring (App. 2055)
v. Whan, 488
v. Wilson, 137
v. Woodward, 516
- Deny v. Correll, 638
- DePalma v. Weinman, 164, 168, 744
- DePere v. Hibbard, 363
- Deppe v. Atlantic Coast Line Ry. Co., 672, 673
v. Chicago, etc. Ry. Co. (App. 2140)
- DePrisco v. Wilmington City Ry. Co., 769
- Depue v. Flatson, 10*a*
- Depuy v. Chicago, etc. Ry. Co. (App. 2160)
- Derby v. Kentucky R. Co., 198
Bank v. Landon, 619
- Dermont v. Detroit, 274
- DeRouigny v. Peale, 569
- DeRozas v. Metropolitan R. Co., 521
- Derr v. Lehigh V. R. Co., 207*c*
- Derrick v. Kelly, 688*a*
- Derry, etc. Co. v. Kerbaugh, 689
- DeRutte v. New York, etc. Tel. Co., 503, 532, 537, 544
- Derwort v. Loomer, 51, 495, 514
- Deschene v. Burgess, etc. Co., 203
- Deskins v. Chicago, etc. Ry. Co., 508
- Deslettes v. Baltimore, etc. Tel. Co., 543
- Deserant v. Cerrillos Coal R. Co., 186
- Desrosiers v. Bourn, 208
- De Tarr v. Ferd-Heine, etc. Co., 706, 712
- Detroit v. Blackeby, 258, 289

[References are to sections.]

- Detroit v. Chaffee, 298, 343, 384
 v. Corey, 287, 291, 358
 v. Putnam, 289
 Crude Oil Co. v. Grable, 216,
 217
 etc. R. Co. v. Hayt, 424
 v. Van Steinburg, 53, 107
 Detwiler v. Lansing, 334, 356
 Detzur v. Stroh Brewing Co., 34
 Deutsch v. Abeles, 708
 Deutsmann v. Kuntze, 335
 De Valla De Costo v. So. Pac. Co.,
 138
 De Vau v. Pa., etc. Canal Co., 56
 Deverill v. Grand Trunk R. Co., 56
 Deville v. Southern, etc. R. Co., 85
 v. So. Pac. R. Co., 474
 Devine v. Boston & A. R. Co., 241b
 v. Savannah, etc. R. Co., 207
 v. National, etc. Deposit, 485
 v. New York, etc. Ry. Co., 20
 Devito v. Pacific R. Co., 198, 208
 Devlin v. Gallagher, 13, 58
 v. Smith, 38, 184, 187
 Devore v. St. Louis, etc. Ry. Co., 195
 Dewald v. Kansas City, etc. R. Co.,
 521
 Deweese v. Meramec Iron Co., 186
 v. Meramec Mining Co., 203
 Dewey v. Detroit, etc. R. Co., 195,
 196, 233a
 v. Leonard, 669
 Dewire v. Bailey, 87, 92
 v. Boston, etc. R. Co., 490,
 523
 DeWitt v. Floriston Pulp Co., 209a,
 773
 De Woolfe v. ———, 561
 Dexter v. Canton Toll-bridge Co., 380
 Dey v. United Ry. Co., 99 485c
 Deyo v. N. Y. Cent. R. Co., 494, 517
 Deyoe v. Saratoga Springs, 291
 De Young v. Irving, 219
 Deyo v. Kingston, etc. Ry. Co., 688
 De Yoe v. Seattle Elec. Co., 59
 Diamond v. Brooklyn, 369
 v. Cowles, 653a, 704
 v. Northern Pac. R. Co., 678
 v. Planet Mills Mfg. Co., 223
 Black Coal Co. v. Cuthbert-
 son, 108, 207g
 Brick Co. v. N. Y. Cent. R.
 Co., 451
 Iron Co. v. Giles, 207g
 Match Co. v. New Haven, 274
 Mill Co. v. Groesbeeck, 587a
 Rubber Co. v. Harryman, 518,
 761
 Di Bari v. Bishop Co., 191, 218
 Diana, The, 172
 Dibble v. N. Y. & Erie R. Co., 140
 Dick v. Railroad Co., 56, 235
 Dickason Coal Co. v. Liddell, 219a
 Dicken v. Liverpool Salt Co., 73a,
 705
 Dickens v. N. Y. Central R. Co., 56,
 769
 Dickenson v. Vernon, 219a
 Dickerson v. Wason, 580a
 Dickeschied v. Wheeling Ex. Bank,
 56b
 Dickey v. Maine Telegraph Co., 25,
 351, 359
 Dickey v. Northern Pac. Ry. Co.,
 421, 452
 Dickins v. N. Y. Cent. R. Co., 135,
 768
 Dickinson v. Boston, 286
 v. Boyle, 39
 v. Northeastern R. Co., 136
 v. Port Huron, etc. R. Co., 406
 v. West End St. Ry. Co., 188,
 488
 v. Worcester, 735
 Dickson v. Hollister, 93, 702, 703,
 742
 v. Kewanee Electric Light Co.,
 361, 370
 v. McCoy, 365, 628, 634
 v. Missouri Pac. R. Co., 66
 v. Omaha, etc. R. Co., 94, 217,
 466a
 v. Parker, 656
 v. Reuter's Tel. Co., 543
 v. Swift Co., 87, 206
 v. Waldron, 145, 150
 Diebold v. Pennsylvania R. Co., 480
 & Sons v. Wollborn, 236
 Dieboldt v. U. S. Baking Co., 207
 Diehl v. Roberts, 649
 v. Lehigh Iron Co., 207
 Diehm v. Cincinnati, 267
 Diekmann v. Chicago, etc. Ry. Co.,
 501, 516
 Dieters v. St. Paul Gaslight Co.,
 207g
 Dietrich v. Hannibal, etc. Ry. Co.,
 741
 v. Northampton, 370
 Digby v. Kenton Works, 102
 Diggs v. Louisville, etc. Ry. Co., 508
 Diles' Admr. v. Chesapeake, etc. Ry.
 Co., 480
 Dill v. Marmon, 232
 Dillian v. Merchants' Nat'l Bank,
 588
 Dillaye v. N. Y. Central R. Co., 498
 Dillingham v. Anthony, 154, 513

[References are to sections.]

- Dillingham v. Barber, 739
 v. Fields, 359
 v. Harden, 217
 v. Parker, 478
 v. Pierce, 492a
 v. Snow, 303
 v. Teeling, 506
 Dillishaw v. Charleston, etc. Ry. Co., 501
 Dillon v. Acme Oil Co., 734
 v. Connecticut, etc. Ry. Co., 484
 v. Great Northern Ry. Co., 135a
 v. Hudson, etc. Ry. Co., 769
 v. Hunt, 765
 v. Raleigh, 346
 v. Sixth Ave. R. Co., 184
 v. Washington Gaslight Co., 359
 Dimes v. Petley, 99
 Dimmey, Admr. v. Wheeling, etc. R. Co. (App. 2104)
 Dimock v. Suffolk, 351, 355, 379
 Dimmitt v. Hannibal, etc. R. Co., 500
 Dingley v. Star Knitting Co., 223
 Dinnihan v. Lake Ontario Imp. Co., 704
 Dipper v. Milford, 376
 DiPrisco v. Wilmington City Ry. Co., 485a
 Dirks v. Juel, 591
 Dirmeyer v. O'Hern, 758
 Disalets v. International Paper Co., 219
 Disbrow v. Chicago, etc. R. Co., 478
 Distler v. Long Island R. Co., 518, 520
 District of Columbia v. Armes, 60b, 369
 v. Bowling, 92
 v. McElligott, 91, 215, 289
 v. Moulton, 361
 v. Robinson, 747
 v. Washington Gaslight Co., 384
 v. Wilcox (App. 2057)
 v. Woodbury, 249, 263, 289, 358, 367, 560, 758
 Ditberner v. Rogers, 162
 Ditchett v. Spuyten, etc. R. Co., 93, 114, 445, 708
 Dittmar v. Brooklyn, etc. Ry. Co., 501
 Dittrich v. Detroit, 369, 376
 Di Vito v. Cragg, 207c
 Dixon v. Bell, 35, 116, 686
 v. Board of Works, 283
 Dixon v. Brooklyn, etc. R. Co., 359, 521
 v. Chicago, etc. R. Co., 203, 237, 238
 v. Grand Trunk Western Ry. Co., 202
 v. Navigation Co., 526
 v. New York, etc. Ry. Co., 64
 v. Plums, 92, 702
 v. Ranken, 180
 v. San Antonio, 367
 v. Southern Ry. Co., 470, 471
 v. Swift, 706
 v. Wachenheimer, 702
 v. Western Union Tel. Co., 196, 553
 Dlauhi v. St. Louis, etc. R. Co., 482
 Doak v. Saginaw Tp., 346
 Doan v. Willow Springs, 375
 Dobbin v. Richmond, etc. R. Co., 233
 Dobbins v. Brown, 16, 57, 223
 v. Missouri, etc. Ry. Co., 457, 705
 Dobbs v. West Jersey R. Co., 476
 Dobbys v. Northern Pac. R. Co., 668
 Dobiecki v. Sharp, 458, 477, 506, 519, 704
 Dobson v. New Orleans, etc. Ry. Co., 488
 Dobyms v. Yazoo, etc. Ry. Co. (App. 2064)
 Dochtermann v. Brooklyn, etc. Ry. Co., 508
 Dockerty v. Hutson, 639
 Dodd v. Holme, 701
 Doel v. Sheppard, 685
 Dodge v. Boston, etc. S. S. Co., 487, 490, 519
 v. Granger, 265, 295
 v. Hughes, 548
 County v. Saunders County, 394
 v. Town of North Hudson, 339
 Doe v. Boston, etc. Ry. Co., 231
 v. Syracuse, etc. Ry. Co., 505
 Doel v. Sheppard, 685
 Doggett v. Ill. Central R. Co., 523
 v. Richmond etc. R. Co., 28, 93, 94, 99, 432, 460, 667, 679
 Doherty v. Ayer, 356
 v. Boston, etc. Ry. Co., 65
 v. Booth, 205 (App. 2152)
 v. California Nav. Co., 515
 v. Lord, 158
 v. Parker Washington Co., 231
 v. Sweetzer, 645
 v. Waltham, 356

[References are to sections.]

- Dohn v. Dawson, 92, 361
 Doing v. N. Y., Ontario, etc. R. Co., 192, 194*a*, 202
 Doir v. New York, etc. S. S. Co., 191, 193
 Dolan v. Delaware, etc. Canal Co., 90, 146, 466, 476
 v. Newburgh, etc. R. Co., 434, 444, 452
 Dolfinger v. Fishback, 626
 Dollard v. Roberts, 710, 763
 Doller v. Union R. Co., 485*c*
 Dolph v. Ferris, 627
 Dolrey v. Ontario, etc. R. Co., 449
 Dolson v. Saxon, 623
 Dominguez v. Orleans R. Co., 408
 Donahoe v. Old Colony R. Co., 185*b*, 203
 v. Wabash, etc. R. Co., 85, 85*c*
 Donahue v. Drowne, 207*a*
 v. Enterprise R. Co., 630
 v. Kendall, 710
 v. Scott Trans. Co., 628, 639
 v. State, 334, 705
 v. Warren, 346
 Dolan v. Chicago, etc. Ry. Co., 359
 Dolon v. Newburg, etc. Ry. Co., 434
 Dollard v. Roberts, 120
 Dolphin v. Worcester Consol. St. Ry. Co. (App. 2069)
 Dolson v. Dunham, 85*a*
 Dolton v. Wilson, 253
 Donald v. Guy, 172, 384
 v. St. Louis, etc. R. Co., 448
 Donaldson v. Boston, 368
 v. Brooklyn, etc. Ry. Co., 193, 195
 v. Haldane, 558, 562, 575
 v. Milwaukee, etc. R. Co., 54, 99, 112
 v. Mississippi, etc. R. Co., 137, 773, 775
 v. Wilson, 708
 Donegan v. Ry. Co., 197
 Donham v. Wild, 621
 Donk, etc. Co. v. Leavitt, 705 (App. 2060)
 Coal, etc. Co. v. Thil, 180, 224, 225, 231, 758
 Donnegan v. Erhardt, 466*a*, 499, 500
 Donnelly v. Booth, etc. Co., 189
 v. Boston, etc. R. Co., 476, 705
 v. Brooklyn R. Co., 66*a*, 475
 v. Brown, 195
 v. Cudahy Pack. Co., 238
 v. Fitch, 60*b*
 v. Hufschmidt, 244, 759
 Donnelly v. Jenkins, 719, 723
 v. Tripp, 299
 Donner v. Ogilvie, 709
 Donogh v. Gillespie, 580*a*
 Donoho v. Vulcan Iron Works, 370
 Donohoe v. Old Colony Ry. Co., 207*g*
 v. C. H. Buck & Co., 197, 203
 v. Keystone, etc. Co., 750
 v. New York, 274
 v. State, 8
 v. Syracuse, etc. R. Co., 367
 Donovan v. Board of Education, 267, 295, 319, 329
 v. Chase-Shawmut Co., 219, 223
 v. Chicago, etc. R. Co., 675
 v. Hannibal, etc. R. Co., 421, 451*a*
 v. Hartford St. R. Co., 57, 490
 v. Laing, 161
 v. Lynn, etc. Ry. Co., 485*c*
 v. McAlpin, 267, 319, 323
 v. Oakland R. Co., 176
 Dooley v. Healey, 518
 v. Meriden, 363, 376
 v. Mobile, etc. R. Co., 480, 484
 v. Sullivan, 356, 358
 Doolittle v. Walpole, 260*a*
 Dooner v. Delaware, etc. Canal Co., 196, 197, 207*a*, 213
 Doran v. East River Ferry Co., 488, 491
 v. Thomsen, 144, 148, 151, 162
 Dorchester Bank v. New England Bank, 582
 Dore v. Milwaukee, 283
 Doris v. Holy Terror Min. Co., 223
 Dorlon v. Brooklyn, 291
 Dorman v. Ames, 709*a*
 v. Broadway R. Co., 483, 485
 v. Kane, 111
 Dorn v. Oyster Bay, 363, 369
 v. Snare, 164, 175
 Dornin v. McCandless, 619
 Dorr v. McCullough, 114
 v. Simerson, 735
 Dorrance v. Commonwealth, 619, 622
 Dorrity v. Rapp, 701
 Dorsey v. Racine, 373
 v. Redford, 162
 Dosdall v. Olmsted County, 256
 Doso v. Billington, 750
 Doss v. Missouri, etc. R. Co., 492*a*
 Dossett v. St. Paul Lumber Co., 232
 Doster v. Charlotte St. R. Co., 426, 485*b*
 Dotta v. Northern Pac. Ry. Co., 484
 Dotton v. Albion, 369

[References are to sections.]

- Douchy Iron Works v. Nevin, 214a
251
- Dougan v. Champlain Transp. Co.,
60b, 60c, 87, 367, 496
- Dougherty v. Amer. U. Tel. Co., 543
v. Bunting, 371
v. Chicago, etc. R. Co., 520
v. Missouri R. Co., 61, 495,
508
v. Pittsburgh Ry. Co., 494,
516
v. Rome, etc. R. Co., 193
v. West Superior Iron Co.,
112, 207h, 211a
v. Yazoo, etc. Ry. Co., 523
- Doughty v. League, 175
v. Penobscot, etc. Co., 233
- Douglas v. Chicago, etc. Ry. Co., 475
v. Haberstro, 618
v. Rome, etc. R. Co., 675
- Douglass v. East Tennessee, etc. R.
Co., 427
v. Placerville, 254
v. Stevens, 95
- Doulon v. Clinton, 367
- Doupe v. Genin, 710
- Dow v. Des Moines, etc. Ry. Co.,
485c
v. Rowe, 618
v. Winnepesaukee, etc. Co.,
692, 693
- Dowd v. Boston & A. R. Co., 241b
(App. 2151)
v. Chicago, etc. R. Co., 485d,
513a
- Dowdy v. Western Union Tel. Co.,
540a, 756
- Dowell v. Burlington, etc. R. Co.,
207e
v. Chicago, etc. Ry., 207
v. Gen. Steam Nav. Co., 61,
99
v. Guthrie, 57, 686, 688
- Dowling v. Allen, 209a, 219, 230
v. N. Y. Central R. Co., 73,
481a
- Downend v. Kansas C'ty, 334, 334a
- Downer v. Lent, 310
v. Madison Co. Bank, 600
v. St. Paul, etc. R. Co., 334
- Downes v. Harper Hospital, 331
- Downey v. Boston, 338
v. Gemini Min. Co., 1a (App.
2188)
v. Hendric, 523
v. Low, 176
v. Sawyer, 203, 218
- Downing v. Herrick, 303
v. Morgan's Ry. etc. Co., 468
- Downs v. High Point, 287
- Dows v. Cobb, 22
- Dox v. Postmaster-General, 321
- Doyle v. Baird, 207a
v. Baltimore, etc. Ry. Co.,
135a
v. Boston, etc. R. Co., 469,
472
v. Chicago, etc. R. Co., 18
v. Detroit Omnibus Co., 645
v. Eschen, 54
v. Fitchburg R. Co., 188, 488,
503
v. Lynn, etc. R. Co., 104
v. Melendy, 203a
v. Missouri, etc. Trust Co.,
192
v. Pennsylvania, etc. R. Co.,
114
v. St. Paul, etc. R. Co., 195
v. Toledo, etc. Ry. Co., 201
v. Union Pac. R. Co., 700
v. White, 195a
- Drais v. Hogan, 572
- Drake v. Hudson River R. Co., 333
v. Kansas City, 368
v. Kiley, 94
v. Lady Ensley Coal Co., 734
v. Lowell, 333, 350, 352, 353
v. Mount, 61, 626
v. N. Y. Central R. Co., 207b
v. N. Y. Lackawanna, etc. R.
Co., 731
v. Penna. R. Co., 521
v. Philadelphia, etc. R. Co.,
61, 441
v. Rogers, 336
v. San Antonio, etc. Ry. Co.,
187, 207g
v. Seattle, 356
v. Union Pac. R. Co., 207h,
208
- Drapeau v. International Paper Co.,
219a
- Draper v. Tucker, 772 (App. 2077)
- Draun v. Northern, etc. Ry. Co.,
493
- Drawdy v. Atlantic Coast Line Ry.
Co., 469, 483
- Drennen v. Smith (App. 2119)
- Drennon v. Patton-Worsham Drug
Co., 168
v. Smith, 165
- Dressell v. Kingston, 298
- Dresslar v. Citizens' St. Ry. Co., 516
- Drew v. Coulton, 310
v. Farnsworth, 644
v. Hicks, 735
v. New River Co., 359

[References are to sections.]

- Drew v. Sixth Ave. R. Co., 73a, 115,
 510
 v. Sutton, 258, 356
 Driess v. Friederich, 758, 762
 Drinkwater v. Dinsmore, 759
 Driscoll v. Carlin, 146, 334, 336, 374
 v. Fall River, 190
 v. Gaffey, 688a, 764
 v. Humes, etc. Co., 225
 v. New York, 110
 v. Norwich, etc. R. Co., 413,
 459
 Drischman v. McManemim, 739
 Driscoll v. Scanlon, 148
 Dritt v. Snodgrass, 323
 Driver's Admr. v. Southern Ry. Co.,
 65, 207b (App. 2194)
 Droge v. John N. Robins Co. (App.
 2171)
 Drommie v. Hogan, 31
 Drovers' National Bank v. Anglo-
 Am., etc. Co., 583
 Drown v. Northern, etc. Tr. Co., 100,
 493
 Drury v. Butler, 559, 567
 v. Worcester, 335
 Dryfus v. St. Louis, etc. Ry. Co., 742
 Drymala v. Thompson, 204, 205
 Duame v. Chicago, etc. R. Co., 471,
 477
 Dubach v. Hannibal, etc. R. Co., 359
 Dube v. Lewiston, 232
 Dubiver v. City, etc. St. Ry. Co., 73,
 73a, 108
 Dublin v. Taylor, etc. Ry. Co., 164
 Cotton Oil Co. v. Jarrard,
 113
 etc. R. Co. v. Slattery, 54, 87,
 89, 464, 476
 DuBois v. Decker, 61, 95
 v. Deckert, 604, 612, 615
 v. Kingston, 57, 110, 358, 367
 v. Luthmer, 688
 Du Boise v. N. Y. Central R. Co.,
 463, 485
 Dubrule v. Smith, 704
 Dubuque, etc. Ass. v. Dubuque, 375
 Wood, etc. Co. v. Dubuque, 40,
 739
 Ducktown, etc. Co. v. Barnes, 750
 Duckworth v. Johnson, 137, 766, 769
 Dudley v. Bolles, 649
 v. Camden, etc. Ferry Co., 92,
 94, 526
 v. Camden, etc. R. Co., 487
 v. Flemingsburg, 262
 v. Front St. R. Co., 508
 v. Kingsbury, 52
 Dudley v. New Orleans Canal Co.,
 386
 v. North Hampton St. R. Co.,
 653a
 v. Smith, 514
 v. Western U. Tel. Co., 531
 Duerler Mfg. Co. v. Eichhorn, 217
 Duetz v. Louisville, etc. Tr. Co., 485c
 Dufer v. Cully, 629
 Duff v. Budd, 47
 v. Gypsum Co., 717
 Duffees v. Judd, 664
 Duffey v. Consol. Block Coal Co.,
 207e
 Duffin v. Dawson, 712
 Duffy v. Atlantic, etc. Ry. Co., 461,
 463
 v. Baltimore 261
 v. Chicago, etc. R. Co., 472,
 476
 v. Dubuque, 354, 369, 370
 v. N. Y. & Harlem R. Co.,
 419, 437, 443
 v. St. Louis Tr. Co., 758
 v. Upton, 217
 Dugan v. Bridge Co., 395, 737
 v. Chicago, etc. R. Co., 108
 Duggan v. Hansen, 627, 663
 Duggins v. Watson, 61, 146, 154
 Duke v. Kansas City, etc. R. Co.,
 436
 v. Missouri Pac. R. Co., 759
 v. St. Louis, etc. Ry. Co., 138,
 769
 Dukeman v. Cleveland, etc. Ry. Co.,
 766
 Dull v. Cleveland, etc. Ry. Co., 481a
 Dumas v. Stone, 209a
 Dummer v. Milwaukee Elec. Ry.,
 etc. Co., 85a
 Dumont v. Kellogg, 729
 Dumontier v. Stetson, etc. Co., 54
 Dun v. Seaboard, etc. R. Co., 519
 Dunbar v. Boston, 291
 Duncan v. Bancroft, 733
 v. Buffalo, 363
 v. Breithaupt, 557
 v. Findlater, 168, 326
 v. Grand Rapids, 375
 v. Greenville county, 61
 v. Klinefelter, 625
 v. Rome R. Co., 485c
 v. St. Louis, etc. Ry. Co.,
 85a, 99, 457, 491
 v. St. Luke's Hosp., 138
 v. W. U. Tel. Co., 753a
 Dunckle v. Kocker, 627
 Duncombe's Case, 343
 Dundas v. Lansing, 368, 369, 376

[References are to sections.]

- Dundee v. Lansing, 368
 Mortgage Co. v. Hughes, 574.
 Dundon v. N. Y., New Haven, etc.
 R. Co., 466
 Dunekake v. Beyer, 223
 Dungan v. Reed, 22
 Dunham's Appeal, 53
 Dunham v. Miller, 739
 Towing Co. v. Dandelin, 89
 Dunkelberger v. McFarren, 653*a*
 Dunkin v. City of Hoquiam, 289, 339
 Dunkirk, etc. R. Co. v. Mead, 449
 Dunlap v. Northeastern R. Co., 207*b*
 v. Reliance, 516
 v. Richmond, etc. R. Co., 195
 v. Monroe, 317, 319, 321
 Dunleavy v. Stockwell, 669
 v. Sullivan, 195
 Dunn v. Ashville, etc. Ry. Co., 485
 v. Barnwell, 350, 355
 v. Brown county, 256
 v. Brown Co. Agr. Soc., 706
 v. Chicago, etc. Ry. Co. (App.
 2141)
 v. Grand Trunk R. Co., 61,
 488, 523
 v. Great Lakes, etc. Co., 195
 v. Kyle, 589
 v. Newberry, 122
 v. New Haven Steamb. Co.,
 525
 v. New York, etc. Co., 195
 v. Olewein, 356
 v. Western Union Tel. Co.,
 534
 v. Wilcox county, 256
 v. Gunn, 363
 Dunne v. Ry. Co., 485*d*
 Dunnigan v. Chicago, etc. R. Co.,
 455
 Dunning v. Bird, 640
 v. Lake Erie, etc., Ry. Co.,
 508
 Dunphy v. St. Joseph, etc., Stock
 Yards Co., 207*a*
 Dunsback v. Hollister, 365, 371, 701*a*
 Dunston v. City of New York, 286
 Dupen v. Keeling, 562
 Du Pratt v. Lick, 173
 Dupuy v. Union, 338
 Duquesne Distributing Co. v. Green-
 baum, 150
 Durant v. Palmer, 108, 352, 353,
 481*b*, 712
 Durbin v. New York etc. Ry. Co.
 (App. 2069)
 v. Oregon R. Co., 90, 476
 Durden v. Barnett, 629
 Durfee v. Johnstown R. Co., 413
 Durgin v. Kennett, 664
 v. Lowell, 356
 v. Munson, 202
 v. Neal, 343
 Durham v. Eno Cotton Mills, 729
 v. Goodwin, 627
 v. Spokane, 369
 Durkee v. Central Pac. R. Co., 518
 (App. 2055)
 Durkin v. Kingston Coal Co., 244
 v. Sharp, 203*a*, 204, 233*a*
 Durrell v. Johnson, 108
 Duryee v. New York, 747
 Dush v. Fitzhugh, 103
 Duthie v. Washburn, 367, 375
 Dutton v. Greenwood Cemetery Co.,
 706
 v. Lansdowne, 23
 v. Weare, 104, 363
 Duval v. Hunt, 133, 230, 772, 774
 (App. 2128)
 Duvall v. Baltimore etc. R. Co., 426
 v. Barnaby, 626
 v. Michigan Cent. R. Co., 476
 v. Simpson (App. 2063)
 Duxbury v. Vermont Cent. R. Co.,
 414
 Dwight v. Elmira, etc. R. Co., 750
 Dwinell v. Abbott, 114, 466
 Dwinelle v. N. Y. Central, etc., R.
 Co., 154, 490, 513
 Dwyer v. American Ex. Co., 232
 v. Chicago, etc. R. Co., 679,
 766
 v. New York, etc. Ry. Co.,
 508
 v. N. Y., Lake Erie, etc. R.
 Co., 90
 v. St. Louis, etc., R. Co., 211
 v. Salt Lake City, 376
 v. Shaw, 195
 v. Woulfe, 23, 574, 602
 Dyas v. Southern Pac. Co., 195, 223,
 767 (App. 2055)
 Dyer v. Depui, 731
 v. Erie R. Co., 66, 93, 417
 v. Talcott, 107
 v. Woodbury, 619
 Dygert v. Bradley 10, 16
 ads. Crane, 623
 v. Schenck, 14, 279, 365, 374,
 390
 Dynes v. Bromley, 73*a*
 Dysart v. Missouri, etc. Ry. Co.,
 489, 513*a*
 Dysinger v. Cincinnati, etc. R. Co.,
 185, 207*e*
 Dyson v. N. Y. & New England R.
 Co., 463

[References are to sections.]

- Dyson v. New York, etc. Ry. Co., 460, 469
v. Southern Ry. Co., 467
- Eads v. Gains, 701
v. Marshall, 346
v. Metropolitan R. Co., 493, 513
- Eager v. Barnes, 577
- Eagle v. Kabrick, 762
Bank v. Chapin, 581
Packet Co. v. Defries, 60
- Eakin v. Brown, 120, 123, 712
- Eaker v. Western Union Tel. Co., 542
- Eames, Admr., v. Town of Brattleboro (App. 2100)
v. Patterson, 657
v. Salem, etc. R. Co., 449
- Ean v. Chicago, etc. Ry. Co. (App. 2105)
- Earhart v. Youngblood, 628
- Earing v. Lansingh, 649
- Earl v. Camp, 303
v. Cedar Rapids, 343
v. Crouch, 705
v. St. Louis, etc. Ry. Co., 448
v. Van Alstine, 626, 629
- Earle v. Hall, 119, 699
- Early v. Charleston Basket, etc. Co., 99
v. Louisville, etc. Ry. Co., 468
County v. Fain, 257
- Earp v. Falkner, 633
- Easley v. Missouri Pac. R. Co., 472
- Eason v. East Tenn., etc. R. Co., 481a
- East Freemantle v. Annois, 283
- East Haddam Bank v. Scovil, 582, 585
- East Linn, etc. Ry. Co. v. Culbertson, 120a, 413
- East Line, etc. R. Co. v. Rushing, 508
v. Scott, 190, 207b, 207i
- East Omaha R. Co. v. Godola, 523
- East River Bank v. Kennedy, 572
- East Saginaw R. Co. v. Bohn, 46, 77, 84
- East St. Louis Ry. Co. v. Allen 60a
v. Eisentraut, 733
v. Gerber, 444
v. Hightower, 195
v. Jenks, 481a
- East St. Louis, etc. Ry. Co., v. Meeker, 231
v. O'Hara, 461, 467
v. Wachtel, 485bd
- East St. Louis Storage Co. v. Crow, 207
- East Tenn. Coal Co. v. Harshaw, 481a
- East Tennessee, etc. R. Co., v. Aiken, 11, 102, 195
v. Bayliss 47, 419, 430
v. Bridges 203, 207b
v. Conner, 520, 521
v. Daniel, 428
v. De Armond, 233, 238
v. Duffield, 91, 210
v. Duggan, 103
R. Co. v. Fain, 103, 472, 483
v. Feathers 470
v. Fleetwood, 485d, 513
v. Green, 523
v. Gurley, 190, 207a, 235
v. Hall, 666
v. Hartley, 485
v. Head, 209a
v. Hesters, 666, 676
v. Holmes, 520
v. Hughes, 520
v. Hull, 102
v. Kane, 410
v. King, 493, 748
v. Kornegay, 475
v. Lee, 748
v. Lilly, 135
v. McClure, 760
v. Maloy, 133
v. Markens, 66a
v. Massengill, 520
v. Miller, 517
v. Nashville, etc. Ry. Co., 250
v. Reynolds, 195
v. Rush, 235, 241
v. St. John, 99, 483
v. Scales, 431, 469
v. Smith, 60a, 207b, 233a
v. Stewart, 222
v. Swaney, 469
R. Co. v. Turaville, 203
etc. R. Co. v. Watson, 506
v. Watters, 419, 448
v. Winters, 13, 457
v. White, 458, 469
v. Wright, 53, 206
- Easter v. Hall, 168
v. Little Miami R. Co., 437
- Eastern Ky. Telp. Co. v. Hardwick, 556c
- Eastern Kentucky, etc. Tel. Co. v. Mellon, 224.
v. Powell, 480, 484
- Eastland v. Clark, 207g
v. Fogo, 334
- Eastman v. Amoskeag Mfg. Co., 737
v. Clackamas county, 256
v. Curtis, 207g

[References are to sections.]

- Eastman v. Judkins**, 621
 v. Lake Shore R. Co., 207*b*
 v. Meredith, 256, 258, 285, 337
 v. Scott, 628
 v. Sanborn, 742
Easton v. Houston, etc. R. Co., 185
 v. Neff, 262
 v. Waters, 493
Eastwood v. Retsof Min. Co., 202
Eaton v. Boston, etc. R. Co., 31, 65, 486, 500
 v. Crips, 646, 654
 v. Delaware, etc. R. Co., 61
 v. Erie Ry. Co., 476
 v. European, etc. R. Co., 168
 v. Fairbury Waterworks Co., 265
 v. Fitchburg R. Co., 463*a*, 466
 v. Hagl, 729
 v. Manitowoc Co., 253
 v. New York, etc. Ry. Co., 59
 v. Oregon R. Co., 679
 v. Weiser, 286
 v. Wilmington City Ry. Co., 497, 516, 517, 519
 v. Winnie, 633
Eberhardt v. Harkless, 559, 568
Eccles v. Darragh, 361
 v. Stevenson, 562
Eckels v. Muttschall, 66
Eckensberger v. Amend, 654
Eckerd v. Chicago, etc. R. Co., 509, 759
Eckert v. Long Island Ry., 85*b*
 v. Pennsylvania, etc. Ry. Co., 22
Eckes v. Stetler, 22
Eckhart v. Wickwire, 343
 etc. Co. v. Schafer, 192
Eckert v. Long Island Co., 85
Ecliff v. Wabash, etc., R. Co., 73, 489
Economy Light etc. Co. v. Stephen, 769
Eddy v. Adams, 195
 v. Bodkin, 215
 v. Dulaney, 432
 v. Elliott, 493
 v. Evans, 419, 427
 v. Kinney, 664
 v. Lafayette, 432, 672, 676, 678, 679, 751
 v. Prentice, 193
 v. Rider, 493
 v. Rogers, 209*a*
 v. Syracuse Rapid Tr. Co., 486
 v. Wallace, 520
Eden v. Lexington, etc. R. Co., 124
Edenville v. Chicago, etc. R. Co., 334
Edgar v. Costello, 124 (App. 2093)
 v. Walker, 120
Edge v. Atlantic, etc. Ry. Co., 99
Edgerly v. Concord, 253, 265
 v. Long Island, etc. Ry. Co., 463
Edgerton v. N. Y. & Harlem R. Co., 61, 488, 502, 513*a*, 516, 523
 v. New York 295
Edgington v. Burlington, etc. Ry., 34, 73*a*
Edmondson v. Moberly, 274, 734
Edmundson v. Pittsburgh, etc. R. Co., 173
Edrington v. Louisville, etc. R. Co., 673
Edsall v. Howell, 750
 v. Vandemark, 644, 645
Edson v. Central R. Co., 27, 426, 427
 v. City of Olathe, 253, 262, 281
Edwards v. Beebe, 751
 v. Buffalo, etc. R. Co., 444
 v. Cahawba, 550
 v. Carr, 31
 v. Charlotte, etc. R. Co., 735
 v. Chicago, etc. R. Co., 477
 v. Dickinson, 321
 v. Hannibal, etc. R. Co., 421
 v. Mfg. Bldg. Co., 60, 487, 717*a*
 v. McLean, 709
 v. N. Y. & Harlem R. Co., 144, 704, 709
 v. Jones, 157
 v. Lake Shore, etc. R. Co., 493
 v. Lord, 57, 495
 v. Philadelphia, etc., R. Co., 451
 v. Pocahontas, 260
 v. Three Rivers, 368, 369, 739
 etc. v. Pflanz, 624
Efron v. Wagner Car Co., 526
Eagan v. Browne, 745
 v. Montana, etc. Ry. Co., 457, 480
Egan v. Dry Dock, etc. R. Co., 195, 683
Egbert v. Lake Shore Ry. Co., 407*a*
Egenor v. N. Y. & Rockaway Beach R. Co., 412
Egerer v. N. Y. Central R. Co., 332
Eggleston v. Columbia Turnp. Co., 386
Eginoire v. Union county, 766

[References are to sections.]

- Ehrgott v. New York, 26, 28, 30, 55,
255, 281, 289, 296, 346, 739,
740, 742, 749a, 754, 760
- Elhmcke v. Porter, 215
- Ehrisman v. East Harrisburg R. Co.,
485c
- Ehrman v. Nassau St. Ry. Co., 73a
- Eichel v. Senhenn, 634, 639
- Eichengreen v. Louisville, etc. Ry.
Co., 145
- Eicholz v. Niagara Falls, etc. Co.,
206, 207h
- Eichhorn v. Missouri, etc. R. Co.,
510
- Eichler v. St. Paul Furniture Co.,
195
- Eicholz v. Niagara Falls, etc. Co.,
742, 758
- Eichorn v. New Orleans, etc. Ry. Co.,
180, 769
v. Central, etc. Ry. Co., 417
- Eighmie v. Rome etc. R. Co., 666,
678
- Eighmy v. Union Pac. Ry. Co., 331
- Elkenberry v. Bazaar, 256
- Eilert v. Green Bay, etc. R. Co., 463
- Einstein v. Dunn, 617
- Eisele v. Oddie, 739
- Eisenberg v. Missouri Pac. R. Co.,
705
- Eisenbrey v. Pennsylvania Co., 119
- Ekendahl v. Hayes, 218
- Ela v. Postal Tel., etc. Co. (App.
2079)
- Elam v. Mt. Sterling, 354, 355, 356
v. Western Union Tel. Co.,
755
- Elbin v. Wilson, 310
- Elder v. Bemis, 161
v. Lykens Valley Coal Co., 30,
734
- Eldred v. Mackie, 163
- Eldridge v. Atlas S. S. Co., 207h,
207i, 233
v. Boston, etc. Ry. Co., 520
v. Long Island R. Co., 89, 519
- Eleanor, The, 322
- Elgin v. Kimball, 274
v. Renwick, 86, 377
Hyd. Co. v. Elgin, 750
etc. R. Co., v. Brown, 485c
v. Herath, 207
v. Hoadley, 473
v. Lawlor, 463a
v. Myers, 215
v. Raymond, 72
v. Thomas, 484
v. Wilson, 516
- Eliason v. Grove, 748
- Elie v. Cowles, 208, 215
- Elizabethtown, etc. R. Co. v. Combs,
334
- Elkhardt v. Ritter, 346
- Elkington v. Holland, 574
- Elkins v. Boston, etc. R. Co., 73, 87,
476, 481
v. McKean, 38, 117
v. Penn. R. Co., 192, 196
- Elkton, etc. Min. Co. v. Sullivan,
208, 209a
- Ell v. Northern Pac. R. Co., 232,
241a
- Elledge v. National City, etc. R. Co.,
206, 241a
- Ellefson v. Singer Mfg. Co., 151, 157
- Ellet v. St. Louis, etc. R. Co., 39,
113, 517
- Ellick v. Wilson, 85a
- Eliff v. Oregon, etc. Ry. Co., 203,
222
- Ellinger v. Phila., etc. R. Co., 500
- Ellington v. Beaver Dam Co., 235,
238
- Ellington v. Great Northern Ry. Co.,
480
- Elliott v. Canadian Pac. Ry. Co.,
189, 207b
v. Carlson, 705
v. Chicago, etc. R. Co., 56,
207, 241a
v. Concord, 358
v. Field, 122
v. Fitchburg R. Co., 729
v. Hall, 38
v. Herz, 628
v. Kansas City, 95
v. Newport R. Co., 519
v. N. Y. Central R. Co., 493
v. Northeastern R. Co., 701
v. Oil City, 274
v. Philadelphia, 291
v. St. Louis, etc. R. Co., 65,
192
v. Sawyer, 207e
v. Western U. Tel. Co., 543
v. Wilmington City Ry. Co.,
509, 518, 758
v. Amer. Tel. Co., 534, 537,
543, 545, 553
- Ellis v. Boston etc. Ry. Co., 485bd
v. Chicago, etc. Ry. Co., 509
v. Cowles & Co., 214a
v. Duncan, 735
v. Durkee, 739
v. Great Western R. Co., 485
v. Lake Shore, etc. R. Co., 90,
463, 476
v. Loftus Iron Co., 627

[References are to sections.]

- Ellis v. Lynn, etc. R. Co., 485b
 v. McNaughton, 361
 v. N. Y., Lake Erie, etc. R. Co., 197, 410
 v. Pennsylvania Ry. Co., 475
 v. Peru, 376
 v. Portsmouth, etc. R. Co., 676
 v. Sheffield Gas Co., 175
 v. Southern Ry. Co., 244
 v. Southwestern R. Co., 61, 451a
 Ellison v. Georgia R. Co., 413
 Ells v. Pacific R. Co., 435
 Ellsworth v. Campbell, 562
 v. Central R. Co., 416
 v. Chicago, etc. R. Co., 488, 493
 v. Lord, 703
 Elmer v. Locke, 186, 193; 241
 Elmgreen v. Chicago, etc. Ry. Co., 207, 207b
 Elmore v. Drainage Com'rs, 256
 v. Hill, 54, 619
 v. Overton, 323
 v. Seaboard, etc. Ry. Co., 207
 Elmwood v. Western Un. Tel. Co., 539a
 Elec. St. Ry. Co. v. Ross, 73
 El Paso county v. Bish, 256
 v. Causey, 285
 Foundry, etc. Co. v. DeGuereque, 187
 Mining Co. v. Ewing, 207b
 Ry. Co. v. Adkins, 463
 etc. Ry. Co. v. Foth, 187, 195, 197
 v. Kelly, 189
 v. Murphy, 758, 759
 v. O'Keefe, 217
 v. Sawyer, 745, 760
 Elrod v. Hamner, 625a
 Elster v. City of Springfield, 1a, 11
 Elting v. East Chester, 285
 Elwell v. Milwaukee St. Ry. Co., 49
 Elwood v. Western Union Tel. Co., 543
 Elec. St. Ry. v. Ross (App. 2061)
 Ely v. Des Moines, 375
 v. Niagara county, 261
 v. Pittsburg, etc. R. Co., 114
 v. Rochester, 737
 v. St. Louis, 253, 274
 v. San Antonio Elec. Ry. Co., 208
 v. Thompson, 303
 Elyton Land Co. v. Mingea, 66, 376
 Elze v. Baumann, 645
 Elzig v. Boles, 363
- Emblen v. Myers, 748
 Embler v. Wallkill, 334a, 354
 Embrey v. Owen, 729, 730
 Emerson v. Lowell Gas Co., 60b, 692, 693
 Emery v. Boston & M. R. Co., 742
 v. Raleigh, etc. R. Co., 114
 Emma Oil Co. v. Hale, 209a
 Emmerling v. Graham, 600
 Emmerson v. St. Louis, etc. R. Co., 434
 Emmons v. Minneapolis, etc. R. Co., 750
 v. Sterane, 628, 637
 Emory v. Minneapolis Exposition, 704
 v. Philadelphia, 351
 Empire Laundry Co. v. Brady, 690
 Emporia v. Schmidling, 36, 376
 Endess v. Chicago, 350
 Engel v. Breitreit, 108
 v. Eureka Club, 175
 v. New York, etc. Ry. Co. (App. 2151)
 v. Smith, 719
 Engelhardt v. Delaware, etc. R. Co., 190
 v. Central, etc. Ry. Co., 705
 Engelking v. City of Spokane, 203a
 Engine Works v. Randall, 203a
 England v. Boston, etc., R. Co., 520
 Engle v. Chicago, etc. R. Co., 58
 English v. Brennan 159
 v. New Haven, etc., R. Co., 359
 v. Southern Pac. Co., 460, 467
 Engstrom v. Ashland Iron Co., 192, 197
 v. Minneapolis, 373
 Enk v. Brooklyn R. Co., 525
 Ennis v. Gray, 698
 Enos v. Rhode Island, etc. Ry. Co., 488
 Enright v. Atlanta, 110, 369
 v. San Francisco, etc. R. Co., 424, 451a
 v. Toledo, etc. R. Co., 241
 Ensign v. Livingston county, 256
 Ensley R. Co. v. Chewing, 468
 Ensley Co. v. Otwell, 634
 Entwistle v. Feighner, 60a
 Enwright v. Oliver, 235
 Ephland v. Missouri, etc. Ry. Co., 513
 Eppendorff v. Brooklyn R. Co., 87, 510, 520
 Epperson v. International, etc. Ry. Co., 460
 v. Postal Tel., etc. Co., 207h

[References are to sections.]

- Eppstein v. Missouri Pac. Ry. Co., 480, 484
- Erd v. Chicago, etc. R. Co., 674, 680
v. St. Paul, 375, 376
- Erdham v. Watab Rapids, etc. Co., 728
- Erhart v. Wabash Ry. Co., 764
- Erickson v. Duluth, etc. R. Co., 451a
v. Kansas City Ry. Co., 225
v. Milwaukee, etc. Co., 211a
v. Pennsylvania Ry. Co., 680
v. St. Paul, etc. R. Co., 100, 203, 483
v. Twenty-third St. R. Co., 54
- Erie v. Caulkins, 298
v. Magill, 87, 376
v. Schwingle, 108, 285, 289, 358, 368, 374, 376
Iron Works v. Barber, 740, 744
R. Co. v. Decker, 675
v. Schomer, 193
v. Schultz, 476, 478
v. Schuster, 73
Ry. Co. v. Weinstein, 73a, 472
Tel. Co. v. Grimes, 93, 754
- Erjanschek v. Kramer, 235
- Ernst v. Hudson River R. Co., 53, 86, 91, 92, 111, 466, 468, 477
v. West Covington, 262
- Erwin v. Blake, 573
v. Kansas, etc. Ry. Co., 516, 522
v. Neversink Steamboat Co., 772
v. St. Louis, etc. R. Co., 73a (App. 2075)
- Erye v. St. Louis, etc. Co., 484
- Esberg, etc. Co. v. City of Portland, 286
- Escher v. Carroll county, 760
- Esher v. Mineral, etc. Co., 770
- Eshleman v. Martie, 750
- Eskildsen v. City of Seattle, 73a
- Esler v. Wabash, etc. R. Co., 463
- Esrey v. Southern Pac. R. Co., 475, 483, 484
- Ess v. Truscott, 597
- Essenwine v. Pennsylvania R. Co. (App. 2088)
- Essex Co. v. Kelley, 204
- Estelle v. Lake Crystal, 358
- Estes v. Troy, 334
- Eswin v. St. Louis, etc. R. Co., 480
- Etheridge v. Central of Georgia Ry. Co., 704
- Ethridge v. Philadelphia, 289
- Eufaula v. Simmons, 274, 750
- Euler v. Sullivan, 701a
- Eureka Co. v. Bass, 215
Block, etc. Co. v. Wells, 186
etc. Mills v. Western Union Tel. Co., 755
- Eustace v. Jahns, 343
- Euting v. Chicago, etc. Ry. Co., 154a
- Evans v. Adams Express Co., 654
v. American Iron Co., 218
v. Atlantic, etc. R. Co., 181
v. Chamberlain, 190, 207g, 217
v. Chessmond, 717
v. Chicago, etc. Ry. Co., 34
v. Concord R. Co., 13, 481b
v. Davidson, 145
v. Foster, 303
v. Elwood, 739
v. Governor, 625a
v. Huntington, 367
v. Iowa City, 368
v. Kankakee, 253, 291
v. Keystone Gas Co., 60b, 693, 750
v. Kodak Co., 215, 221
v. Lake Shore, etc. R. Co., 466
v. Louisiana Lumber Co., 232
v. Louisville, etc. R. Co. 241c (App. 2157, 2158)
v. McDermott, 628
v. Merriweather, 729
v. Murphy, 708
v. Newland, 125
v. Oregon, etc. Ry. Co., 773
v. Rudy, 526, 751
v. Thurston, 619
v. Utica, 86, 87, 375, 376
v. Watrous, 559, 569, 573
v. Western Union Tel. Co., 754, 755
- Laundry Co. v. Crawford, 203, 218
etc. Brick Co. v. St. Louis, etc. R. Co., 467
- Evanston v. Fitzgerald, 353
v. Gunn, 285
- Evansville v. Decker, 255, 262, 271, 272, 274
v. Frazier 353
v. Gas, etc. Co. v. Raley, 216
Hoop Co. v. Bailey, 29a, 760
etc. Ry. Co. v. Allen, 414
etc. R. Co. v. Barbee, 424
v. Barnes, 207c, 489, 513a
v. Baum, 230
v. Berndt, 108, 481b
v. Carvener, 21, 376, 408
v. Cates, 493
v. Clements, 476, 478
v. Crist, 408
v. Darting, 512

[References are to sections.]

- Evansville, etc. R. Co. v. Dick, 407a
 v. Duel, 222
 v. Duncan, 521
 v. Gentry, 485c
 v. Griffin, 97, 705
 v. Guyton, 189, 190
 v. Henderson, 207c, 218, 241
 v. Hiatt, 85, 113, 480
 v. Holcomb, 203
 v. Krapf, 207, 485
 v. Lowdermilk, 61, 102
 v. Maddux, 219a
 v. Marohn, 482
 v. Mills, 1
 v. Mosier, 417a, 455
 v. Ross, 422
 v. Senhenn, 367
 v. Spiegel, 94, 99
 v. Willis, 434
 v. Wilter, 369
 v. Wolf, 71, 74
 Evarts v. Kiehl, 303
 v. St. Paul, etc. R. Co., 99
 Evensen v. Lexington, etc. Ry. Co.,
 66 (App. 2069)
 Everett v. Great Northern, etc. Ry.
 Co., 470
 v. Hydraulic Co., 16, 17, 701a,
 732
 v. Los Angeles, 653
 v. Los Angeles R. Co., 480,
 480c, 653
 v. Oregon, etc. R. Co., 489
 Evers v. Hudson River Bridge Co.,
 363
 v. Long Island City, 289
 v. Philadelphia Traction Co.,
 73a, 485c
 v. Wiggins Ferry Co., 495,
 515
 Evertson v. Sutton, 303
 Every v. Rains, 206
 Evison v. Chicago, etc. R. Co., 485
 Eviston v. Cramer, 749
 Ewald v. Chicago, etc. R. Co., 188,
 241
 Ewen v. Chicago, etc. R. Co., 65,
 73a (App. 2105)
 Ewan v. Lippincott, 225
 Ewing & Sons v. Callahan, 94b
 Ewing v. Chicago, etc. R. Co., 419,
 435, 453
 v. Lenark Fuel Co., 219
 v. North Versailles, 55
 v. Pittsburgh, etc. R. Co., 761
 Excelsior Brick Co. v. Haverstraw,
 336
 Electric Co. v. Sweet, 698
 Excelsior Exchange Bank v. Sutton
 Bank, 581
 Fire Ins. Co. v. Delaware, etc.
 Canal Co., 399, 725
 Nat. Bank v. Third Nat.
 Bank, 382, 578
 Explorer, The, 131
 Exton v. Central, etc. Ry. Co., 490,
 501, 511, 516
 Eyre v. Jordan, 709
 Fabens v. Mercantile Bank, 582, 585,
 598
 Faber v. Carlisle Mfg. Co., 232
 v. St. Paul, etc. R. Co., 467,
 478
 Face v. Ionia, 334a
 Factors, etc. Ins. Co. v. Werlein, 61
 Faerber v. Scott Lbr. Co., 184a
 Fagan v. Rhode Island Co., 516
 Fagundes v. Central Pac. R. Co., 241
 Fahey v. Harvard, 367, 384
 Fahn v. Reichart, 669
 Fahy v. Fargo, 581, 587a
 Failing v. Fargo, 587a
 Fair v. Philadelphia, 271, 274, 287
 Fairbank Canning Co. v. Innes, 207f
 Fairbanks v. Boston Storage Ware-
 house Co., 151
 v. Haentzche, 203
 v. Kerr, 28, 35, 55
 v. San Francisco, etc. Ry. Co.,
 22
 Fairbury Brick Co. v. Chicago, etc.
 Ry. Co., 406
 Fairchild v. Bentley, 629
 v. California Stage Co., 51,
 495, 516
 Fairfield v. Baldwin, 617
 Fairlawn Coal Co. v. Scranton, 287
 Fairmount Cemetery v. Davis, 217
 etc. R. Co. v. Stutler, 116,
 486, 508
 Fairweather v. Quarry Co., 224
 Faith v. New York, etc. Ry. Co.
 (App. 2171)
 Fajardo v. New York Cent. Ry. Co.,
 769 (App. 2082)
 Fake v. Addicks, 630, 639
 Fales v. Cole, 664
 v. Dearborn, 652
 Falk v. Havermeyer (App. 2171)
 Falkins v. Boston, etc. Ry. Co., 497
 Falkiner v. Great Southern, etc. R.
 Co., 510
 Fall River Works v. Fall River, 334
 Fallan v. Steamboat Co., 232
 Fallon v. Boston, 47, 375

[References are to sections.]

- Fallon v. Central Park, etc. R. Co., 82
 v. O'Brien, 365, 634
 v. West End St. Ry. Co. (App. 2151)
- Falls v. San Francisco, etc. R. Co., 502, 506
 Mfg. Co. v. Oconto River Imp. Co., 729
- Falvey v. Northern Transp. Co., 550
- Fanjoy v. Seales, 707
- Fanning v. White, 688
- Fanquet v. New York, etc. Ry. Co., 235, 236
- Farber v. Missouri Pac. R. Co., 151
 v. Roginsky, 628
- Farell v. Bannerman, 689
- Faren v. Sellers, 122, 166, 233
- Faris v. Hoberg, 705
- Farish v. Reigle, 51, 486, 495, 514, 516
- Farley v. Chicago, etc. R. Co., 417
 v. Cincinnati, etc. Ry. Co., 486
 v. New York, 263, 358, 370
 v. Norfolk, etc. Ry. Co., 518, 704
 v. Philadelphia, 350
 v. Picard, 639
 v. Philadelphia Traction Co., 497
 v. Wilmington, etc. Ry. Co., 66
- Farlow v. Kelly, 519
- Farly v. St. Louis, etc. R. Co., 444
- Farman v. Ellington, 313, 340, 367
- Farmer, The v. McCraw, 61, 94
- Farmers' Bank v. Champlain Transp. Co., 503, 544, 550
 v. Chester, 313
 v. Newland, 580a, 583, 587a
 v. Owen, 584
 etc. Bank v. Third Nat. Bank, 580
 etc. Nat'l Bank v. Hanks, 487, 719a
 etc. Bank v. Merchants' Bank, 579
 Loan, etc. Co. v. Oregon, etc. R. Co., 727a
- Farnandis v. Great Northern Ry. Co., 283
- Farnham v. Camden, etc. R. Co., 505
- Farnom v. Boston, etc. Ry., 523
- Farnum v. Concord, 350, 351
- Farquar v. Roseberg, 289
- Farr v. Spartenburg, etc. R. Co., 413
 v. Swigart (App. 2099)
- Farrand et al. v. Land, etc. Co., 568
- Farrand et al. v. Marshal, 701
- Farrant v. Barnes, 690
- Farrar v. Greene, 87, 346, 375, 378
- Farrell v. Eastern Machinery Co. (App. 2127)
 v. North Elba, 376
 v. Oldtown, 350
- Farrelly v. Cincinnati, 8, 739
- Farrer v. Greene, 87
- Farrigan v. Pevear, 331
- Farrington v. Boston, etc. Co., 509
 v. Cheponis, 151, 739
 v. Rutland, R. Co., 672
- Farris v. Cass Ave. R. Co. 483 (App. 2075)
 v. Southern Ry. Co., 108
- Farrow v. Hoeffcker, 748
- Farve v. Louisville, etc. R. Co., 460
- Farwell v. Boston & Worcester R. Co., 178, 180, 235, 241
- Fash v. Third Ave. R. Co., 408, 480
- Fass v. Western Union Tel. Co., 756
- Fassbinder v. Missouri, etc. R. Co., 717
- Fassett v. Roxbury, 114
- Fassion v. Landrey, 365
- Faucet v. Garden City Bank, 582
- Faucheaux v. St. Martinville, 299
- Faulkner v. Aurora, 262
 v. Erie R. Co., 189
 v. Mammoth Min. Co., 207e, 208
- Faust v. Pope, 688a
- Fauvia v. New Orleans, 261
- Favor v. Boston, etc. R. Co., 410, 426
- Favre v. Louisville, etc. R. Co., 113, 519
- Fawcett v. Dole, 310
 v. York, etc. R. Co., 418, 449
- Fay, Admr. v. Kent (App. 2100)
 v. Minneapolis, etc. R. Co., 410, 473
 v. Parker, 61, 741
 v. Prentice, 721
- Faxon v. Butler, 710
- Fearns v. New York, etc. Ry. Co., 201
- Fearons v. Kansas City, etc. Ry. Co., 457
- Feary v. Metropolitan St. Ry. Co., 495, 516, 518
- Feather v. Reading, 353
- Feaver v. Montreal Tel. Co., 543
- Federal St., etc. R. Co., v. Gibson, 494
- Federal Lead Co. v. Lohr, 223
 v. Swyers, 209a, 218
- Feddeck v. St. Louis Car Co., 207a

[References are to sections.]

- Fee v. Columbus, 368
 Feeley v. Pearson Cordage Co., 209a, 214
 Feeney v. Long Island R. Co., 466, 477, 743
 Fehlhauer v. City of St. Louis, 120
 Fehnrich v. Michigan Cent. R. Co., 73a, 473
 Feil v. West, etc. Ry. Co., 501
 Feille v. San Antonio Tr. Co., 61
 Feital v. Middlesex R. Co., 104, 120a, 503, 516
 Feitl v. Chicago City Ry. Co., 516
 Felch v. Allen 207
 v. Concord R. Co., 99, 481, 484
 v. Town of Weare, 258
 Felder v. Louisville, etc. R. Co., 480
 Feldheim v. Brooklyn, etc. Ry. Co., 523
 Feldman v. Detroit United Ry. Co., 73a
 v. Sellig, 639
 Feldschneider v. Chicago, etc. Ry. Co., 494, 505, 516
 Felice v. N. Y. Central R. Co., 203
 Fell v. Burlington, etc. R. Co., 467
 v. Brown, 557
 v. Northern Pac. R. Co., 493
 v. Union Pac. Ry. Co., 747
 Fellows v. Gilhuber, 709
 Felt v. Puget Sound Elec. Ry. Co., 773
 v. Vicksburg, etc. R. Co., 735
 Feltham v. England, 195, 227
 Felton v. Aubrey, 73, 481a
 v. Bullard (App. 2178)
 v. Deall, 144
 v. Girardy, 207i, 218
 v. Holbrook, 494, 516
 Felver v. Central Elec. Ry. Co., 1a
 Fenaille v. Coudert, 559, 574
 Fenderson v. Atlantic City R. Co., 187, 193, 195, 223
 Feneff v. Boston, etc. Ry. Co., 188, 192, 209
 v. New York, etc. Ry. Co., 773
 Feneran v. Singer Mfg. Co., 151
 Fennell v. Seguin St. R. Co., 662
 Fenneman v. Holden, 88
 Fenner v. Crips, 162
 Fennevan v. Singer Mfg. Co., 146
 Fennimore v. New Orleans, 285
 Fent v. Toledo, etc. R. Co., 30, 666, 674
 Fenton, Matter of, 561
 v. Dublin Steam Packet Co., 162
 Fenton v. Second Ave. R. Co., 485a
 Fererro v. United S. Tel. Co., 755
 Ferguson v. Anglo-American Tel. Co., 754
 v. Boston Gaslight Co., 698
 v. Central Ry. Co., 54
 v. Columbus, etc. R. Co., 73, 78
 v. Firmenich Mfg. Co., 734, 750
 v. Hubbell, 164, 666, 669
 v. Kinnoull, 122
 v. Truax, 122, 487, 488, 719a
 v. Virginia, etc. R. Co., 417a
 v. Wisconsin Cent. R. Co., 408
 Fernandez v. Sacramento, etc. R. Co., 94, 114
 Fernbach v. Waterloo, 110
 Fernow v. Dubuque, etc. R. Co., 441
 Fero v. Buffalo, etc. R. Co., 85, 86, 680
 Ferrari v. Beaver Hill Coal Co., 60c, 203, 218
 Ferrara v. Aurie Mining Co., 134a
 Ferrell v. Erie Ry. Co., 472
 Ferren v. Old Colony R. Co., 192
 Ferrera v. Western Union Tel. Co., 542, 543, 753a
 Ferrier v. Trepannier, 343
 Ferris v. Aldrich, 719, 719a
 v. Carson Water Co., 265
 v. Detroit Bd. of Education, 721
 v. St. Louis, etc. R. Co., 449
 v. Union Ferry Co., 511
 Ferriss v. Berlin Machine Works, 215
 Ferriter v. Tyler, 323
 Ferry v. Manhattan R. Co., 500, 516
 Fertich v. Michener, 323
 Fetting v. Winch, 151
 Fettritch v. Dickenson, 480
 Fewell v. Southern Ry. Co., 207
 Fewings v. Mendenhall, 500, 511, 512, 516
 Ficken v. Jones, 58, 634
 Fickle v. St. Louis, etc., R. Co., 436
 Field v. Apple River Log Co., 737
 v. Chicago, etc. R. Co., 62
 v. French, 117a
 v. Gibbs, 562
 v. Gowdy, 13, 27a
 v. Lelean, 179
 v. N. Y. Central R. Co., 58, 675, 676
 v. Wallace, 591, 592
 v. Winheim, 719a
 Fielder v. St. Louis, etc. Ry. Co., 154, 483

[References are to sections.]

- Fields v. Johnston City, 298
 v. Lancaster Cotton Mill, 146
 Fiero v. N. Y. Central, etc. R. Co.,
 213
 Fife v. Oshkosh, 343, 368
 Fifield v. Northern R. Co., 185, 192
 v. Phoenix, 262
 Fik Hon v. Spring Valley Water
 Co., 680
 Filbert v. Dechert, 729
 v. Delaware, etc. Canal Co.,
 195
 Filburn v. People's Palace Co., 629
 Filer v. N. Y. Central R. Co., 54, 87,
 91, 92, 519, 520, 743, 760
 Files v. Boston, etc. R. Co., 91
 Fillebrown v. Hoar, 761
 Fillingham v. St. Louis Tr. Co., 494,
 520
 Filliter v. Phippard, 17, 665, 668
 Fillmore v. Booth, 659
 Finan v. Sutch, 195, 207
 Finch v. Bangor, 354
 v. Board, etc., 267
 v. Board of Education, 295,
 329
 v. Karste, 582, 584, 587a
 Findlay v. Russell Wheel Co., 232
 v. Western U. Tel. Co., 554
 Brewing Co. v. Bellman, 703
 Fineman v. Phila. Rapid Tr. Co., 73a
 Fines v. Sillery, 190
 Finck v. Garman (App. 2091)
 Finckle v. Village of Valatie, 338
 Fing v. Western Union Tel. Co.,
 540a
 Finer v. Nichols, 708, 708a
 Fink v. City of Des Moines, 73a
 v. Evans, 427
 v. Coe, 110
 v. Des Moines Ice Co., 192
 v. Missouri Furnace Co., 73a
 v. Potter, 51
 v. St. Louis, 298, 358
 Finklestein v. N. Y. Central R. Co.,
 461, 471, 481a
 Finlayson v. Chicago, etc. R. Co.,
 480
 v. Utica Mining Co., 195
 Finley v. Bradley, 656
 v. Hudson R. Co., 489
 v. City of Kendallville, 274
 v. Langston, 670, 671
 v. Louisville Ry. Co., 217
 Finn v. Adrian, 376
 v. Clark, 13
 v. Western Ry. Corp., 115
 Finnegan v. Chicago, etc. R. Co., 490
- Finnegan v. Fall River Gas Works
 Co., 114, 693, 696
 v. Moore, 356
 v. New York Contracting Co.
 (App. 2171)
 Finnell v. Delaware, etc. R. Co., 197,
 207
 Finney v. Curtis, 628
 Finnick v. Boston, etc. St. Ry. Co.,
 485c
 Firebaugh v. Seattle, etc. Co., 516
 Fireman's, etc. Co. v. Northern Pac.
 Ry. Co., 674
 Firkins v. Chicago, etc. R. Co., 60a
 Firmstone v. Wheelley, 736
 First Nat. Bank v. Bank of Denver,
 584
 v. Chandler, 189
 v. City Nat. Bank, 583
 v. Fourth Nat. Bank, 583,
 587, 587a
 of Memphis v. First Nat'l
 Bank of Clarendon, 580a
 v. German Bank, 585
 v. Graham, 49
 v. Mansfield Savings Bank,
 582
 v. Ocean Nat. Bank, 24, 588
 v. Quinby, 582
 v. Rex, 588
 v. Sprague, 579, 582, 592
 v. Western U. Tel. Co., 543,
 739, 753a, 754
 v. Zent, 588
 Firth v. Bowling Iron Co., 661, 662,
 701a
 Fischer v. Columbia, etc. Ry. Co.,
 495, 513a
 v. Langbein, 567
 Fish v. Chicago, etc. R. Co., 666,
 675
 v. Dodge, 118, 120, 709a
 v. Ferris, 121
 v. Illinois Cent. R. Co., 207b
 v. Kelly, 562
 v. Nethercutt, 625a
 v. Skut, 628, 636
 v. Waverly Elec. etc. Co., 698
 Fishburn v. Burlington, etc. Ry.
 Co., 34, 73, 760
 Fisher v. Boston, 265
 v. Boston, etc. Ry. Co., 518
 v. Cambridge, 379
 v. Chicago, etc., R. Co., 185
 v. Clark, 633
 v. Cook, 144, 719
 v. Crosby Mfg. Co., 203
 v. Farmers' Loan, etc. Co.,
 428

[References are to sections.]

- Fisher v. Feige, 730
 v. Franklin, 380
 v. Golladay, 690
 v. Gordon, 619
 v. Jansen, 719, 758, 760
 v. Metropolitan R. Co., 144, 154, 749
 v. Monongahela R. Co., 478
 v. Mount Vernon, 66
 v. New Bern, 1a
 v. New York, 373
 v. Oregon, etc. R. Co., 233
 v. Pennsylvania R. Co., 427
 v. Prairie, 218, 219a
 v. Prowse, 343
 v. Southern Pac. R. Co., 495
 v. Thirkell, 365, 703, 708
 v. Vanmeter, 622
 v. Waupaca Elec. Light, etc. Co., 485ba
 v. Western Fuse, etc. Co., 689
 v. Western Union Tel. Co., 531, 542, 753a, 755
 v. West Virginia, etc. R. Co., 510, 523
 Fisher's Admr. v. Chesapeake, etc. Ry. Co., 187
 Fishkill v. Fishkill Plank Road Co., 256
 Fisk v. Havana, 334
 v. Fitchburg R. Co., 201, 241b
 v. Framingham Mfg. Co., 708
 v. Wait, 92
 Fiske v. Forsythe, etc., Bleaching Co., 54
 Fitch v. Mason City, etc. Ry. Co., 495, 516
 v. New York, 262, 263, 407
 v. Pacific R. Co., 676, 680
 v. Scott, 569
 v. Western Union Tel. Co., 754
 Fito v. Seaburg, 573
 Fitter v. Iowa Tel. Co. 191
 Fitts v. Cream City R. Co., 57
 Fitz v. Boston, 350, 352
 Fitzgerald v. Binghamton, 254, 374
 v. Boston, etc. R. Co., 239
 v. Connecticut Paper Co., 114b, 185a, 209a, 211a, 214
 v. Elsas Paper Co., 219
 v. Honkomp, 232
 v. International Flax Twine Co., 61, 202, 207g
 v. N. Y. Central R. Co., 199
 v. St. Paul, etc. R. Co., 71, 74, 418, 424, 466a
 v. Sharon, 258, 262
 Fitzgerald v. Southern Ry. Co. (App. 2172)
 v. Warhol, 630
 v. Weston, 60a, 93, 110
 Fitzgibbon v. Chicago, etc. Ry. Co., 513a
 v. Morgan, 489
 Fitzhugh v. Boston, etc. R. Co., 472
 Fitzmaurice v. Connecticut St. Ry. Co., 73
 v. New York, etc. Ry. Co., 488
 Fitzpatrick v. Cumberland, etc. Co., 705
 v. Garrison Ferry Co., 683
 v. Slocum, 254
 Fitzsimmons v. Brown, 688a, 750
 Flack v. Green Island, 334
 Flagg v. Chicago, etc. R. Co., 451
 v. Hudson, 346
 v. Millbury, 104
 v. Worcester, 273, 283, 287, 299
 Flaherty v. Butte Elec. Ry. Co., 1a
 v. Minneapolis, etc. R. Co., 31, 66
 v. Moran, 702
 v. St. Louis Tr. Co., 758
 Flaig v. Andrews Steel Co., 187
 Flanagan v. Atlantic, etc. Co., 704
 v. Levine, 701
 v. Philadelphia, etc. Ry. Co., 525
 v. St. Paul City Ry. Co., 61
 v. Sanders, 705
 v. Wells Co., 65
 Flanders v. Chicago, etc. R. Co., 201
 v. Meath, 103
 v. Norwood, 367
 Flannagan v. Chicago, etc. R. Co., 207e
 Flannegan v. Chesapeake, etc. R. Co., 233a
 Flannery v. Baltimore, etc. R. Co., 512
 v. St. Louis, etc. R. Co., 750
 Flannigan v. F. W. Carlin Const. Co., 192
 Flansburg v. Basin, 632
 Flattes v. Chicago, etc. R. Co., 27, 93, 429, 467
 Flavin v. Chicago, etc., Ry. Co., 761a
 Fleck v. Union R. Co., 523
 Fleckenstein v. Dry-Dock, etc., R. Co., 485a
 Fledderman v. St. Louis Trans. Co., 16, 122
 Fleeming v. Orr, 626, 629

[References are to sections.]

- Fleenor v. Oregon, etc. Ry. Co., 417,
 463, 482
 Fleet v. Hollenkemp, 46 691
 Fleischner v. Pacific Cable Co., 540,
 555, 755
 v. Postal Tel., etc. Co., 540a
 Fleishman v. Meyer, 573
 Fleming v. Beck, 28
 v. East Brooklyn R. Co., 488,
 492
 v. Davis, 729, 733
 v. Lockwood, 728
 v. Manchester, 275
 v. Northern Tissue Paper
 Mills, 193, 203, 206
 v. Northampton Bank, 589
 v. St. Paul, etc. R. Co., 451a
 v. Suspension Bridge, 286
 v. Texas Loan Agency (App.
 2098)
 v. Wilmington, etc. R. Co.,
 733
 Flemming v. Western Pacific R. Co.,
 112, 476
 Fletcher v. Atlantic, etc. R. Co., 54
 v. Baltimore, etc. Ry. Co., 1a,
 12a
 v. Barnett, 378
 v. Boston, etc. R. Co., 47, 502
 v. Braddick, 172
 v. Dixon, 653b
 v. Ellsworth, 356
 v. Fitchburg R. Co., 478
 v. Hyde, 219
 v. Kelly, 485
 v. Peto, 225
 v. Rylands, 9, 17, 653c, 668
 v. South Carolina, etc. Ry.
 Co., 464, 483
 Fletchers v. Bradley, 618
 Fliege v. Kansas, etc. Ry. Co., 122
 Flike v. Boston, etc. R. Co., 186, 191,
 204, 231
 Flinn v. N. Y. Central R. Co., 412,
 672, 673, 675, 676
 v. Phil., Wilms., etc. R. Co.,
 504, 519
 Flint v. Gloucester Gas Co., 695
 v. Norwich, etc. R. Co., 410,
 426, 512
 etc. R. Co. v. Lull, 62, 419,
 434
 Flippen v. Kimball, 232
 Flitterling v. Missouri Pac. R. Co.,
 450
 Flood v. Huff, 708a
 v. Western U. Tel. Co., 217
 Flora v. Naney, 334a, 376
 Flori v. St. Louis, 67, 256, 271
- Florida v. Pullman Car Co., 526
 etc. Ry. Co. v. Burney, 760
 v. Dorsey, 64, 508
 v. Foxworth, 408, 463, 468,
 470, 471, 484, 769, 773
 v. Hirst, 49, 64, 523, 748
 v. Lassiter, 203, 207, 518
 v. Mooney (App. 2128)
 v. Rudolph, 494, 518
 v. Sturkey, 1
 v. Sullivan, 774
 R. etc. Co. v. Webster, 523
 Cent. Ry. Co. v. Williams, 26,
 88, 88a, 103, 463, 483
 Florola Sawmill Co. v. Smith, 219
 Flournoy v. Jeffersonville, 303
 Flower v. Bolingbroke, 572
 v. Penn., etc. R. Co., 481a,
 492
 Flowers v. Louisville, etc. Ry. Co.,
 209a
 Floyd v. Nangle, 569
 v. Philadelphia, etc. R. Co.,
 466
 Floytrup v. Boston, etc. R., 510
 Fluhrer v. Lake Shore, etc. R. Co.,
 202
 Fluker v. Georgia R. Co., 144
 Flynn v. Beebe, 184
 v. Butler, 73a, 689
 v. Campbell, 216
 v. Canton Co., 14, 257, 343
 v. Central R. Co., 457
 v. Eastern R. Co., 479
 v. Gallagher, 60
 v. Kansas City R. Co., 204,
 207b, 215 (App. 2076)
 v. Manhattan R. Co., 676
 v. Metropolitan St. Ry. Co.,
 485b
 v. Neosho, 376
 v. Prince, etc. Co., 204
 v. San Francisco, etc. R. Co.,
 94, 666, 678, 680
 v. Taylor, 362
 Fockler v. Kansas City, 353
 Foden v. Brooklyn, etc. Ry. Co., 508
 Foels v. Tonawanda, 369, 741
 Fogarty v. Bogert, 704
 v. Finley, 594, 602
 v. Pac. Co., 204, 207b
 Fogassi v. N. Y. Cent. R. Co., 521
 Fogg v. Nahant, 346, 379
 Fohs v. Rain, 625a
 Foley v. Boston, etc. Ry. Co., 207b
 v. Chicago, etc. R. Co., 203
 (App. 2141)
 v. East Flamborough, 354
 v. Everett, 758

[References are to sections.]

- Foley v. Jersey City Electric Co., 216
 v. Martin, 618, 619
 v. New York, 373
 v. New York, etc. Ry. Co., 77
 v. Northern, etc. Co., 683, 698
 v. Pettie Machine Works, 203
 v. Troy, 363
 v. Wyeth, 701
 Folk v. Milwaukee, 262
 Folkmire v. Ry. Co., 463*a*
 Follman v. Mankato, 66, 274
 Folsom v. Lewis, 120
 v. Underhill, 334
 Fonder v. Gen. Const. Co., 223
 Fones v. Phillips, 203, 233
 Fontaine v. Southern Pac. R. Co., 126*a*, 444, 445
 Foot v. Great Northern Ry. Co. (App. 2070)
 v. Wiswall, 246, 515
 Foote v. Amer. Product Co., 370, 646, 758
 Fopper v. Wheatland, 652
 Forban v. N. Y. Central R. Co., 478
 Forbell v. New York, 274
 Forbes v. Atlantic, etc., R. Co., 458
 v. Chicago, etc. Ry. Co., 520
 v. Escambia county, 256, 266
 v. Lee Conservancy Board 262
 v. Suffield, 373
 Forbrick v. General Elec. Co., 705
 Force v. Standard Silk Co., 23
 Ford v. Chicago, etc. R. Co., 197, 417
 v. Fitchburg R. Co., 91, 194, 204, 207*f*, 211, 214, 233*a*
 v. Kansas City, 49
 v. Kendall School District, 267
 v. Lake Shore, etc. R. Co., 195, 202, 203
 v. Lyons, 195
 v. Paducah City Ry. Co., 485*a*
 v. Parker, 321
 v. Perkerson, 617
 v. Southwestern R. Co., 496
 v. Tremont Lbr. Co., 91
 v. Umatilla Co., 94, 108, 367
 v. Whiteman, 375, 644, 653*c*
 Fordham v. Brighton, etc. R. Co., 89
 v. Gouverneur, 367
 v. London, etc. R. Co., 519
 Fordyce v. Briney, 192, 202, 207*a*
 v. Edwards, 207*a*, 211, 216, 217
 v. Jackson, 492, 500
 v. Lowman, 185*a*
 v. McCants, 772
 v. Manuel, 761*a*
- Fordyce v. Merrill, 506
 v. Nix, 513
 v. Woman's Library Ass'n, 331
 Foreman v. Eagle Rice Mill Co., 184, 203, 207*g*
 v. Pennsylvania Ry. Co., 488
 Forest v. Cleveland, 333
 Forker v. Sandy Lake, 375
 Forks v. King, 376, 379
 Forney v. Geldmacher, 647
 Forquer v. Slater Brick Co., 192, 218
 Forrest v. Southern Pac. Ry. Co. (App. 2124)
 Forrestal v. Milwaukee Elec. Co., 485*bc*
 Forrow v. Arnold, 559
 Forsman v. Seattle Elec. Co., 207*b*
 Forster, Matter of, 561
 Forsyth v. Atlanta, 262
 v. Boston, etc. R. Co., 521
 v. Hooper, 165
 Forsythe v. Oswego, 373
 v. Saginaw, 373
 Fort v. Orndoff, 744
 v. Whipple, 204, 230, 248
 Fort Covington v. U. S., etc. R. Co., 750
 Fort Dearborn Nat'l Bank v. Security Nat'l Bank, 587*a*
 Fort Edward, etc., Plank Road Co. v. Payne, 385
 Fort Hill Stone Co. v. Orm, 180
 Fort Pitt Gas Co. v. Evansville, 751
 Fort Plain Bridge Co. v. Smith, 395
 Fort Scott, etc. R. Co. v. Karracker, 676
 v. Sparks, 513*a*
 v. Tubbs, 679, 750
 Fort Smith v. York, 289, 337
 Oil Co. v. Slover, 185
 Fort Wayne v. Breese, 376
 v. Christie, 206, 232
 v. Coombs, 287, 368
 v. DeWitt, 367, 369
 Coop. Co. v. Page, 35
 Gas Co. v. Nieman (App. 2137)
 etc. R. Co. v. Gruff, 217
 v. Herbold, 434
 v. Hinebaugh, 445, 446
 v. O'Keefe, 448
 etc. Ry. Co. v. Olinger, 508
 v. Woodward, 452
 Fort Worth v. Crawford, 262, 285
 St. Ry. Co. v. Allen, 485
 etc. Ry. Co. v. Anderson, 201
 v. Arthur, 674, 678
 v. Conner, 151

[References are to sections.]

- Fort Worth v. Dennis, 461
 v. Dial, 672, 674
 v. Ferguson, 413
 v. Floyd, 773
 v. Graves, 201
 v. Hodge, 434, 752
 v. Hudgens, 428*a*, 429
 v. Hyatt, 497
 v. Kennedy, 495
 v. Longino, 481*b*
 v. Mackney, 61, 65*a*
 v. Measles, 73
 v. Peters, 233*b*
 v. Roberts, 451
 v. Robertson, 758
 v. Robinson, 208, 763
 v. Rogers, 503, 505
 v. Shetter, 481*a*, 482
 v. Sivells, 769, 773
 v. Swan, 424
 v. Viney, 508
 v. Wallace, 676, 750
 v. Wilson (App. 2097)
 v. Worsham, 455
- Fortin v. Easthampton, 369
- Fortune v. Southern Ry. Co., 485*d*
- Forward v. Pittard, 16
- Fosberry v. Waterford, etc. R. Co., 416
- Fosburg v. Phillips Fuel Co., 195, 232
- Foshay v. Glen Haven, 355
- Foshna v. Prosser et al., 573
- Fosnes v. Duluth St. Ry. Co., 520
- Foss v. Boston, etc. R. Co., 521
 v. Chicago, etc. R. Co., 473
- Fossar v. Western Union Tel. Co., 542
- Foster v. Charlotte St. Ry. Co., 449
 v. Chattanooga, 265
 v. Dixfield, 111
 v. Essex Bank, 150, 589
 v. Goddard, 649
 v. Grand Rapids Ry. Co., 513
 v. Holly, 100
 v. Jack, 557
 v. Minn. Central R. Co., 241
 v. Missouri Pac. R. Co., 60*a*, 230
 v. New York, etc. Ry. Co., 54
 v. Old Colony, etc. Ry. Co., 497
 v. Pusey, 185, 209*a*, 219*a*, 232, 233
 v. St. Louis, 274
 v. St. Louis, etc. R. Co., 436, 448
 v. Seattle, etc. Ry. Co., 508
 v. Swope, 702
 v. Yazoo, etc. Ry. Co. (App. 2072)
- Foulkes v. Metropol. Dist. R. Co., 502
- Fournet v. Morgan's, etc. S. S. Co., 115
- Fowle v. Alexandria, 255, 263
- Fowler v. Athens Waterworks Co., 265
 v. Baltimore, etc. R. Co., 108, 523
 v. Buffalo Furnace Co., 773
 v. Chicago, etc. R. Co., 137, 235, 241, 766
 v. Jersey Shore, 384
 v. Linguist, 346, 351, 367
 v. Lock, 181
 v. Mott, 272, 333
 v. N. Y. Central R. Co., 476
 v. Sargent, 607
 v. Strawberry Hill, 334*a*
 v. Western U. Tel. Co., 537, 545, 554
- Fowles v. Briggs, 36
- Fowlkes v. Nashville, etc. R. Co., 140
- Fox v. Borkey, 57, 761
 v. Buffalo Park, 706
 v. Chelsea, 356
 v. Chicago, etc. R. Co., 207*b*, 207*h*, 213
 v. Glastenbury, 86, 87, 107, 212, 376
 v. Jacob, etc. Pkg. Co., 232
 v. Jones, 558, 567
 v. New York, 285, 496, 506, 521
 v. Northern Liberties, 291
 v. Peninsular Lead Works, 203
 v. Philadelphia, 291, 719*a*
 v. Oakland Con. St. Ry. Co., 10, 73*a*, 74 (App. 2055)
 v. Postal Tel., etc. Co., 547, 553
 v. Sackett, 92, 376
 v. Sandford, 180
 v. Spring Lake Iron Co., 193
- Foxworthy v. Hastings, 343, 363
- Foy v. London, Brighton, etc. R. Co., 91, 509, 519
 v. Winston, 88*a*, 644*a*
- Fraam v. Grand Rapids, etc. Ry. Co., 1*a*
- Frace v. N. Y., Lake Erie, etc. R. Co., 30, 53, 666, 672
- Frahm v. Siegel-Cooper Co., 719*a*
- Fraker v. St. Paul, etc. R. Co., 180, 207*e*
- Frammell v. Little, 635
- France v. Rome, etc. R. Co., 195
- Francis v. Cockrell, 704
 v. Franklin Tp., 392

[References are to sections.]

- Francis v. Kansas City, etc. R. Co., 207*b*, 210, 211, 215 (App. 2075)
 v. New York Steam Co., 519
 v. Schoellkop, 750
 v. Western U. Tel. Co., 554, 756
- Francisco v. Troy, etc. R. Co., 523
- Frandsen v. Chicago, etc. Ry. Co., 207*h* (App. 2140)
- Frank P. Lee, The, 13
 v. Conradi, 708
 v. Mandel, 708*a*
 v. Metropolitan St. Ry. Co., 485*b**c*
 v. St. Louis Tr. Co., 485*c*
- Franke v. St. Louis, 92, 702
- Frankel v. New York, 367
- Frankford, etc. Turnp. Co. v. Phil. & Trenton R. Co., 672, 673
- Frankfort v. Coleman, 333, 336
 v. Downey, 367, 368
 Bridge Co. v. Williams, 386
- Frankland v. Cole, 569
- Franklin v. Atlanta, etc. Ry., 512
 v. Harter, 110, 375
 v. House, 358
 v. Low, 321
 v. Smith, 602
 v. Southeastern R. Co., 115, 137, 679
 v. Southern Cal. R. Co., 525
 v. Tracy, 708
 v. Winona, etc. R. Co., 186
 Turnp. Co. v. Crockett, 386
- Franklins v. Atlanta, etc. Ry. Co., 502
- Franz v. Mulligan, 710
- Frary v. Allen, 256
- Fraser v. California, etc. Ry. Co., 518
 v. Freeman, 150
 v. Red River Lumber Co., 195
 v. Tupper, 666
- Frassi v. McDonald, 164
- Fraud Broyles v. Central, etc. Ry., 488
- Frauenthal v. Western U. Tel. Co., 531
- Frazer v. Bedford, 656
 etc. Co. v. Collier, 232
 v. Kimler, 626
 v. Lewiston, 258
 v. South, etc. Ala. R. Co., 483
 v. W. U. T. Co., 753*a*
- Frazier v. Georgia Ry. Co., 135*a*
 v. Georgia R. Co., 133
 v. New Orleans Gas, etc. Co., 585, 599
- Frazier v. New York, etc. Co., 490, 501
 v. Penn. R. Co., 190, 209*a*, 226
 v. Western Union Tel. Co., 543
- Freburg v. Davenport, 274
- Frech v. Philadelphia, etc. R. Co., 57, 108, 480, 483, 485
- Fredenburg v. Northern Cent. R. Co., 192, 197
- Frederick v. Hale, 728
 v. Lansdale, 287
 v. Marquette, etc. R. Co., 493
- Fredericks v. Northern Cent. R. Co., 497, 500
- Free v. Western Union Tel. Co., 554
- Freeberg v. St. Paul Plow Works, 207
- Freebourn v. Chamberlain Medicine Co., 218
- Freel v. Wanamaker, 645
- Freelove v. Cole, 557
- Freeman v. Costley, 493
 v. Davis, 494
 v. Duluth, 466, 476
 v. Field, 750
 v. Glens Falls Paper Mill Co., 13, 719
 v. Independence, 367
 v. Pere Marquette, etc. Ry. Co., 522
 v. Puckett, 518
 v. Waters, 672
 v. Western U. Tel. Co., 753*a*
- Freemantle v. London & Northwestern R. Co., 672, 675, 680
- Freeport v. Isbell, 262, 356
 v. Marks, 249
- Freer v. Cameron, 704, 719
- Freese v. Kemplay, 56
- Freidman v. Mathes, 313
- Fremont, etc. R. Co. v. Crum, 750
 v. Hagblad, 490
 v. Harlin, 750
 v. Marley, 735, 747, 750
 v. Pounder, 448, 455
- French v. Aulls, 195
 v. Brunswick, 107, 111, 367
 v. Camps, 333
 v. Central Constr. Co., 248
 v. Conn. River Lumber Co., 750
 v. Donaldson, 401
 v. Pacific Elec. Co., 520
 v. Taunton Br. R. Co., 87, 458, 464, 466, 477
 v. Wilkinson, 739
- Frericks v. Bermes, 758
- Frerker v. Nicholson, 143, 162

[References are to sections.]

- Frey v. Lowden, 53
 Frick v. Kansas City, 361, 731
 v. St. Louis, etc. R. Co., 72,
 78, 483
 Friddy v. MacKenzie, 574
 Friedman v. Gold, etc. Tel. Co., 536
 v. New York, 174, 337, 367
 v. Railroad Co., 60a
 v. Snare, etc. Trust Co., 361
 Friedmann v. McGown, 630
 Friel v. Citizens' R. Co., 195
 Friend v. Chicago, etc. R. Co., 483
 v. Hamill, 310
 v. Ingersoll, 760
 Frier v. Delaware, etc. Canal Co.,
 674, 675
 Fries v. Amer. Lead Pencil Co., 219,
 219a
 Friess v. N. Y. Central R. Co., 463,
 466, 468
 Frink v. Coe, 495, 514, 749
 v. Potter, 89, 497, 519
 v. Schrover, 743
 v. Scovel, 623
 Frisbery v. Builders, etc. Co., 189
 Frith v. Bowling Iron Co., 39
 Fritsch v. Allegheny, 289
 v. New York, etc. Ry. Co.,
 485ba
 Fritsche v. Clemow, 628
 Fritts v. Jenner, 54
 v. Missouri, etc. R. Co., 207b
 v. New England R. Co., 426
 v. St. Paul, etc. R. Co., 433
 Fritz v. Salt Lake, etc. Co., 221
 v. Western Union Tel. Co.,
 12a (App. 2099)
 Frizell v. Cole, 485
 Frobisher v. Fifth Ave. Tr. Co., 495,
 497, 520
 Fromm v. Ide, 22
 Frost v. Belmont, 254
 v. Berkeley Phosph. Co., 701a
 v. Josselyn, 688
 v. McCarthy, 61
 v. Milwaukee, etc. R. Co., 464
 v. Portland, 348, 350
 v. Waltham, 110, 375, 376
 Frostburg v. Duffy, 274
 Frostbury v. Hitchins, 289
 Fry v. Derstler, 115
 Frye v. St. Louis, etc. Ry. Co., 464
 Fuchs v. Lehigh, etc. Ry. Co., 475,
 478
 v. St. Louis, 287
 v. Schmidt, 118, 703
 Fugere v. Cook, 373
 Fuhry v. Chicago City Ry. Co., 516,
 518
- Fujise v. Los Angeles, etc. Ry. Co.,
 485ab, 518
 Fulco v. Schuylkill Stone Co., 134a
 Fulger v. Bothe (App. 2075)
 Fulks v. St. Louis, etc. R. Co., 520
 Fuller v. Atlanta, 274
 v. Bennett, 69
 v. Boston, etc. R. Co., 113
 v. Chicopee Mfg. Co., 728
 v. Citizens' Nat. Bank, 57,
 164, 165
 v. Denison, etc. Ry. Co., 508
 v. Grand Rapids, 298
 v. Hyde Park, 375
 v. Jackson, 334a, 368, 369,
 742
 v. Jewett, 192, 193, 197, 204,
 233, 705
 v. Naugatuck R. Co., 53, 115,
 508
 v. New York, etc. Ry. Co.,
 195a
 v. Tremont Lbr. Co., 186
 Fullerton v. Fordyce, 501
 v. Metropolitan St. Ry. Co.,
 485bc
 Fulliam v. Muscatine, 352, 376
 Fullom v. Stearns, 617
 Fulsom v. Underhill, 376
 Fulsome v. Concord, 346
 Fulton v. Grieb Rubber Co., 193, 195
 v. Tucker, 343, 384
 Bag, etc. Mills v. Willson, 194,
 207b, 241d
 Co. v. Rickel, 257
 Gas, etc. Co. v. Hudson River
 Tel. Co., 24a
 Fire Ins. Co. v. Baldwin, 118,
 313, 325, 341
 Iron Works v. Kimball, 380
 etc. R. Co. v. Butler, 472
 St. R. Co. v. McConnell, 359
 Fultz v. Wycoff, 633
 Fulwider v. Trenton, etc. Gas Co.,
 206
 Funck v. Metropolitan St. Ry. Co.,
 485ab
 Funk v. St. Paul R. Co., 241c (App.
 2154)
 Funston v. Chicago, etc. R. Co., 463,
 478
 Furey v. New York, etc. Ry. Co., 706
 Furley v. Chicago, etc. R. Co., 633
 Furlong v. Carroll, 668
 v. New York, etc. Ry. Co.,
 189
 Furman St., Matter of, 283
 Furnell v. St. Paul, 289, 353
 Furnish v. Missouri Pac. R. Co., 494,
 495, 516

[References are to sections.]

- Fusili v. Missouri Pac. R. Co., 481
 Fusselman v. Wabash, etc. Ry. Co., 522
 Futch v. Walker, 625
 Gaar v. Hughes, 570
 Gaasbeck v. Saugerties, 356
 Gable v. Sisters of St. Frances, 331
 Gabrielson v. Waydill, 233
 Gadsden R. Co. v. Causter, 93, 495, 521
 Gaetjens v. New York, 291
 Gaffert v. Hackett, 488
 Gaffner v. Johnson, 24a
 Gaffney v. Brown, 704
 v. Inman Mfg. Co., 207
 Gage v. Pontiac, etc. R. Co., 415
 Gagg v. Vetter, 54, 60b
 Gagnon v. Klauder, etc. Co., 207i
 v. Seaconnet Mills, 185a
 Gahagan v. Boston, etc. R. Co., 92, 479
 Gahan v. W. U. Tel. Co., 756
 Gaines v. Bard, 157
 Galbraith v. West End R. Co., 49, 654
 Galen v. Clyde Plank Road Co., 256
 Galena, etc. R. Co. v. Crawford, 421
 v. Dill, 53, 463, 468
 v. Fay, 60a, 495, 524
 v. Griffen, 436
 v. Jacobs, 102
 v. Loomis, 27, 469, 482
 v. Rae, 155
 v. Yarwood, 53, 495, 516, 519
 Galesburg v. Benedict, 369
 v. Hall, 376
 Electric Co. v. Manville, 426
 Gall v. Funkenstein, 562
 Gallagher v. Bowie, 495, 514, 761
 v. Button, 120
 v. Kingston Water Co., 729
 v. New England R. Co., 421, 436
 v. Newman (App. 2171)
 v. New York, etc. Ry. Co., 140a, 434
 v. Piper, 227
 v. Tipton, 353, 354
 Gallaher v. Thompson, 605, 607
 Gallegley v. Kansas City, etc. Ry. Co., 493
 Gallena v. Hot Spring, etc. R. Co., 151, 493
 Galligan v. Metacommet Mfg. Co., 705
 v. Old Colony St. Ry. Co., 516
 Gallin v. London & Northw. R. Co., 505
 Gallon v. House of Good Shepherd, 331
 Galloway v. Chicago, etc. R. Co., 1, 218, 410, 492a
 v. Western, etc. R. Co., 178
 Galpin v. Chicago, etc. R. Co., 57, 418, 676
 Galveston v. Barbour, 258, 763
 v. Gonzales, 384
 v. Hemmis, 370, 376
 v. Posnainsky, 258, 289, 346
 v. Smith, 369
 City Ry. Co. v. Chapman, 760
 v. Hanna, 484
 Land Co. v. Levy, 702
 Oil Co. v. Morton, 705
 Rope, etc. Co. v. Burkett, 222
 etc. R. Co. v. Arispe, 190, 207e
 v. Bonn, 207h
 v. Brocken, 90
 etc. Ry. Co. v. Brown, 201
 v. Butchek, 742
 v. Cassanelli, 419
 v. Chittim, 674, 750
 v. Clark, 761
 v. Cooper, 521
 v. Currie, 17, 18, 154a (App. 2098)
 v. Davis, 189, 195
 v. Doris, 189
 v. Delehanty, 205
 v. Downey, 751
 v. Drew, 208, 209a, 210, 230
 v. Duelm, 460
 v. Eitzen, 470
 v. Faber, 190, 241
 v. Ford, 769
 v. Garteiser, 68, 413
 v. Gillespie, 207b
 v. Gormley, 202, 457
 v. Green, 516
 v. Henefy, 203, 223a
 v. Hewitt, 3
 v. Horne, 750
 v. Houston Elec. Ry. Co. 485
 v. Kutac, 66, 67, 476 (App. 2097)
 v. LaPrelle, 513
 v. Lempe, 207e, 209a
 v. Levy, 457
 v. Long, 496
 v. McMonigal, 513
 v. Manns, 114b, 203
 v. Matula, 463, 472
 v. Mohrmann (App. 2187)
 v. Moore, 73, 78
 v. Morris, 524
 v. Norris, 238
 v. Olds, 138
 v. Parish, 195
 v. Paschall, 743, 760

[References are to sections.]

- Galveston, etc. Ry. Co. v. Perry, 769
 (App. 2187)
 v. Pigott, 24a, 769
 v. Puente, 771
 v. Ryan, 88, 90
 v. Ryon, 484
 v. Scott, 493
 v. Senn, 184a
 v. Slinkard, 202, 206
 v. Smith, 193, 233b
 v. Sweeney, 207b
 v. Templeton, 193
 v. Thompson, 204
 v. Thornsberry, 759
 v. Tirres, 476
 v. Vollrath, 31, 122, 467
 v. Walker, 136, 475
 v. Waldo, 241c
 v. Ware, 741
 v. Warnecke, 750
 v. White, 359
 v. Worthy, 767, 773, 775
- Galvin v. Beals, 708
 v. Brown, 223
 v. Gualala Mill Co., 671
 v. New York, 31, 107, 111,
 112, 114, 181, 207a, 285
 v. Old Colony R. Co., 187, 207
 v. Parker, 638
 v. Pierce, 232
- Gamache v. Johnson, etc. Co., 770
- Gambert v. Hart, 558, 559, 565
- Gamble v. Hine, 219
 v. St. Louis, 334
- Gammage v. Atlanta, etc. R. Co.,
 481b
- Gandy v. Chicago, etc. R. Co., 58,
 676
 v. Jubber, 120
- Gangewer v. Phila., etc. R. Co., 475
- Ganiard v. Rochester, etc. R. Co.,
 87, 490, 521
- Gannon v. Housatonic R. Co., 181
- Garbanati v. Durango, 88a, 644a
- Garber v. St. Louis, etc. Ry. Co., 467
- Garden v. Houston, 748
 City, etc. Ry. Co. v. Nation,
 310
- Gardner v. Bennett, 60a
 v. Boston. Elev. Ry. Co., 49,
 495
 v. Detroit, etc. R. Co., 476
 v. Friederich, 12a, 31, 54
 v. Heartt, 19, 20, 119
 v. Metropolitan St. Ry. Co.,
 494, 516
 v. Michigan Cent. R. Co., 54,
 192
 v. New England Tel. Co., 232
 v. New Haven, etc. Co., 488,
 489
- Gardner v. Philadelphia, 363
 v. Providence Telep. Co., 545,
 556c
 v. Rhodes, 13a
 v. Smith, 421, 423, 446, 451a
 v. State, 323
 v. Ward, 310
- Gardiner v. Johnston, 274
- Garfield v. Douglass, 303
 etc. Co. v. Rockland, etc. Co.,
 727a
- Garibaldi v. O'Connor, 703
- Garland v. Maine Cent. R. Co., 483
 v. Southern Ry. Co., 513a
 v. Towne, 17, 343
- Garlich v. Northern Pac. Ry. Co.,
 480
- Garlinghouse v. Jacobs, 276, 313, 338
- Garmon v. Bangor, 46, 68, 86, 644
- Garner v. Chicago, etc. Ry. Co., 518
 v. Green, 333
 v. Trumball, 457, 480
 v. Western Union Tel. Co.,
 542
- Garnett v. Hamilton, 375
 v. Phoenix Bridge Co., 192
 v. Slater, 334
- Garnetz v. Carroll, 356
- Garnier v. Porter, 669
- Garrahy v. Kansas City, etc. R. Co.,
 233
- Garratt v. Canandaigua, 271, 274
- Garrett v. Chicago, etc. R. Co., 58,
 114, 680
 v. Freeman, 668
 v. Peoples Ry. Co., 518, 751
 v. St. Louis Transit Co.,
 (App. 2074)
 v. Southern Ry. Co., 675
 v. Western U. Tel. Co., 555,
 755
- Garris v. Portsmouth, etc. R. Co., 16,
 419
- Garrison v. Barnes, 635
 v. New York, 285
 v. Ry. Co., 475
 v. St. Louis, etc. R. Co., 73,
 476, 483
- Gartin v. Meredith, 62
- Gartland v. Toledo, etc. R. Co., 218
 v. Zoological Society, 85a, 331
- Gartner v. Chicago, etc. Ry. Co., 407a
- Gartside Coal Co. v. Turk, 218
- Garwood v. N. Y. Central R. Co., 729
- Gas Fuel Co. v. Andrews, 692
- Gaska v. American Car, etc. Co., 202
- Gassenheimer v. District of Colum-
 bia, 362
- Gaston v. Mace, 737
 v. Atlanta, etc. R. Co., 749

[References are to sections.]

- Gates v. Chicago, etc. R. Co., 189
 v. Fleischer, 607
 v. Fulkerson, 701
 v. Latta, 688a
 v. Neal, 310
 v. Pennsylvania R. Co., 214, 416
 v. Southern Minn. R. Co., 187
 v. State, 219a
 v. Western Union, 542
 Gathman v. City of Chicago, 232, 238, 291, 367
 Gaughan v. Philadelphia, 375
 Gaul v. Rochester Paper Co., 216
 Gautret v. Egerton, 401, 705
 Gavett v. Manchester, etc. R. Co., 89, 520, 523
 Gavigan v. Lake Shore, etc. R. Co., 207h
 Gavin v. Chicago, 370
 Gavitt v. Jackson, 343
 Gay v. Cambridge, 367, 373
 v. Essex, etc. R. Co., 73
 v. Milwaukee, etc. Co., 494, 516
 v. Mitchell, 622
 v. Roanoke Lbr. Co., 168
 v. Wadley, 429
 v. Winter, 65, 108, 111, 112, 481b
 Gayette v. Fitchburg, etc. R. Co., 222
 Gayford v. Nichols, 173
 Gaylor v. Hunt, 303
 Gaylord v. New Britain, 363
 Gaynor v. Louisville, etc. Ry. Co., 475
 v. Old Colony, etc. R. Co., 53, 54, 107, 490, 525
 Gearner v. American Car Co., 238
 Gearns v. Bowery Sav. Bank, 588
 Geddis v. Bann Reservoir, 283
 Gee v. Metropolitan R. Co., 60, 65, 85, 89, 92
 v. St. Louis, etc. Ry. Co., 451a
 Geer v. Cleveland, etc. R. Co., 415
 v. Darrow, 165
 Gehring v. Atlantic City R. Co., 472, 476
 v. Galveston Elec. Co., 99
 Geibel v. Elwell, 181
 Geiselman v. Scott, 85, 615
 Geisman v. Missouri, etc. Elec. Co., 698
 Geismer v. Lake Shore, etc. R. Co., 155
 Geist v. Missouri Pac. Ry. Co., 1a
 Geloneck v. Dean Pump Co., 192
 General Steam Nav. Co. v. British, etc. Nav. Co., 160
 v. Mann, 61
 Genenz v. De Forest, 632
 Geneva v. Brush Electric Co., 384
 Gens v. Western Union Tel. Co., 754
 Genung v. N. Y. & New England R. Co., 675, 676, 678
 Geoghegan v. Atlas Steamship Co., 57, 131, 195
 Geogheghan v. N. Y., New Haven, etc. R. Co., 520
 George v. Chicago, etc. Ry. Co. (App. 2104)
 v. Clark, 195
 v. Fisk, 39
 v. Haverhill, 89
 v. Los Angeles Ry. Co., 485bc
 & Richard, The, 133
 v. Skivington, 38, 116
 Georgetown v. Alexandria Canal Co., 333
 v. Groff, 356
 Water, etc. Co. v. Forwood, 192, 207a
 etc. Ry. Co. v. Smith, 518
 Georgia Coal, etc. Co. v. Bradford, 224
 Elec. etc. Ry. Co. v. Baker, 493
 v. Rich, 154
 Ry., etc. Co. v. Haas, 413
 R. Co. v. Berry, 750
 Ry. Co. v. Blacknail, 485bd
 v. Brown, 241c
 v. Burke, 429
 v. Carr, 467
 v. Daniel, 470, 483
 v. Dougherty, 493, 749
 v. Eskew, 95, 493
 v. Fisk, 431
 v. Reeves, 516
 v. Richmond, 485d
 v. Waxlace, 752
 v. Wood, 151
 v. Wynn, 135
 etc. R. Co. v. Anderson, 440
 v. Asmore, 493
 v. Davis, 108
 v. Dougherty, 493
 v. Forshee, 483
 v. Gilleland, 60a, 518
 v. Hicks (App. 2131)
 v. Ivey (App. 2131)
 v. Jones, 429
 v. Lippman, 487
 v. McDade, 103
 v. Mayo, 408
 v. Middlebrooks, 432
 v. Miller, 241c
 v. Nelms, 195, 241c
 v. Newsome, 154, 426
 v. Olds, 493

[References are to sections.]

- Georgia, etc. R. Co. v. Parks, 432
 v. Pittman, 103
 v. Propst, 182 (App. 2120)
 etc. Ry. Co. v. Hallman, 207
 v. Harris, 432
 v. Neely, 99, 103, 419, 428
 v. Oaks, 185
 v. Parks, 359
 v. Rhodes, 180, 216
 v. Ross, 457
 v. Sasser, 207*b*
 v. Thomas, 426
 v. Walker, 485
 v. Williams, 460
 Central R. Co. v. Phinazee, 413
 Midland R. Co. v. Evans, 113, 463
 Pac. R. Co. v. Davis, 201, 207*b*
 v. Dooley, 241*d*
 v. Hughes, 66, 516
 v. Lee, 476
 v. Love, 516
 v. Money, 448
 v. Propst, 114
 v. Underwood, 519
 Geraghty v. New, 115
 Gerald v. Boston, 375
 Geraty v. Nat. Ice Co., 645
 Gerber v. Boarstein, 73*a*
 Gerdes v. Christopher Foundry Co., 362, 376
 Gerety v. Phila. R. Co., 477
 Gerhard v. Bates, 28
 Gerhardt v. Boatman's Savings Inst., 585
 Gerhart v. Wabash, etc. Ry. Co., 501
 Gerin v. Western Union Tel. Co., 540
 Gerity v. Haley, 106
 Gerlach v. Edelmeyer, 60, 160, 162, 225
 Germaine v. Muskegon, 358, 376
 German v. Bennington, etc. Ry. Co., 483
 v. Brooklyn, etc. Ry. Co., 516
 Amer. Bank v. Auth, 589
 Lbr. Co. v. Broch, 203
 v. Hannah, 73*a*
 Ins. Co. v. Chicago, etc. Ry. Co., 1
 Nat. Bank v. Burns, 583
 Theo. School v. Dubuque, 271, 274
 Germantown Pass. R. Co. v. Brophy, 519
 Germania Fruit Co. v. Western Union Tel. Co., 753*a*
 Germanus v. Lehigh Valley Ry. Co., 231
 Gerock v. Western Union Tel. Co., 756
 Geroux, Admx. v. Graves (App. 2100)
 Gerrard v. La Crosse St. Ry. Co., 485*b**b*
 Gerren v. Hannibal, etc. R. Co., 435
 Gerrish v. Edson, 624
 v. New Haven Ice Co., 189, 191, 231, 233
 Gerring v. North Carolina R. Co. (App. 2085)
 Gerry v. New York, etc. Ry. Co., 449
 Gerst v. St. Louis, 285, 701
 Gesas v. Oregon Short Line Ry. Co., 73, 73*a*
 Gessley v. Missouri Pac. R. Co., 471
 Gessner v. Metropolitan St. Ry. Co., 485*a*
 Gettsworth v. Hedden, 701
 Getty v. Hamlin, 374
 Geyette v. Fitchburg Ry. Co. (App. 2150)
 Gheens v. Golden, 113
 Gherkins v. Louisville, etc. R. Co., 484
 Gianfortone v. New Orleans, 261
 Gibbon v. Coggon, 619
 Gibbons v. Phenix, 376
 v. United States, 249
 v. Wilkesbarre R. Co., 89, 485*c*
 v. Williams, 73*a*, 74
 Gibbs v. Chicago, etc. R. Co., 426
 v. Hannibal, etc. Ry. Co., 135
 v. Liverpool Docks, 327
 Gibler v. Quincy, etc. Ry. Co. 184*a* (App. 2161)
 Giblyn v. McIntyre (App. 2099)
 v. McMullen, 49
 Gibney v. Lewis, 748
 v. State, 30, 85
 Gibraltar Sanitary Commissions v. Orfila, 254
 Gibson v. Bessemer, etc. Ry. Co., 66*a*
 v. Denton, 702
 v. Emerson, 257
 v. Erie R. Co., 178, 198, 207*e*, 209
 v. Huntington, 370
 v. International, etc. Co., 516, 719*a*
 v. Leonard, 27, 52, 685, 705, 719
 v. Minneapolis, etc. R. Co., 215
 v. Northern Central R. Co., 204
 v. Oregon Short Line, etc. R. Co., 202
 v. Pacific R. Co., 184, 192
 Giddens v. Western Union Tel. Co., 756
 Giddings v. Freedley, 617

[References are to sections.]

- Gier v. Los Angeles R. Co., 190
 Giffen v. Lewistown, 376
 Giger v. Chicago, etc. R. Co., 455
 Gilbertson, *Ex parte*, 558
 Gilbert v. Ann Arbor Ry. Co., 481b
 v. Beach, 174
 v. Boston, 375
 v. Burlington, etc. Ry. Co., 207 (App. 2116)
 v. Chicago, etc. Ry. Co., 207
 v. Elk Tanning Co., 230
 v. Guild, 219a
 v. Roxbury, 363
 v. Savannah, etc. R. Co., 735
 v. Schwenck, 115
 v. Trinity House, 327
 v. West End R. Co., 496
 v. Williams, 559, 568, 569
 Gilbertson v. Forty-second St. R. Co., 758, 761
 Gilbraith v. Littlech, 336
 Gilchrist v. South Omaha, 356
 Gildersleeve v. Hammond, 701
 Gile v. Bishop Co., 87
 Giles v. Diamond, etc. Co., 702
 v. School District, 256
 Gilkerson v. Missouri Pac. Ry. Co. (App. 2074)
 Gill v. Atlantic, etc. R. Co., 419, 437
 v. Homrighausen, 212
 v. Longher, 567
 v. Middleton, 708
 v. Pittsburgh, etc. Ry. Co. (App. 2178)
 v. Rochester, etc. R. Co., 493
 Gillam v. Sioux, etc. Ry. Co., 449
 Gillenwater v. Madison, etc. R. Co., 234, 486, 491
 Gillerly v. Madison, 287
 Gillespie v. Brooklyn, etc. Ry. Co., 513, 761a
 v. Lincoln, 265
 v. McGowan, 58, 703
 v. Newburgh, 85, 90, 375, 476
 v. Palmer, 310
 v. St. Louis, etc. R. Co., 16
 Gillett v. Johnson, 729
 v. Kinderhook, 274
 v. Tucker, 606, 608
 v. Western R. Co., 408, 751, 752
 Gilliam v. Ball, 566
 v. Reddick, 313
 Gillies v. Eckerson, 701
 Gilligan v. Harlem R. Co., 115, 739
 Gillingham v. Christen, 668
 Gilliland v. Charleston, etc. Ry. Co. (App. 2183)
 v. Middlesex, etc. Tr. Co., 485bb
 Gillis v. Cambridge Gaslight Co., 485
 v. Great Western R. Co., 449
 v. Pennsylvania R. Co., 410, 418, 492a, 705
 v. Western U. Tel. Co., 547, 553
 Gillison v. Charleston, 274
 Gilloon v. Reilly, 710
 Gillrie v. Lockport, 363
 Gillshannon v. Stoney Brook R. Co., 61, 239
 Gillum v. Sisson, 97
 Gilman v. Brown, 762
 v. Dart Hardware Co., 766, 772, 775
 v. Deerfield, 89
 v. Eastern R. Co., 189, 203a, 239
 v. Hovey, 574
 v. Laconia, 256, 370
 v. Noyes, 55
 etc. R. Co. v. Spencer, 27
 Gilmartin v. Kilgore, 215
 v. New York, 299
 Gilmore v. Am. Tube, etc. Co., 231 (App. 2127)
 v. Brooklyn Heights R. Co., 516
 v. Cape Fear, etc. R. Co. (App. 2085)
 v. Driscoll, 701
 v. Federal St. R. Co., 485b
 v. Fuller, 686
 v. Oxford Iron Co., 232
 v. Philadelphia, etc. R. Co., 490
 v. Union Pac. R. Co., 205
 Gilpatrick v. Biddeford, 274
 Gilson v. Collins, 242
 Gilsinger v. Saugerties Water Co., 729
 Ginna v. Second Ave. R. Co., 91, 523
 Ginnon v. Harlem R. Co., 519
 Giordano v. Brandywine, etc. Co., 189, 190, 207g
 Giovanelli v. Erie Ry. Co., 508
 Gipe v. Pittsburg, etc. Ry., 140
 Gipson v. Southern Ry. Co., 475, 476
 Giraudi v. Electric Imp. Co., 698
 Girton v. Lehigh Valley, etc. Ry. Co., 520
 Gisson v. Schwabacher, 192
 Gist v. Western U. Tel. Co., 753a
 Gitzhoffen v. Sisters, etc. Hospital, 331
 Given v. Western U. Tel. Co., 540, 540a
 Givens v. Briscoe, 573
 v. Kentucky Cent. R. Co., 139

[References are to sections.]

- Givens v. Louisville, etc. Ry. Co., 481a
 v. Paris, 291
 v. Southern Ry. (App. 2157)
 Gjukur v. Chicago Crushed Stone Co., 207e
 Gladman v. Johnson, 630
 Gladstone v. Brunkhurst, 626
 Glantz v. Chicago, etc. Ry. Co., 85c, 207e
 Glaseock v. Central Pac. R. Co., 476, 482
 Glasgow v. Crisp, 375
 Glaser v. Rothchild, 683, 705, 706, 719
 Glasier v. Hebron, 356
 Glass v. Memphis, etc. R. Co., 480, 484, 485
 Glascock v. Swofford Dry Goods Co., 206
 Glassey v. Hestonville, etc. R. Co., 56, 71, 73a
 Glazebrook v. West End R. Co., 485a
 Gleason v. Amsdel, 157
 v. Boehm, 61
 v. Bremen, 107, 375
 v. Clark, 568, 569
 v. Excelsior Mfg. Co., 114, 209
 v. Kellogg, 559
 v. Suskin, 207
 Gleeson v. Brummer, 107
 v. Virginia Midland R. Co., 58b, 407, 516
 Glendale, The (App. 2100)
 Glendening v. Sharp, 476
 Glenn v. Hill, 708a
 v. Lake Erie, etc. Ry. Co., 501
 v. Norfolk, etc. Ry. Co., 90
 v. Philadelphia, etc. Co., 758
 v. Winters, 117
 Glettler v. Sheboygan, etc. Ry. Co., 485ab
 Glezen v. Rood, 624
 Glidden v. Moore, 634
 Glossen v. Gehman, 193
 Glossop v. Pole, 623
 Glover v. Dwight Mfg. Co., 219
 v. Mersman, 702
 v. Western Union Tel. Co., 540a
 Gluck v. Ridgewood Ice Co., 725
 Glueck v. Scheld, 686
 Glushing v. Sharp, 466, 477
 Gobeil v. Ponemah Mills, 197
 Goddard, Matter of, 343
 v. Austin, 617
 v. Chicago, etc. R. Co., 451a
 v. Grand Trunk R. Co., 151, 154, 513, 749
 v. Lincoln, 367
 Goddard v. McIntosh, 376
 Godden v. Coonan, 702
 Godeau v. Blood, 632
 Godfrey v. Gibbons, 618
 v. Illinois Cent., 192
 v. Kings Co., 256
 Godfroy v. Dalton, 564
 v. Jay, 566, 569, 570
 Godly v. Hagerty, 709
 Godsoe v. Dodge Clothespin Co., 203
 Godwin v. Carolina Telep., etc. Co., 556c
 Goe v. Northern Pac. Ry. Co., 16
 Goeltz v. Ashland, 289, 346
 Goetchens v. Matthewson, 310
 Goff v. Chippewa River, etc. R. Co., 207
 v. Great Northern R. Co., 145
 v. Norfolk, etc. R. Co., 132, 198, 219
 Goforth v. Southern Ry. Co. (App. 2084)
 Goga v. Amer. Car, etc. Co., 207h
 Goins v. Moberly, 353
 Gold v. Philadelphia, 371
 Goldberg v. N. Y. Cent. R. Co., 521
 Golden v. Chicago, etc. Ry. Co., 367
 v. Clinton, 369
 v. Ellis, 193
 v. Newbrand, 150
 v. Pennsylvania Ry. Co., 479
 v. Pittsburg, etc. Ry. Co., 493
 Goldie v. Werner, 185a
 Goldrick v. Bristol Co. Savings Bank, 588
 Goldschmidt v. New York, 744
 Goldsmith v. Holland, etc. Co., 487, 719a
 Goldstein v. Chicago, etc. R. Co., 87
 v. People's Ry. Co., 73a
 Goldthorpe v. Clark, etc. Lbr. Co., 207h
 Goldthwait v. Haverhill R. Co., 209a
 v. East Bridgewater, 350
 Golinvaux v. Burlington, etc. Ry. Co., 476, 478
 Goltz v. Milwaukee, etc. Ry. Co., 217
 Gomez v. Scanlon, 625a
 Gonzales v. Galveston, 346
 v. N. Y. & Harlem R. Co., 54, 94a, 481, 520, 521
 Gooch v. Asso. for Relief of Aged Females, 331
 v. Bowyer, 702
 v. Gregory, 592
 v. Stephenson, 664
 v. Western Union Tel. Co., 753a
 Good v. Altoona, 734
 Goodale v. Tuttle, 735

[References are to sections.]

- Goodale v. York, 1
 Goode v. Martin, 632
 Goodes v. Boston & A. R. Co., 209
 Goodenough v. Pennsylvania R. Co., 478
 Goodfellow v. Boston, etc. R. Co., 225, 477
 v. New York, 368
 Goodhart v. Pennsylvania R. Co., 743, 758, 759, 760
 Goodhue v. Western Union Tel. Co., 756
 Gooden v. Des Moines, 333, 353
 Gooding v. Chutes, 626, 629
 Goodloe v. Memphis, etc. R. Co., 513
 Goodman v. Gay, 634
 v. Harvey, 20
 v. Lehigh Valley Ry. Co., 672
 v. Simonds, 20
 v. Walker, 558, 564
 Goodno v. Oshkosh, 759
 Goodnow v. Walpole Emery Mills, 207e
 Goodrich v. Burlington, etc. R. Co., 472, 481a, 763
 v. Chicago, 262
 v. N. Y. Central, etc. R. Co., 193, 196, 209a, 217
 v. Starr, 623
 v. University Place, 281, 289, 337
 Goodridge v. Washington Mills Co., 216
 Goodsell v. Hartford, etc. R. Co., 124, 767
 v. Taylor, 487, 497, 719a
 Goodwin v. Atlantic Coast Line Ry. Co., 64, 464, 484
 v. Boston, etc. R. Co., 523
 v. Central R. Co., 480
 v. Cincinnati Tr. Co., 513
 v. Columbia Mills Co., 218
 v. Greenwood, 151
 v. Hersom, 605
 v. Nickerson, 133 (App. 2093)
 v. Smith, 623
 Gordon v. Chicago, etc. Ry. Co., 186
 Gordon v. Boston, etc. R. Co., 606
 v. Cummings, 704, 705a, 710, 719
 v. Ellenville, etc. Ry. Co., 728
 v. Farrar, 310
 v. Grand St. R. Co., 519
 v. Kaufman, 629
 v. Louisville, etc. R. Co., 429
 v. Omaha, 262, 291
 v. Peltzer, 120, 703
 v. Reynolds' Card Co., 219
 v. Richmond, 108, 375
 v. Sullivan, 384
 Gordon v. West End St. Ry. Co., 520
 Gordy v. Railway, 27b
 Gore v. Brazier, 574
 Gorham v. Gale, 618
 v. Gross, 17
 v. Kansas City, etc. R. Co., 197, 743
 v. Milford, etc. St. Ry. Co. (App. 2068)
 v. Springfield, 281
 Gorman v. McArdle, 13, 207g, 222, 702a
 v. Minneapolis, etc. R. Co., 219a
 v. Odell Mfg. Co., 202
 v. Pacific R. Co., 419
 v. Southern Pac. Co., 486, 763
 Lbr. Co. v. Brock, 206
 Gormley v. Ohio, etc. R. Co., 235, 241
 v. Sanford, 735
 Gorseigner v. Burnham, 192
 Gorton v. Erie R. Co., 482
 v. Harmon, 138
 Gosa v. Southern R. Co., 483
 Goshen v. England, 95, 369
 v. Myers, 289, 334, 394
 Turnp. Co. v. Sears, 346, 355, 386
 Goshorn v. Wheeling Mold, etc. Co., 209a
 Gosport v. Evans, 367, 376
 Goss v. Goss, 741
 Gossett v. Citizens Ry. Co., 13
 Gothard v. Alabama, etc. R. Co., 64, 89, 99, 478
 Gottlieb v. New Jersey, etc. Ry. Co., 135
 v. N. Y., Lake Erie, etc. R. Co., 459
 Gottsberger v. New York, 295
 Gottwald v. Bernheimer, 647
 Goudie v. Foster, 207e (App. 2152)
 Goudreau v. Connecticut Co., 457
 Gough v. Bryan, 115
 Gould v. Bangor, etc. R. Co., 448
 v. Booth, 274
 v. Boston Duck Co., 729
 v. Boston Elec. Ry. Co., 497
 v. Gt. Northern R. Co., 434
 v. McKenna, 61, 93, 95, 741
 v. Northern Pac. R. Co., 668
 v. Schermer, 393
 v. Slater Woolen Co., 690
 v. Topeka, 255, 272
 v. Union Tr. Co., 485bc
 v. Winona Gas Co., 696
 Gourcier v. Cormack, 144, 173, 702
 Goure v. Storey, 207e
 Gover v. Atchison, etc. Ry. Co., 761a

[References are to sections.]

- Government St. R. Co. v. Hanlon, 73, 78
- Governor v. Allen, 249
 v. Carter, 620
 v. Dodd, 591
 v. Justices, etc., 256
 v. Powell, 620
 v. Wiley, 591
- Gowen v. Glaser, 673, 675
 v. Harley, 185, 207, 223
- Gowling v. Amer. Exp. Co., 580a
- Gozler v. Georgetown, 283
- Graaf v. Vulcan Iron Wks., 184a
- Grabaski v. New Castle Leather Co., 758
- Grabenheimer v. Budd, 619
- Grabrues v. Klein, 654
- Grace Co., Wm. v. Gallagher, 195
- Gracy v. Atlantic, etc. Ry. Co., 672, 675
- Gradin v. St. Paul, etc. R. Co., 486
- Graefe v. St. Louis, etc. Co., 59
- Graeff v. Philadelphia, etc. R. Co., 494, 497
- Graff v. Detroit City R. Co., 485c
 v. Lemp Brewing Co., 708a
 v. N. Y. Central, etc. R. Co., 195
- Graham v. Albert Lea, 334a
 v. Boston, 370
 v. Chicago, St. Paul, etc. R. Co., 195
 v. Consolidated Tr. Co., 485bc
 v. Delaware, etc. Canal Co., 448
 v. Evening Press Co., 644
 v. McNeil, 523
 v. Newburg Coal Co., 215
 v. Northeastern R. Co., 225
 v. Payne, 629, 632, 639
 v. Pennsylvania Co., 61
 v. Rockford, 353, 373
 v. Thrall, 207e
 v. Toronto, etc. R. Co., 61
 v. Western Union Tel. Co., 756 (App. 2064)
- Grahlman v. Chicago, etc. R. Co., 455, 518
- Grahn v. International, etc. Ry. Co., 489, 513a
- Grainger v. Still, 609
- Gram v. Northern Pacific R. Co., 108, 113, 666, 678
- Gramm v. Boener, 107, 606, 608, 615
- Granby v. Michigan Cent. R. Co., 428
- Grand Island, etc. Ry. Co. v. Phipps, 427
 Rapids v. Wyman, 57, 258, 369
 etc. R. Co. v. Cox, 475, 477
- Grand Island, etc. R. Co. v. Huntley, 497
 v. Judson, 57
 v. Monroe, 418, 425
 v. Pettit (App. 2138)
- Trunk R. Co. v. Cummings, 186
- v. Ives, 53, 61, 99, 466, 467, 485a
- v. Jennings, 765
- v. Latham, 24a
- Ry. Co. v. Ives, 99, 463a, 464
- v. Poole, 207
- Ry. Co. v. Reynolds, 472
- v. Richardson, 53, 675, 680
- v. Siebald, 414
- v. Stevens, 488
- v. Walker, 495
- Valley, etc. Co. v. Pitzer, 33
- Grandona v. Lovdal, 701a
- Grandstaff v. Ridgley, 625a
- Graney v. St. Louis, etc. R. Co., 481a
- Granger v. Boston, etc. R. Co., 475
 v. Pulaski Co., 256
 v. Seneca Falls, 272
- Grangier v. Hughes, 561
- Grannis v. Branden, 614
 v. Chicago, etc. R. Co., 207g
 v. Cummings, 671
- Grant v. Armstrong, 653b
 v. Baker, 108
 v. Baltimore, etc. R. Co., 479
 v. Brainerd, 367, 393
 v. Brooklyn, 356
 v. Erie, 262, 265
 v. Fitchburg, 73a, 74
 v. Hasz, 705
 v. Kuglar, 737
 v. Louisville, etc. R. Co., 744
 v. Ludlow, 47
 v. Metropolitan St. Ry. Co., 516
 v. Newton, 22
 v. Pennsylvania, etc. Canal Co., 223
 v. Raleigh, etc. R. Co., 499
 v. Ry. Co., 184a
 v. Ricker, 635
 v. Robb, 729
 v. Singer Mfg. Co., 146
 v. St. Louis, etc. Ry. Co., 741
 v. Union Pac. R. Co., 195
 v. Varney, 195
- Gratoit v. Missouri Pac. R. Co., 472
- Gratton v. Williamston, 369
- Grau v. St. Louis, etc. R. Co., 448
- Gravelle v. Minneapolis, etc. R. Co., 197, 232, 233
- Graven v. MacLeod, 501, 525
 v. Wabash R. Co., 22

[References are to sections.]

- Graver Tank Works v. McGee, 209a
 Graves v. Brewer, 207e
 v. Chicago, etc. R. Co., 425
 v. People, 518
 v. Rochester, 296
 v. Santway, 607
 v. Shattuck, 354, 370, 652
 v. Thomas, 97, 703
 Graville v. Manhattan R. Co., 523
 Graw v. Baltimore, etc. R. Co., 40
 Gray v. Boston Gaslight Co., 24a,
 120, 343
 v. Brackenridge, 557
 v. Brooklyn, 254
 v. Central R. Co., 747
 v. Chicago, etc. Ry. Co., 140a
 v. Commutator Co., 206
 v. Coombs, 97, 720
 v. Danbury, 416
 v. Emporia, 367
 v. Ft. Pitt Tr. Co., 525
 v. Griffin, 260a
 v. Harris, 343, 705, 728, 732
 v. Howell, 573
 v. McDonald, 64 (App. 2075)
 v. Noonan, 625a
 v. Northern, etc. Ry. Co., 206
 v. Phillips, 138
 v. Pullen, 122, 176
 v. ——— Ry. Co., 65
 v. Rochester, etc. R. Co., 523
 v. St. Paul, etc. Ry. Co., 485bc
 (App. 2071)
 v. Scott, 73, 472, 473
 v. Schriber, 735
 v. Seigel-Cooper Co., 704
 & Shealy v. Charleston, etc.
 Co. (App. 2093)
 v. Washington Water Power
 Co., 760
 v. Wass, 573
 v. Western U. Tel. Co., 532,
 538, 543a, 756
 Graybill v. Chicago, etc. Ry. Co., 427
 Grayboski v. New Castle Leather
 Co., 741
 Grayrock Land Co. v. Wolff, 313
 Grayson v. Lynch, 633
 v. St. Louis Tr. Co., 513
 v. Wilkinson, 569
 Grayville v. Whitaker, 393
 Greaney v. Holyoke Water Power
 Co., 693
 Greany v. Long Island R. Co., 112,
 114, 476, 477
 Greasley v. Codling, 371
 Great Falls Co. v. Worster, 731
 Lakes Towing Co. v. Kelly,
 etc. Transport Co., 298, 367
 Great Northern, etc. Ry. Co. v. Coats,
 676
 v. Harrison, 486, 488, 491
 v. McDermid, 202
 Western R. Co. v. Bacon, 437
 v. Blake, 459, 503
 v. Braid, 406, 407
 v. Geddis, 27, 427
 v. Haworth, 674, 680
 v. Miller, 493, 749
 v. Morthland, 57, 419, 436
 Greathouse v. Croan, 7
 Greb v. Pennsylvania Ry. Co., 513
 Greeley v. Federal St., etc. R. Co.,
 408
 Irrigating Co. v. House, 728
 Green v. Baltimore, etc. Ry. Co., 490
 v. Banta, 204
 v. Birge, 122, 701
 v. Burke, 121, 313
 v. Chicago, etc. Ry. Co., 470
 v. Clarke, 22
 v. Coast Line Ry. Co., 459
 v. Cross, 209a
 v. Danby, 350, 352, 363
 v. Dixon, 575
 v. Eden, 646
 v. Erie R. Co., 99
 v. Harrison Co., 256
 v. Hudson River R. Co., 124,
 764, 768, 773
 v. Kansas, etc. Coal Co., 716
 v. Louisville, etc. R. Co., 484
 v. Los Angeles Ry. Co., 475,
 483
 v. Los Angeles Ter. Co., 99,
 476, 483
 v. Minneapolis, etc. R. Co.,
 186, 187, 208, 211, 215
 v. Missouri Pacific Ry. Co.,
 475
 v. New York, 254
 v. Nebagamain, 393
 v. Pacific Lbr. Co., 516
 v. Portland, 359
 v. Shoemaker, 688a
 v. Soule, 164
 v. Southern Cal. Ry. Co., 475
 v. Southern Pac. Co., 483, 773
 v. State, 251
 (addresssee) v. Western U. T.
 Co., 756
 (sender) v. Western U. T. Co.,
 542, 756
 v. Whitcomb Lumber Co.,
 219a, 245
 Co. v. Eubanks, 256
 etc. R. Co. v. Bresmer, 209a
 Green's Adm. v. Maysville, etc. Ry.
 Co. (App. 2064)

[References are to sections.]

- Greenberg v. Kingston, 334
 v. Man, 120
 v. People, 625a
 v. Third Ave. Ry. Co., 485bc
 v. Whitcomb Lbr. Co., 248
 Ridge R. Co. v. Brinkman,
 666, 676
 Greene v. Linton, 705
 Greenfield v. Chicago, etc. R. Co.,
 675, 676, 750
 v. Detroit, etc. Ry. Co., 489
 v. Roback, 354
 Greenland v. Chaplin, 28, 61, 100
 Greenleaf v. Dubuque, etc. R. Co.,
 209a
 v. Illinois, etc. R. Co., 54, 111,
 207a, 213, 222
 Greenough v. Gaskell, 576
 Greensboro v. McGibbony, 289
 Greenville v. Pitts, 97, 698, 705a
 Greenwald v. Marquette, etc. R. Co.,
 241
 Greenway v. Conroy, 218
 Greenwell v. Washington Market
 Co., 719a
 Green-Wheeler Shoe Co. v. Chicago,
 28, 29
 Greenwood v. Callahan, 114
 v. Coal Co., 749
 v. King, 769 (App. 2078)
 v. Louisville, 265, 289
 v. Phila., etc. R. Co., 477
 v. Westport, 285
 Co. v. Scott, 367
 Greer v. Louisville, etc. R. Co., 233b
 v. Nashville, etc. Ry. Co., 455
 v. White, 747
 Gregg v. Hotcher, 291
 v. Wyman, 104
 Gregor v. Cady, 708
 Gregorio v. N. Y. City Ry. Co., 516
 Gregory v. Adams, 258, 370, 380
 v. Brown, 303
 v. Bush, 735
 v. Chicago, etc. R. Co., 187
 v. Cleveland, etc. R. Co., 484
 v. Layton, 668, 672
 v. Louisville, etc. Ry. Co., 460,
 480
 v. N. Y., Lake Erie, etc. R.
 Co., 760
 v. Ohio River R. Co., 146
 v. Slaughter, 739
 v. Woodworth, 107, 109, 113
 Greinke v. Chicago City Ry., 60a
 Greist v. Amrbyn, 703
 Gresh v. Wanamaker, 151
 Gresham v. Louisville, etc. R. Co.,
 482
 Gress v. Missouri, etc. Ry. Co., 520
 Lbr. Co. v. Corley, 747
 Grethen v. Chicago, etc. R. Co., 480
 Grey v. Mobile Trading Co., 58, 113
 v. Patterson, 729, 734
 v. Western Union, 538
 Grider v. Jefferson Realty Co., 356
 v. Tally, 310
 Gridley v. Bloomington, 343, 365,
 384
 Grier v. Sampson, 652
 Gries v. Zeck, 628
 Grieve v. New Jersey St. Ry. Co.,
 523
 Griffen v. Auburn, 60b, 376
 v. Colver, 744
 v. Glen Mfg. Co., 213
 v. Johnson, 369
 v. Manice, 487, 497, 719a
 v. New York, 262, 367, 376
 v. Ohio, etc. R. Co., 207e
 v. Sanbornton, 8, 338, 371
 v. Willow, 53
 Griffin v. Bell, 644
 v. Boston, 338
 v. Boston & Alb. R. Co., 206
 v. Ganaway, 620
 v. Ohio, etc. Ry. Co., 207e
 v. Pacific, etc. Ry. Co., 495,
 516
 v. United Elec. Co., 97
 Griffith v. Baltimore, etc. R. Co., 66a,
 482
 v. Denver, etc. Tram. Co.,
 485bb
 v. Follett, 310
 v. Friendly, 151
 v. Lewis, 712, 728
 v. Missouri Pac. R. Co., 509,
 521
 v. Utica, etc. R. Co., 523
 Griffiths v. Clift, 645
 v. Earl Dudley, 140, 178
 v. Gidlow, 180, 209a
 v. London, etc. Docks Co., 222
 v. Northwestern R. Co., 410
 v. Wolfram, 245
 Griggs v. Fleckenstein, 61, 64, 66,
 94, 104, 634, 645
 Grigsby v. Chappell, 386, 397
 v. Clear Lake Water Co., 709a
 Grill v. Gen. Iron Screw Co., 48
 v. Gulfreund, 683, 704
 Grim v. Olympia, etc. Light Co., 224
 Grimes v. Eddy, 633
 v. Keene, 286
 v. Pennsylvania Co., 488, 490
 v. Young, 151
 Grimm v. Greenbush, 363

[References are to sections.]

- Grimm v. Milwaukee Elec., etc. Co.,** 1a, 49, 472, 485c
 v. Omaha Elec. Light, etc. Co., 208, 209a
Grimmelman v. Union Pac. Ry. Co., 222, 769
 v. Union Pac. R. Co., 222
Grimmell v. Chicago, etc. R. Co., 429, 430
Grimsley v. Hawkins, 60
Grindey v. MacKechnie, 703
Grinnell v. Taylor, 634
Grippen v. N. Y. Central R. Co., 61, 63, 64, 92, 93, 96, 417, 460, 463, 468, 471, 484
Grisim v. Milwaukee R. Co., 518
Grisser v. Schoenborn, 762
Griswold v. Boston, etc. Ry. Co., 480
 v. Chicago, etc. R. Co., 492a
Griveaud v. St. Louis Cable, etc. R. Co., 407
Groesbeck v. Chicago, etc. R. Co., 481b
Groff v. Ankenbrandt, 709a
 v. Cresse, 633
 v. Duluth Imperial Mill Co., 207
Grondin v. Duluth, etc. R. Co., 434
Groner v. Delaware, etc. Canal Co., 476
Groom v. Kavanagh, 645
Gropp v. Atlantic, etc. Co., 629
Gross v. Elec. Tr. Co. (App. 2090)
 v. Pennsylvania, etc. R. Co., 146
 v. Portsmouth, 295
 v. World's Columbia Exposition, 250
 Coal Co. v. Rose (App. 2105)
Grosse v. Chicago, etc. R. Co., 434
Grossenback v. Milwaukee, 353
Grosso v. Delaware, etc. R. Co., 124
Grostick v. Detroit, etc. R. Co., 90, 476
Grote v. Chester, 15, 278
 v. Chester, etc. Co., 406, 497
Grotenkemper v. Harris, 766 (App. 2089)
Grotsch v. Steinway R. Co., 523, 742
Grove v. Burlington, etc. R. Co., 421
 v. Fort Wayne, 289, 352
Groves v. James McNeil & Bro. Co. (App. 2181)
 v. Lord Nimborne, 685
Grover v. New York, etc. Ry. Co., 222
Growcock v. Hall, 160a
Grows v. Maine Cent. R. Co., 475
Grube v. Missouri Pac. R. Co., 190
 v. St. Paul, 265
Grumbine v. Washington, 291
Grundy v. Janesville, 369
 v. Louisville, etc. R. Co., 429, 432, 433
Gschwend v. Millvale, 375
Gubasco v. New York, 354
Gue v. Wilson, 653b
Guelich v. Nat. State Bank, 582
Guenther v. Fahey, 626
 v. Metropolitan Ry. Co., 508, 742, 758
 v. St. Louis, etc. R. Co., 99, 114, 484
Guerdes v. Christopher Foundry Co., 376
Guerdon v. Corbett, 56
Guernsey v. Tuthill, 617
Guest v. Edison, etc. Co., 231
Guggenheim v. Lake Shore, etc. R. Co., 463, 464, 472, 478
Guhl v. Whitcomb, 476, 477
Guichard v. New, 61, 73a, 719a
Guilford v. Western Union Tel. Co., 754
Guille v. Swan, 35, 122
Guilloz v. Ft. Wayne, etc. R. Co., 485a
Guilmartin v. Solvay Process Co. 207i (App. 2171)
Guilmont's Admr. v. Central Vermont Ry. Co., 475, 483
Guinard v. Knapp Co., 217
Guinn v. Delaware, etc. Co., 97, 698
Guldner v. Cramm, 758
Guldseth v. Carlin, 702
Gulf, etc. Ry. Co. v. Abendroth, 475
 v. Adams, 197
 v. Anderson, 477
 v. Bagby, 741
 v. Barnes, 66, 66a, 68
 v. Barnett, 493
 v. Beall, 139
 v. Beall (App. 2097)
 v. Bell, 517
 v. Bennett, 427
 v. Benson, 672, 678
 v. Blake, 751
 v. Blakeney, 675
 v. Blohn, 233b
 v. Box, 426, 474
 v. Breitling, 468
 v. Brentford, 114b, 208
 v. Brown, 742
 v. Bryant, 410
 v. Bulcher, 501
 v. Bunn, 761a
 v. Bussey (App. 2158)
 v. Campbell, 513a
 v. Cash, 421, 451a
 v. Childs, 419

[References are to sections.]

- | | |
|--|--|
| <p>Gulf, etc. Ry. Co. v. Cleveland, 508
 v. Cohen, 464, 484
 v. Coleman, 73<i>a</i>
 v. Compton, 763, 767, 772
 v. Coopwood, 486
 v. Cusenberry, 668
 v. Dawkins, 522
 v. Dickens, 748, 758, 761
 v. Donahoo, 735
 v. Donnelly, 215
 v. Dorsey, 225
 v. Elmore (App. 2187)
 v. Findley (App. 2098)
 v. Finley, 773
 v. Fowler, 60<i>a</i>
 v. Fox, 99
 v. Garren, 215, 221
 v. Gaskill, 162, 225
 v. Gasscamp, 376
 v. Geer, 553
 v. Gierse, 89
 v. Greenlee, 67, 467
 v. Griggs, 192
 v. Grisom, 485
 v. Haden, 195
 v. Hamilton, 476, 479
 v. Harriett, 208, 209<i>a</i>, 743
 v. Helsley, 735
 v. Hodges, 51, 463
 v. Hudson, 421
 v. Huyett, 12<i>a</i>, 208, 209
 v. Jackson, 218, 219
 v. James, 145
 v. Jones, 218, 219
 v. Jordon, 521
 v. Keith, 421
 v. Killebrew, 494, 519
 v. Kirkbride, 493
 v. Kizziah, 207<i>e</i>, 186, 217
 v. Knox, 198, 198<i>a</i>
 v. Letsch, 471
 v. Levy, 538, 543, 756
 v. Loonie, 753<i>a</i>, 754
 v. Lowe, 680
 v. Luther, 513, 748
 v. McGowan, 60<i>c</i>
 v. McLean, 679
 v. McWhirter, 73
 v. Mannewitz, 95
 v. Matthews, 54, 457, 460, 464, 480, 481<i>b</i>
 v. Matzdorf, 485<i>d</i>
 v. Miller, 459<i>a</i>, 537, 573
 v. Montgomery, 417
 v. Moore, 749
 v. Oakes, 17, 18
 v. Ogg, 434
 v. Overton, 486
 v. Pendry, 473
 v. Pettis, 193</p> | <p>Gulf, etc. Ry. Co. v. Phillips, 516
 v. Pomeroy, 407
 v. Pool, 750
 v. Redeker, 197, 219
 v. Rowland, 678
 v. Ryan, 207<i>b</i>
 v. Schwabbe, 208
 v. Shelton, 501, 508, 513, 518
 v. Sheperd, 747
 v. Shieder, 61, 90, 108, 113, 478
 v. Sliger, 196
 v. Smith, 29<i>a</i>, 457, 463
 v. Southwick, 138, 770, 773
 v. Styron, 73
 v. Taylor, 407
 v. Trott, 761
 v. Walker, 408
 v. Washington, 419, 428, 441
 v. Wells, 187, 233<i>b</i>
 v. Williams, 217, 485<i>d</i>
 v. Wilson, 475, 492, 500
 v. Wittnebert, 459<i>c</i>
 v. Wood, 195
 v. Younger, 773
 etc. R. Co. v. Witte, 666
 etc. Tel. Co. v. Richardson, 756</p> <p>Gullett v. Lewis, 573
 Gullikson v. McDonald, 260, 291
 Gulline v. Lowell, 370
 Gulliver v. Blauvelt, 365
 Gulzoni v. Tyler, 502, 518
 Gumb v. Twenty-third St. R. Co., 760
 Gumbel v. Ill. Cent. R. Co., 676
 Gumbert v. Kilgore, 717
 Gumbes v. Philadelphia, 283
 Gumm v. Kansas City Belt R. Co., 99, 483
 Gumz v. Chicago, etc. R. Co., 89
 Gund v. Nye, etc. Co., 773
 Gunderson v. Northwestern Elevator Co., 73
 v. Roebling Const. Co., 207
 Gundy v. N. Y. C., etc. Co., 769
 Gunn v. Ohio River R. Co., 99, 481<i>a</i>, 484, 518
 Gunnison v. New York Board of Education, 296
 Gunszfski v. People's, etc. Co., 195
 Gunter v. Graniteville Mfg. Co., 184, 204, 232
 v. Wicker, 94, 99
 Gurley v. Missouri Pac. R. Co., 464, 479
 Gurney v. Rockfort, 338
 Gurofsky v. Lehigh Valley Ry. Co., 132
 Gusick v. Kinney, 653<i>b</i>
 Gusman v. Caffery, etc. Ry. Co., 198<i>a</i></p> |
|--|--|

[References are to sections.]

- Gustafsen v. Washburn, etc. Mfg. Co., 241b
 Guta v. Lake Shore, etc. R. Co., 476
 Guthrie v. Finch, 376
 v. Louisville, etc. R. Co., 205
 v. Maine Cent. R. Co., 206
 v. Missouri Pac. Ry. Co. (App. 2077)
 Gutridge v. Missouri Pac. R. Co., 193, 410
 Gwathney v. Little Miami R. Co., 413, 708
 Gwinnell v. Eamer, 709a
 Gwynn v. Citizens Telep. Co., 534, 556c, 748
 v. Duffield, 691
 Gyles v. Southern Ry. Co., 520

 Haack v. Fearing, 686
 Haas v. Balch, 207h, 215
 v. Buffalo, etc. R. Co., 185
 v. Chicago, etc. R. Co., 207b, 213, 476
 v. Grand Rapids, etc. R. Co., 62, 417, 478
 v. Missionary Society, 331
 v. St. Louis, etc. Ry. Co., 488, 497, 516
 v. St. Paul Gaslight Co., 693
 Haase v. Morton, 26
 v. Oregon R. Co., 489
 Habine v. Twin City, etc. Co., 705
 Hach v. St. Louis, etc. Ry., 137, 192, 193, 197, 766
 Hachel v. Pittsburgh, etc. R. Co., 525
 Hackett v. Middlesex Mfg. Co., 719a
 v. Smelsley (App. 2060)
 v. Western Union Tel. Co., 164
 v. Wisconsin, etc. Ry. Co., 775 (App. 2196)
 Hackford v. N. Y. Cent. R. Co., 113, 472, 476
 Hackney v. Delaware, etc. Ry. Co., 769, 772
 v. Ill. Cent. Ry. Co., 481
 Haden v. Sioux City, etc. R. Co., 99, 241c, 758
 Hadley v. Baxendale, 754
 v. Cross, 495
 v. Taylor, 343, 703
 v. Western U. Tel. Co., 531, 754
 Maehl v. Wabash R. Co., 151, 775 (App. 2076)
 Haertel v. Pennsylvania Light, etc. Co., 698
 Haesley v. Winona, etc. R. Co., 73

 Haetsch v. Chicago, etc. R. Co., 476 (App. 2104)
 Hafford v. New Bedford, 265
 Hafner v. St. Louis Trans. Co. (App. 2075)
 Hagan v. Chicago, etc. R. Co., 673, 675, 676
 v. Gibson Min. Co., 230
 v. Providence, etc. R. Co., 749
 Hagar v. Haas, 617
 Hageman v. North Jersey St. Ry. Co., 485c
 Hager v. Southern Pac. R. Co., 482, 485
 v. Wharton Tp., 368
 Haggerty v. Chicago, etc. R. Co., 207
 v. Hollowell Granite Co. (App. 2065)
 v. Lewiston, 338
 v. Thomson, 709a
 Hagin v. Cayuga Lake Cement Co., 708a
 Hagins v. Cape Fear R. Co., 180, 233a
 Hagood v. Southern, 249
 Hahn v. So. Pac. R. Co., 410, 426
 Hahs v. Cape Girardeau, etc. Ry. Co., 459
 Haight v. Keokuk, 362
 v. New York, 266, 295
 Haile v. Texas, etc. R. Co., 761
 Hailey v. Texas & Pac. Ry. Co., 223
 Haines v. Hall, 737
 v. Lewiston, 373
 v. Pearson, 773
 v. Roberts, 701, 706, 716
 v. Schultz, 749
 v. Spencer, 195
 v. Welch, 731
 Hainlin v. Bridge, 85a, 108
 v. Budge, 108
 Halbert v. Texas Tie, etc. Co. (App. 2098)
 Hale v. Bickett, 622
 v. Columbia, etc. R. Co., 480
 v. Crown Paper Co., 237
 v. Dutant, 708
 v. Huntley, 621
 v. Johnson, 165
 v. New York, etc. Ry. Co. (App. 2069)
 v. Smith, 57, 107, 112
 v. Weston, 371
 Haley v. Chicago, etc. R. Co., 94
 v. Earle, 93
 v. Jump River R. Co., 217
 v. Keim, 224
 v. Missouri Ry. Co., 460
 v. Mobile, etc. R. Co., 139, 235
 v. St. Louis, etc. R. Co., 675

[References are to sections.]

- Halivas v. Amer. Granite Co., 232
Hall v. Bedford Quarries Co., 189
 v. Burns, 709
 v. Cadillac, 742
 v. Chicago, etc. R. Co., 51
 v. Concord, 338
 v. Connecticut River Steamb.
 Co., 495, 749
 v. Corcoran, 104
 v. Crain (App. 2089)
 v. Galveston, etc. R. Co., 206
 v. Hollander, 115
 v. Houston, etc. Ry. Co., 415
 v. Johnson, 204
 v. Lacy, 737
 v. Manchester, 333, 334, 353
 v. Manson, 353, 377
 v. Memphis, etc. R. Co., 151,
 493
 v. Missouri, etc. Ry. Co., 99
 v. New York, etc. Ry. Co., 689
 v. Northwestern Ry. Co., 207a
 v. Norwalk, 258, 259, 338
 v. Ogden City R. Co., 55, 99,
 485c, 654
 v. Pac. R. Co., 205
 v. Pickard, 644
 v. Rankin, 691
 v. Ripley, 104, 379, 646
 v. Smith, 14, 340
 v. Southern Ry. Co. (App.
 2084)
 v. Terre Haute Elec. Co., 488
 v. Texas, etc. R. Co., 410
 v. Tiernay, 625a
 v. Tillson, 725
 v. Unity, 351
 v. Washington, etc. Co., 485a,
 485ab
 v. Western Union Tel. Co.,
 753a, 754
 v. Wright, 573
Halley, The, 172
Hallahan v. N. Y., Lake Erie, etc.
 R. Co., 518, 519
Hallihan v. Ry. Co. (App. 2075)
Hallman v. Plattville, 253
Hallock v. New York, etc. Ry. Co.,
 236 (App. 2172)
Halloran v. Harlem R. Co., 435
 v. Worcester, etc. St. Ry.,
 485ab
Hallower v. Henley, 192
Hallum v. Omro, 367
 v. Southern Ry. Co. (App.
 2183)
Halm v. Board of Freeholders, 393
Halpin v. Kansas City, 289, 356, 369
 v. Third Ave. R. Co., 525
Halstead v. New York, 299
Halstead v. Postal Tel., etc. Co., 543,
 547, 555
Haltiwanger v. Columbia, etc. Ry.
 Co., 480
Haltom v. Southern Ry. Co., 108
Halverson v. Minneapolis, etc. R. Co.,
 424
 v. Seattle Elec. Co., 769
Ham v. Delaware, etc. Canal Co., 480,
 488, 493, 525
 v. Lewiston, 368
 v. New York, 255, 267, 285,
 295, 723
Haman v. Omaha R. Co., 493
Hamann v. Milwaukee Bridge Co.,
 186, 189, 205, 206, 230, 232,
 773
Hamblin v. New York, etc. Ry. Co.,
 476
Hamburg, etc. Ins. Co. v. Atlantic
 Coast Line Ry. Co., 678
Hamden v. New Haven, etc. R. Co.,
 415
Hamerlynck v. Banfield, 748
Hamilton v. Caledonia R. Co., 488
 v. Central, etc. R. Co., 472
 v. Chicago, etc. Ry. Co., 12a
 v. Des Moines, etc. R. Co.,
 750
 v. Feary, 708a, 709
 v. Galveston, etc. R. Co., 219
 v. Goding, 698
 v. Great Falls R. Co., 495, 516
 v. Hannibal, etc. R. Co., 133
 v. Jones, 135b
 v. Louisiana, etc. Ry. Co., 459a
 v. McPherson, 95, 741
 v. Minneapolis Disk Mfg. Co.,
 705a
 v. Minneapolis Desk Mfg. Co.,
 8, 13
 v. Morgan's S. S. Co., 73a, 139,
 471
 v. N. Y. Central, etc. R. Co.,
 60a
 v. Rich Hill Coal Co., 211
 v. State, 336
 v. Taylor, 710
 v. Texas, etc. R. Co., 492a
 v. Third Ave. R. Co., 493
 v. Walla Walla, 230
 Co. v. Mighels, 256, 285
Hamlin v. City of Biddeford, 287
 v. Columbia, etc. Ry. Co., 481
 v. Yazoo, etc. R. Co., 58
Hamm v. Bettendorf Axle Co., 180,
 203
 v. N. Y. Central R. Co., 478
Hammacher v. New Berlin, 356
Hammack v. White, 644, 647

[References are to sections.]

- Hammargran v. St. Paul, 60c
 Hammer v. Great Northern Ry. Co., 207
 Hammill v. Louisville, etc. R. Co., 481
 Hammon v. Central Coal, etc. Co., 769
 v. Southeastern R. Co., 680
 Hammond v. Melton, 629
 v. Mukwa, 49, 85, 378
 v. St. Pancras, 11
 v. Schiff, 701
 Co. v. Johnson, 192
 v. Mason, 192
 etc. Ry. Co. v. Blockie, 485bc
 Hampson v. Taylor, 110, 334, 363, 376
 Hampick v. Shipp, 614a
 Hampton v. Pullman Car Co., 518, 526
 Hamrahn v. Cochran, 646
 Hance v. Cayuga, etc. R. Co., 61, 455
 Hancke v. Hooper, 605
 Hancock v. Walsh, 251
 v. Western Union Tel. Co., 543a
 v. York, 738
 Hand v. Baynes, 40
 v. Brookline, 286
 v. Klinker, 362
 Handelun v. Burlington, etc. Ry. Co. (App. 2141)
 Handyside v. Powers, 35, 55
 Haney v. Kansas City, 18
 v. Pinckney, 373, 760
 v. Pittsburgh R. Co., 213
 Haniford v. Kansas City, 358, 368
 Hankins v. N. Y., Lake Erie, etc. R. Co., 205, 231, 233, 233a
 v. Watkins, 16, 18, 19, 686
 Hankinson v. Charlotte, etc. R. Co., 468
 Hanks v. Boston, etc. R. Co., 464
 v. Chicago, etc. R. Co., 510
 Hanley v. Grand Trunk, 192
 v. Huntington, 334
 v. West Virginia, etc. Ry. Co. (App. 2104)
 Hanlon v. Ingram, 669
 v. Keokuk, 376
 v. Milwaukee Elec., etc. Co., 49
 v. Missouri Pacific R. Co., 54, 99
 v. Philadelphia, etc. Turnp. Co., 413
 v. South Boston R. Co., 467
 Hanly v. Grand Trunk R. Co., 194, 195
- Hanna v. Chattanooga, etc. R. Co., 181
 v. Grand Trunk R. Co., 132
 v. Granger, 232
 Hannaford v. Kinney, 708
 Hannah v. Connecticut River R. Co., 193, 207a, 213
 Hannaher v. St. Paul, etc. R. Co., 407, 412
 Hannan v. St. Clair, 653b
 Hannem v. Pence, 343, 701a
 Hannibal, etc. R. Co. v. Fox, 202, 203a, 205, 233
 v. Husen, 633
 v. Kenney, 419, 456
 v. Martin, 490, 502, 523
 v. Swift, 486
 Hannigan v. Union Warehouse Co., 181
 Hannon v. Agnew, 310, 330
 v. Boston, etc. Ry. Co., 518
 v. St. Louis Co., 285, 286
 Hanover, etc. R. Co. v. Coyle, 481
 Hanrahan v. Cochran, 646
 v. Manhattan Co., 60b, 519
 Hanrathy v. Northern Central R. Co., 180, 184, 209a
 Hans v. Louisiana, 249
 Hansan v. So. Pacific R. Co., 417a, 457, 481
 Hanscom v. Boston, 338, 367
 Hanselman v. Carstens, 614
 Hansel-Elcock, etc. Co. v. Clark, 12a, 186
 Hansley v. Janesville, etc. R. Co., 748
 Hanson v. Chicago, etc. R. Co., 417, 426, 476
 v. Eastern, etc. R. Co., 749
 v. European, etc. R. Co., 154
 v. Minneapolis, etc. R. Co., 520
 v. Northern Pacific Ry. Co. (App. 2155)
 v. Schneider, 187
 v. Spokane Valley, etc. Co., 703, 719
 v. Spokane, etc. Land Co., 343
 Hanvey v. Rochester, 299
 Haralson v. San Antonio Tr. Co., 520
 Harbert v. Atlanta, etc. Ry. Co., 476, 482
 Harbeson v. Louisville, etc. Ry. Co., 472
 Harbor v. Kallager, 367
 Harby v. Florida, etc. Hotel Co., 758
 Hard v. Vermont, etc. R. Co., 180, 184, 187
 Hardcastle v. South Yorkshire R., etc. R. Co., 343, 403, 703

[References are to sections.]

- Hardegg v. Willards, 146
 Harden v. Georgia, etc. Ry. Co., 1, 460
 v. North Carolina R. Co., 413, 459
 Hardenburgh v. St. Paul, etc. R. Co., 493
 Harder v. Minneapolis, 373
 etc. Coal Co. v. Schmidt, 207*h*
 Hardiman v. Wholley, 645
 Harding v. Boston, 166
 v. Chicago, etc. Ry. Co., 455
 v. Fahey, 16
 v. Hale, 334
 v. Jaspar, 334
 v. St. Louis Nat. Stock Yards, 151
 v. Townshend, 765
 Hardman v. King, 656
 Hardrop v. Gallagher, 702
 Hardwick v. Georgia R. Co., 519
 Hardy v. Boston, etc. Ry. Co., 198
 v. Brooklyn, 254, 262, 279
 v. Chicago, etc. Ry. Co., 203, 207*b*, 219
 v. Delaware, etc. R. Co., 225
 v. Keene, 291, 354
 v. Milwaukee R. Co., 518, 740, 743
 v. Minneapolis, etc. R. Co., 231
 v. N. Y. Cent. R. Co., 493
 v. North Carolina Cent. R. Co., 180, 191, 407
 v. Shedden, 114*b*
 Hare v. McIntyre, 245, 688*a*
 Hargis v. St. Louis, etc. R. Co., 474
 Hargreaves v. Deacon, 8, 97, 705
 Harkavy v. Zismaw, 753
 Harkin v. Crumbie, 710
 Harkins v. Pittsburgh, etc. Traction Co., 73*a*
 Harkness v. Western U. Tel. Co., 540*a*, 542, 553
 Harlan v. Lumsden, 617, 618
 v. St. Louis, etc. R. Co., 24, 25 (App. 2074)
 Harley v. Buffalo Car Mfg. Co., 195
 v. Eutawville R. Co., 428
 Harlinger v. N. Y. Central R. Co., 137, 151, 769, 772
 Harlow v. Humiston, 279, 365
 Harman v. Tappenden, 310
 Harmon v. Columbia, etc. Ry. Co., 459
 v. Gelphart, 332
 v. Western Union Tel. Co., 753*a*, 755
 Harmond v. Pearson, 738
 Harney v. Chicago, etc. Ry. Co., 203
 Harniss v. Bulpitt, 703
 Harold v. Watney, 27*a*
 Harp v. Southern Ry. Co., 493
 Harper v. Kopp, 73
 v. Milwaukee, 258, 287
 v. Norfolk, etc. R. Co., 132
 v. N. & W. R. Co. (App. 2101)
 v. Town of Lenoir, 285
 v. Western Union Tel. Co., 755
 Harr v. N. Y. Central R. Co., 217
 Harrell v. Mayor and Council of Macon, 376
 v. Albemarle, etc. R. Co., 426
 Harrigan v. Bakersfield, 370
 v. Brooklyn, 353, 375
 Harrill v. Southern Carolina, etc. Ry. Co. (App. 2084)
 Harriman v. Boston, 369
 v. Pittsburg, etc. Ry. Co., 484, 688
 v. Reading, etc. Ry. Co., 494, 516
 v. Stowe, 244
 v. Wilkins, 618
 Harrington v. Binno, 572
 v. Buffalo, 363
 v. Butte, etc. Ry. Co., 1, 108
 v. Chicago, etc. Ry. Co., 449
 v. Fuller, 618
 v. Los Angeles, etc. Co., 114*a*
 v. Union Cotton Mfg. Co., 219
 v. Woodbridge Tp., 271
 Harriott v. Plimpson, 614*a*
 Harris, The C. P., 726
 v. Atlanta, 291
 v. Atlantic, etc. Ry. Co., 480 (App. 2084)
 v. Berkley, etc. Co., 750
 v. Bottum, 214*a*
 v. Cameron, 34
 v. Commercial Ice Co., 654
 v. Sonsol. Coal Co., 193
 v. Dampskibsselskab, 224
 v. Fall, 614*a*
 etc. Ry. Co. v. Finn, 99
 v. Fisher, 635
 v. Gulf, etc. Ry. Co., 508
 v. Hannibal, etc. R. Co., 513*a*
 v. Hewitt, 185*a*
 v. Louisville, etc. R. Co., 150
 v. Mabry, 148
 v. McNamara, 129, 164, 167, 168 (App. 2052)
 v. Minneapolis, etc. R. Co., 476
 v. Missouri, etc. Ry. Co., 419
 v. Newbury, 373
 v. Nicholas, 150
 v. Packney Co., 629

[References are to sections.]

- Harris, etc. Ry. Co. v. Perry**, 719, 723
 v. Puget Sound Ry. Co., 488, 494, 505, 516
 v. Ryding, 716
 v. Savage, 665, 666
 v. School District, 256
 v. Shebek, 219
 v. Simon, 688*a*
 v. Southern Ry. Co., 475, 482, 483
 v. Stevens, 492*a*
 v. Thompson, 332
 v. Uebelhoeer, 66*a*
 v. Vigo Co., 257
 v. Western Union Tel. Co., 540, 547
Harrisburg v. Saylor, 278
Harrisburgh, The, 124, 132
 v. Taylor, 298
Harrison v. Adamson, 656
 v. Albia, 373
 v. Baltimore, 266
 v. Berkley, 28
 v. Brega, 592
 v. Butte, etc. Ry. Co., 25
 v. Central R. Co., 178, 179, 185
 v. Chicago, etc. R. Co., 428
 v. Collins, 298
 v. Denver, etc. R. Co., 207*k*, 208
 v. Detroit, etc. R. Co., 221, 230, 233
 v. Fink, 493, 519
 v. Great Northern R. Co., 65, 122, 728
 v. Hughes, 747
 v. McClellan, 627, 655
 v. New York, etc. Ry. Co., 140*a*, 198*a*, 201, 206
 v. Ry. Co., 761*a*
 v. Redden, 302, 303
 v. Sutter, 516, 769
 v. Washington, etc. R. Co., 520
 v. Western Union Tel. Co., 540*a*, 543*a*
 Tel. Co. v. Wisdom, 556*a*
Harrod v. Bisson, 760, 761
 v. Hammond Packing Co., 192
Harroun v. Brush El. Light Co., 698
Hart v. Albany, 332, 333
 v. Bridgeport, 261
 v. Brooklyn, 367
 v. Charlotte, etc. R. Co., 759
 v. Chicago, etc. R. Co., 466
 v. Cole, 710
 v. Delaware, etc. Co., 114, 725
 v. Devereux, 92, 482
 v. Direct, etc. Cable Co., 556*a*
 v. Fletcher Land Co., 487, 497
Hart v. Frame, 559, 564, 567
 v. Grennell, 719
 v. Grinnell, 704
 v. Hill, 333
 v. Hudson, 587
 v. Hudson River Bridge Co., 54, 57, 58, 107, 112, 114, 396
 v. Lancashire, etc. R. Co., 60*c*
 v. Naumburg, 217
 v. New Haven, 760
 v. Red Celar, 376, 377
 v. Ryan, 701
 v. Washington Park Club, 626
 v. Western R. Co., 666
 v. Western U. Tel. Co., 556
Harte v. Frazer, 207*g*
Harten v. Brightwood Ry. Co., 525
Harter v. Morris, 24, 566
Hartfield v. Roper, 10, 73, 73*a*, 74, 75, 84
Hartford v. Northern Pac. R. Co., 232, 241*c*
 v. Talcott, 13*a*, 343, 703*a*
 etc. R. Co. v. Jackson, 179
 Co. v. Hamilton, 257
 v. Wise, 257, 289
Hartigan v. Southern Pac. R. Co., 133 (App. 2055)
Hartley v. Harriman, 629
Hartman v. Chicago, etc. Ry. Co., 464
 v. Citizens', etc. Gas Co., 693
Harton v. Forest Telep. Co. (App. 2085)
Hartshorn v. Chaddock, 750
Hartstein v. W. U. Tel. Co., 753*a*
Hartwell v. Riley, 590
Hartwig v. Bay State Shoe Co., 181, 207
 v. Chicago, etc. R. Co., 57, 473
 v. N. P. Lumber Co., 202
Harty v. Central R. Co., 470, 480
Hartzall v. Sill, 730
Hartzig v. Lehigh Val. R. Co., 513*a*
Hartzler v. Met. St. Ry. Co., 772
Hartzog v. Western Union Tel. Co., 756
Harvard v. Stiles, 739
 College v. Stearns, 371
Harvey v. Alturas Gold Min. Co., 215
 v. Baltimore, etc. Ry. Co., (App. 2066)
 v. Buchanan, 628, 645
 v. Chicago, etc. Ry. Co., 508
 v. Dunlop, 10, 16
 v. Erie Ry. Co., 476
 v. Hillsdale, 291

[References are to sections.]

- | | |
|--|---|
| <p>Harvey v. Louisiana, etc. Ry. Co., 460
 v. Mason, etc. Ry. Co., 406, 412
 v. Missouri, etc. Ry. Co., 207<i>h</i>
 v. N. Y. Central, etc. R. Co., 190, 233<i>a</i>, 235, 241
 v. Virginia, 249
 Harwood v. Bennington, etc. R. Co., 421, 451<i>a</i>
 v. Lowell, 338, 749<i>a</i>
 Harz v. Gowland, 594
 Hasbrouck v. Armour, 117, 690
 v. Western Union Tel. Co., 741
 Hase v. Seattle, 373
 Hashman v. Wyndotte Gas Co., 692, 693
 Haskell v. New Bedford, 258, 274
 v. No. Adirondack R. Co., 750
 v. Penn Yan, 368
 etc. Car Co. v. Prezezdziakowski, 193
 Haskins v. New York Cent. R. Co., 193
 Hass v. Philadelphia, etc. S. S. Co., 234
 Hassa v. Junger, 61
 Hassenyer v. Mich. Central R. Co., 86, 212
 v. Railroad Co., 379
 Hastie v. Jenkins, 731
 Hastings v. Central Crosstown R. Co., 523
 v. Halleck, 559, 569, 572
 v. Northern Pac. R. Co., 497
 v. Southern Ry. Co., 481<i>a</i>
 Hastings v. Le Roi, 224
 Hasty v. Sears, 241
 Hatch v. Dwight, 731
 v. Fogerty, 559
 v. Philadelphia, etc. Ry. Co., 508
 v. Reynolds, 207<i>i</i>
 v. Vermont Cent. R. Co., 283, 395
 Hatcher v. Dunn, 313
 Hathaway v. Des Moines, 230
 v. Detroit, etc. Ry. Co., 451
 v. East Tennessee, etc. R. Co., 56
 v. Hinton, 340
 v. Illinois Cent. R. Co., 190, 232
 v. Tinkham, 626
 v. Toledo, etc. R. Co., 74
 Hathorn v. Richmond, 607
 Hatt v. Nay, 190, 221
 Hatter v. Illinois Cent. R. Co., 207<i>e</i>
 Hattermann v. Siemens, 117</p> | <p>Hatton v. Holmes, 602
 Hauch v. Hernandez, 672
 Hauffer v. Public Service Ry. Co., 742
 Haugen v. Chicago, etc. R. Co., 666, 678
 Haugh v. Chicago, etc. R. Co., 158, 207<i>g</i>, 217
 Haughey v. Hart, 343, 703
 Hauser v. Central R. Co. of New Jersey, 485
 v. Griffith, 748
 Hausler v. Commonwealth Elec. Co., 698
 Hausman v. Madison, 363
 Haven v. Pittsburg Bridge Co., 376
 Havener v. W. U. Tel. Co., 756
 Havens v. Erie R. Co., 469, 482
 Haver v. Central, etc. Ry. Co., 154
 Haverly v. McClelland, 591
 v. State Line, etc. R. Co., 55, 679
 Haviland v. Kansas City, etc. Ry. Co., 189
 Havre de Grace v. Fletcher, 353, 354
 Hawes v. Fox Lake, 355
 Hawk v. McLeod Lbr. Co., 232
 Hawke v. Brown, 164
 Hawker v. Baltimore, etc. R. Co., 467
 Hawkeye Lumber Co. v. Diddy, 619
 Hawkins v. Front St. R. Co., 516, 523, 764
 v. Great Western R. Co., 178
 v. Johnson, 185<i>a</i>
 v. Pythian, 119
 Hawks v. Northampton, 350, 408
 v. Slusher, 64
 v. Winans, 520
 Hawksworth v. Thompson, 122, 248
 Hawley v. Atlantic, 356
 v. Chicago, etc. R. Co., 87
 v. Gloversville, 368
 v. Northern Central R. Co., 91, 207<i>h</i>, 209<i>a</i>, 215
 v. Saranac, 373
 v. Sumpter, etc. Ry., 672
 Hawver v. Whalen, 14, 359
 Hawxhurst v. New York, 298, 345
 Haxton v. Pittsburgh, etc. R. Co., 434
 Hay v. Baraboo, 338, 703
 v. Cohoes Co., 9, 688<i>a</i>
 Haycroft v. Grigsby, 323
 v. Lake Shore, etc. R. Co., 54, 73, 476, 477
 Hayden v. Attleborough, 334, 356, 393
 v. Chemical Nat. Bank, 584
 v. Clark, 365</p> |
|--|---|

[References are to sections.]

- Hayden v. Missouri, etc. R. Co., 478, 750
 v. Smithville Mfg. Co., 184, 192, 218, 683
- Hayes v. Cambridge, 338
 v. Bush, etc. Mfg. Co., 73, 207*b*
 v. Forty-second St. R. Co., 56
 v. Houston, etc. Ry. Co.
 v. Michigan Central R. Co., 8, 9, 13*a*, 27, 27*a*, 57, 88, 442, 466*a*, 481
 v. Northern Pac. R. Co., 120*a*, 477
 v. Norcross, 73*a*
 v. Oshkosh, 265
 v. Pitts-Kimball Co. (App. 2068)
 v. Porter, 313, 616
 v. R. R. Co., 392
 v. Smith, 626, 635, 638
 v. Waldron, 729, 730, 734
 v. West Bay City, 14, 368
 v. Williams, 54, 133, 773
- Haygood v. Galveston, etc. Ry. Co., 207*h*
 v. Justices, etc., 256
 v. McKenzie, 562
- Hayman v. Hewett, 629
- Hayne v. Rhodes, 559, 575
 v. Union St. Ry. Co., 513
- Haynes, Matter of, 574
 v. Boston Elev. Ry. Co., 140*a*
 v. East Tennessee R. Co., 202
 v. Tunstall, 619
 Automobile Co. v. Sinnett, 653*a*, 653*b*
- Hays v. Gainesville R. Co., 99
 v. Gallagher, 58
 v. International, etc. Ry. Co., 49
 v. Kennedy, 16
 v. Millar, 142
 v. Miller, 669
 v. Tacoma Ry. Co., 485
 v. Western Union Tel. Co., 753*a*, 755
- Hayward v. Merrill, 102
- Haywood v. Charlestown, 334
 v. Galveston, etc. R. Co., 208
 v. N. Y. Central R. Co., 466
- Hazard v. New England Ins. Co., 179
 v. Robinson, 731
 Co. v. Volger, 764
- Hazeltine v. Concord R. Co., 676
- Hazen v. West Superior Lumber Co., 203
- Hazelhurst v. Brunswick Lumber Co., 216
- Hazlett v. Commercial Nat. Bank, 580*a*
- Hazman v. Hoboken Land, etc. Co., 511
- Hazzard v. Council Bluffs, 286, 287, 375
- Heacock v. Sherman, 359, 390
 v. State, 398
- Headen v. Rust, 419
- Healey v. City Pass. R. Co., 151
 v. New York, 93
- Healy v. Ehret, 92
 v. Johnson, 147*a*
 v. Smith, 418, 655
 v. Vorndraw, 343
- Heaney v. Long Island R. Co., 56, 463, 467, 476, 478
- Heape v. Berkeley Count, 253
- Heard v. Holman, 744
- Hearn v. Ayers, 622, 625*a*
- Hearne v. Southern Pac. R. Co., 90, 475
- Hearns v. Waterbury Hospital, 331
- Heater v. Pearce, 590, 592
- Heath, Matter of, 310
 v. Barman, 385
 v. Cook, 653
 v. Met. Exhibition Co., 709
 v. Postal Tel., etc. Co., 543*a*, 741, 753*a*, 754
 v. Stewart, 460
 v. Williams, 731
- Heaven v. Pender, 1, 8, 38, 116
- Heavener v. North Carolina, etc., Ry. Co., 457
- Heavey v. Hudson, etc. Paper Co., 218
- Heazle v. Indianapolis, etc. R. Co., 494
- Hebbard v. Berlin, 350
- Hebblethwaite v. Old Colony St. Ry. Co., 516
- Heberling v. Warrensburg, 375
- Hebert v. Hudson R. Elec. Co., 73*a*
- Hebron v. Chicago, etc. R. Co., 429
- Hecht v. Ohio, etc. R. Co., 140 (App. 2061)
- Heckle v. Southern Pac. Co., 108
- Hector v. Boston El. Light Co., 698
 Min. Co. v. Robertson, 64
- Heddles v. Chicago, etc. R. Co., 467, 761
- Hedekin v. Gillespie, 708*a*
- Hedge v. City of Des Moines, 253
- Hedges v. Kansas City, 67
- Hedin v. Suburban R. Co., 485*c*
- Hedley v. Pinkney S. S. Co., 227
- Hedrick v. Missouri, etc. Ry. Co., 513*a*
- Heeg v. Licht, 17, 689, 701*a*

[References are to sections.]

- Heeney v. Sprague, 13, 13a, 343
 Hefferen v. Northern Pac. R. Co., 195, 218
 Hefferman v. Barber, 649
 Heffinger v. Minneapolis, etc. R. Co., 90
 Heffron v. Brooklyn Heights Ry. Co., 485a
 Hegan v. Eighth Ave. R. Co., 485a, 652
 Hegeman v. Western R. Co., 14, 45, 410, 497
 Hegerich v. Keddle, 135b
 Heggen v. Fort Dodge, etc. Ry. Co., 154
 Hegman v. Jersey City, etc. Ry. Co., 197
 Heidenheimer v. Ellis, 747
 Heidenwag v. Philadelphia, 298, 361
 Heidt v. Minor, 549, 602
 Heil v. Glanding, 61, 62, 99, 748, 758
 Heilbron v. St. Louis, etc. Ry. Co., 334
 Heilig v. Southern Ry. Co., 201
 Heimann v. Western U. Tel. Co., 554
 Heimberger v. St. Louis, etc. R. Co., 238
 Heindrix v. Louisville Elev. Co., 690
 Heine v. Chicago, etc. R. Co., 233
 Heinel v. People's Ry. Co., 758
 Heinemann v. Heard, 57, 58
 Heininger v. Gt. Northern R. Co., 426
 Heinlein v. Boston, etc. R. Co., 490, 492a
 Heintze v. New York, 118
 Heinz v. Consumers', etc. Co., 693
 Heirn v. McCaughan, 115
 Heissenbittel v. New York, 285
 Heiser v. Kingsland Mfg. Co., 117a, 690
 Heiss v. Chicago, etc. Ry. Co., 457
 v. Lancaster, 108
 Heitman v. Pacific Elec. Ry. Co., 476
 Heizer v. Kingsland, etc. Mfg. Co., 117
 Heland v. Lowell, 379
 Helena v. Thompson, 272, 274
 Gas Co. v. Rogers, 769, 773
 Helfenstein v. Medart, 185, 207b
 Helfrich v. Ogden R. Co., 201
 Helland v. Bridenstine, 614a
 Hellams v. Western Union Tel. Co., 540a, 542, 543a
 Heller v. Abbott, 451a, 452
 v. Sedalia, 265
 v. Stremmel, 253
 Helm v. Louisville, etc. R. Co., 182
 v. O'Rourke, 207g
- Helmke v. Stetler, 629
 v. Thilmany, 218
 Helton, etc. Lbr. Co. v. Ingram, 189
 Heltonville Mfg. Co. v. Fields, 207a, 207g
 Hembling v. Grand Rapids, 346, 369
 Hemingway v. Ill. Cent. Ry. Co., 114
 Hemmingway v. Chicago, etc. R. Co., 510, 520
 Henahan v. Lyons, 195 (App. 2152)
 Henavie v. N. Y. Cent. R. Co., 654
 Hencke v. Milwaukee R. Co., 495
 Henckes v. Minneapolis, 363
 Hendershott v. Ottumwa, 289
 Henderson v. Chicago, etc. R. Co., 417, 455
 v. Covington, 256
 v. Davis, 334
 v. Greenfield, etc. St. Ry. Co., 485bd
 v. Kansas City, 218
 v. Los Angeles Tr. Co., 485ab
 v. Minneapolis, 274
 v. Philadelphia, etc. R. Co., 58
 v. Philadelphia, etc. Ry. Co., 58, 676
 v. St. Paul, etc. R. Co., 479
 v. Sandefur, 262
 v. Stevenson, 504
 v. Walker, 241c
 v. Williams, 203
 Co. v. Phila. & Reading R. Co., 675, 676
 Est. Co. v. Carroll Elec. Co., 729, 730
 Trust Co. v. Stuart, 114
 Hendrick v. Chicago, etc. Ry. Co., 490
 v. Cook, 733
 v. Ilwaco R. Co., 129
 v. Walton, 129
 Hendricks v. Butcher, 115
 v. Johnson, 729
 v. Lesure Lbr. Co., 232
 v. Western Union Tel. Co., 540a
 Hendricks v. State, 302
 Hendricksen v. Meadows, 704, 719
 v. Philadelphia, etc. Ry. Co., 455
 Hendrikson v. Great Northern R. Co., 481b, 482
 Hendrix v. St. Joseph, etc. R. Co., 449
 v. Vale Royal Mfg. Co., 203
 Henkel v. Murr, 708, 709, 710
 Henley v. Lyme Regis, 281
 Henly v. Delaware, etc. Ry. Co., 493
 Henn v. Long Island Ry. Co., 467

[References are to sections.]

- Hennessey v. Brooklyn R. Co., 81
 v. New Bedford, 291
 Hennessey v. Taylor, 653*d*
 Hennie v. Vogel, 115
 Henning v. Caldwell, 477
 v. Sampsell, 485
 v. Western U. Tel. Co., 359
 Henrietta Coal Co. v. Campbell, 207*g*
 Henry v. Brackenridge Lumber Co.,
 57
 v. Cleveland, etc. R. Co., 97,
 476, 674
 v. Dennis, 35, 39
 v. Dubuque, etc. R. Co., 419
 v. Grant St., etc. Ry. Co., 520
 v. Hudson, 195
 v. Klopfer, 645, 764
 v. Lake Shore, etc. R. Co.,
 193, 241
 v. Missouri, etc. Ry. Co., 73*a*
 v. Ohio River R. Co., 735
 v. Omaha Packing Co., 206
 v. St. Louis, etc. R. Co., 28, 55
 v. So. Pacific R. Co., 28, 30,
 666, 675
 v. Staten I. R. Co., 241
 v. Wabash W. R. Co., 197
 Henry Hall Sons' Co. v. Sundstrom,
 688*a*
 Henshaw v. Noble, 243
 Hensler v. Stix, 487, 719*a*
 Henslin v. Wheaton, 606
 Henson v. Lehigh Valley Ry. Co.,
 184*a*
 v. Pascola Stave Co., 180
 Hepburn v. Philadelphia, 359
 Hepfel v. St. Paul, etc. R. Co., 73*a*,
 99
 Herdt v. Koenig, 73*a*, 120, 709*a*
 v. Rochester, etc. R. Co., 523
 Heriot's Hospital v. Ross, 331
 Herlisch v. Louisville, etc. R. Co.,
 476
 Hermann v. New Orleans, etc. R. Co.
 (App. 2064)
 v. New Orleans, etc. R. Co.,
 124
 Hermans v. N. Y. Central R. Co.,
 478
 Hermes' Admr. v. Hatfield Coal Co.,
 705
 Herndon v. Salt Lake City, 354, 356
 Herne v. So. Pac. R. Co., 678
 Herold v. Meyers, 656, 662
 v. Pfister, 218
 Heron v. St. Paul, etc. Ry. Co., 459,
 459*a*
 Herr v. Lebanon, 378
 v. St. Louis, etc. Ry. (App.
 2157)
- Herrick v. Gary, 633
 v. Minneapolis, etc. R. Co., 131
 v. Sullivan, 647
 v. Wixom, 110
 Herriman Irr. Co. v. Keel, 734
 Herring v. Dist. of Columbia, 274
 v. Wilmington, etc. R. Co., 57,
 93, 480
 Herrington v. Corning, 262
 v. Lansingburgh, 175, 298
 v. Macon, 73, 73*a*
 v. Phoenix, 369
 Herron v. Amer. Steel, etc. Co., 207*h*
 v. Western U. Tel. Co., 542,
 543, 555, 754, 755.
 Hershberg v. Barberville, 262
 Hershberger v. Lynch, 162
 Hersom's Case, 303
 Herstine v. Lehigh Val. R. Co., 516
 Hertel v. Safety Folding Bed Co., 197
 Herzog v. Hemphill, 704, 705
 Heslop v. Metcalfe, 568
 Hess v. Lupton, 720
 v. Pegg, 254
 v. Rosenthal, 192
 Hesse v. Columbus (App. 2178)
 Hesse v. Meridian, etc. Tramw. Co.,
 516
 Hesselbach v. St. Louis, 361
 Hesser v. Grafton, 376
 Hession v. Wilmington, 287
 Hetfield v. Towsley, 303
 Hetrich v. Deachler, 729, 730
 Hett v. Pun Pong, 572
 Heubner v. Hammond, 706
 Heucke v. Milwaukee, etc. R. Co., 54,
 60*o*
 Hewett v. Swift, 244, 248
 v. Woman's Hospital Aid
 Ass'n, 54
 Hewey v. Nourse, 668
 Hewison v. New Haven, 262, 350, 355
 Hewitt v. Eisenbart, 759
 v. Flint, etc. R. Co., 209*a*, 221
 v. Seattle, 262
 v. Walker, 659
 Hewlett v. Brooklyn, etc. Ry. Co.,
 769
 v. George, 766
 v. Western U. Tel. Co., 536,
 546, 556*c*
 Hexamer v. Webb, 144, 164, 165, 168,
 173, 361
 Hexter v. Knox, 709
 Hey v. Philadelphia, 346
 v. Prime, 115, 764
 v. Simon, 567
 Heyde v. St. Louis Tr. Co., 516
 Heymann v. Cunningham, 618
 Heywood v. Hildreth, 623

[References are to sections.]

- Heywood, etc. Co. v. Jacobson, 215
 v. Morrill, etc. Co., 207*h*
 Hiatt v. Des Moines, etc. R. Co., 410
 Hibbard v. Thompson, 61, 99, 615, 741
 v. W. U. Tel. Co., 547, 553
 Hickenbottom v. Delaware, etc. R.
 Co., 508
 Hickey v. Boston, etc. R. Co., 61, 473,
 523
 v. McCabe, 688*a*
 v. N. Y. Central R. Co., 114,
 463
 v. Rio Grande, etc. Ry. Co.,
 108
 v. St. Paul R. Co., 485*c*
 v. Taaffe, 195, 218, 219
 v. Waltham, 350
 Hickman v. Kansas City, etc. R. Co.,
 113
 v. Missouri Pac. R. Co., 521
 Hickok v. Auburn Light, etc. Co.,
 698*a*
 v. Hine, 736
 v. Plattsburgh, 281, 289, 328,
 358
 Hicks v. Chesapeake, etc. Ry. Co.,
 416
 v. Dorn, 325
 v. N. Y., New Haven, etc. R.
 Co., 463, 468, 477
 v. Pacific, etc. R. Co., 73, 458,
 644*a*
 Hide v. Thornborough, 701
 Higbie v. New York Board of Educa-
 tion, 296
 Higert v. Greencastle, 353
 Higginbotham v. Higginbotham, 56*b*
 Higgins v. Boston, 378
 v. Butcher, 124
 v. Central, etc. R. Co., 132, 133
 v. Chesapeake, etc. Canal Co.,
 16, 402
 v. Deeney, 74
 v. Dewey, 739
 v. Dewey, 21, 30, 666, 669
 v. Fannin, 184*a*
 v. Glens Falls, 353, 375
 v. Harlem R. Co., 522
 v. Kendrick, 621
 v. Missouri Pac. R. Co., 238
 v. New Orleans, etc. R. Co.,
 505
 v. Ruppert, 704, 706
 v. Ry. Co., 421, 451*a*
 v. St. Louis, etc. Ry. Co.
 (App. 2076)
 v. Superior, 291
 v. Watervliet Turnpike, etc.
 Co., 150, 151, 493
 v. Wilmington City Ry. Co., 99
 Higgins Carpet Co. v. O'Keefe, 218
 Higgs v. Maynard, 144
 High v. Carolina Cent. R. Co., 483
 Highland Ave. R. Co. v. Burt, 508
 v. Walters (App. 2120)
 etc. R. Co. v. Donovan, 523
 v. Sampson, 467, 483, 485*c*
 v. South, 459*a*
 v. Walters, 241*b*
 v. Winn, 7
 Highlands v. Raine, 376
 Higley v. Gilmer, 60*b*
 Hildreth v. Lowell, 299
 Hill v. Allen, 559
 v. Applegate, 97
 v. Balls, 633
 v. Big Creek Lbr. Co., 189,
 191, 203*a*
 v. Boston, 256, 258, 267, 281,
 285, 337
 v. Charlotte, 262, 355
 v. Cincinnati, etc. R. Co., 729
 v. Concord R. Co., 449
 v. Featherstonhaugh, 559
 v. Fond du Lac, 334*a*
 v. Glenwood, 88*a*
 v. Gust, 46, 114, 219
 v. Hayes, 709*a*
 v. Lake Shore, etc. Ry. Co.
 (App. 2178)
 v. Livingston, 394
 v. Louisville, etc. R. Co., 65
 v. Missouri Pac. R. Co., 419,
 428
 v. Mynatt, 559
 v. Nelson Coal Co., 206
 v. New Haven, 108
 v. New York, 262
 v. Ninth Ave. R. Co., 516, 518
 v. Ontario, etc. R. Co., 680
 v. Portland, etc. R. Co., 426
 v. Ragland, 625*a*
 v. Rensselaer County, 261
 v. Schneider, 688*a*, 701*a*
 v. Seekonk, 375, 379
 v. Sewell, 617, 619
 v. Smith, 283
 v. State, 340
 v. Supervisors, etc., 337
 v. Tionesta, 376
 v. United States, 249
 v. West End R. Co., 508
 v. Western U. Tel. Co., 546,
 554, 754
 Hillard v. Chicago, etc. R. Co., 434
 Hille v. Winsor, 739
 Hillebrand v. Standard Biscuit Co.,
 766, 769
 Hiller v. Sharon Springs, 367
 Hilliard v. Richardson, 168, 173, 699

[References are to sections.]

- Hilliker v. Coleman, 733
 Hillman v. Newington, 66
 Hillquist v. Sun, etc. Pub. Co., 741
 Hillyer v. Borough of Winstead, 339
 Hilman Land, etc. Co. v. Littlejohn, 207
 Hilsdorf v. St. Louis, 291
 Hilsenbeck v. Guhring, 710
 Hilton v. Fitchburg Ry. Co., 190
 v. Granville, 716
 v. Whitehead, 716
 Hilts v. Chicago, etc. R. Co., 190
 Himmelwright v. Baker, 101
 Himmerman v. Satterlee, 333
 Hinchman v. Pere Marquette Ry. Co., 474
 Hine v. Cape Cod R. Co., 107, 111, 112, 476
 v. Danbury (App. 2127)
 v. Emerson, 629
 v. Horazdowsky, 218; 219a
 v. Krug, 23
 v. Penobscot, 104
 v. Somerset, 356, 369
 Hindal v. Blades, 624
 Hindley v. Manhattan Ry. Co., 702
 Hindman v. Oregon R., etc. Co., 421, 451a
 v. Timme, 355
 Hine v. Cushing, 666, 702
 v. Erie Ry. Co., 467
 v. Wooding, 657
 Hiner v. Fond du Lac, 343
 Hines v. Charlotte, 262
 v. Lockport, 253, 262, 374
 v. Nevada, 262
 v. N. Y. Central R. Co., 185a
 v. Scott County, etc. Co., 752
 v. Wilcox, 708, 709a
 Hinion v. New York, etc. Ry., 211
 Hinken v. Iowa Central R. Co., 476
 Hinkle v. Richmond, etc. R. Co., 463, 464, 476
 Hinman v. Chicago, etc. R. Co., 421
 Hinsdale v. New York, etc. Ry. Co., 769, 775 (App. 2082)
 Hinshaw v. Raleigh, etc. R. Co., 521
 Hinson v. Postal, etc. Tel. Co., 540a
 Hinz v. Starin, 702, 704
 Hipkins v. Birmingham Gas Co., 692, 693
 Hipp v. Champion Fibre Co., 231
 Hirsch v. American Dist. Tel. Co., 534
 v. New York, etc. R. Co., 525
 Hirschkovitz v. Pennsylvania R. Co., 137, 769
 Hirst v. Fitchburg, etc. Ry. Co., 148
 Hirte v. Eastern, etc. Ry. Co., 151
 Hise v. Western Union Tel. Co., 542, 735
 Hissong v. Richmond, etc. R. Co., 241c
 Hitch v. County Com'rs, 256
 Hitchcock v. Bank of Suspension Bridge, 585
 Hitchcock v. Boston, 363
 v. Burgett, 605, 607
 v. Riley, 665, 666
 Hitheins v. Frostburg, 273
 Hite v. Blanchford, 633
 v. Whitley County, 256
 Hixon v. Lowell, 258, 333, 350
 Hixson v. St. Louis, etc. R. Co., 476
 Hjelm v. Volz, 232
 Hoadley v. International Paper Co., 704
 v. Northern Tr. Co., 40
 v. Ohio, etc. Ry. Co., 770
 Hoag v. Lake Shore, etc. R. Co., 28, 30, 666
 v. N. Y. Central, etc. R. Co., 66a, 67
 v. South Dover Marble Co., 485bd
 Hoagland v. Culvert, 313
 Hoar v. Maine Central R. Co., 61, 525
 v. Merritt, 195
 Hoard v. Peck, 115
 Hoback v. Louisville, etc. Ry. Co., 457
 Hobart & Co. v. Keck, 704
 Nat. Bank v. McMurrough, 583, 587a
 Hobbs v. Atlantic, etc. R. Co., 233a
 v. Stauer, 195, 197
 Hobel v. Mahoning, etc. Ry. Co., 760
 Hoben v. Burlington, etc. R. Co., 96
 -Blum Block Co. v. Southern Bell, etc. Co., 757
 Hoberg v. Collins, etc. Co., 705
 Hoboken Land, etc. Co. v. Hoboken, 729
 v. Lally, 92
 Hoby v. Built, 568
 Hockett v. State, 536, 556c
 Hockstedler v. Dubuque, etc. R. Co., 674
 Hocum v. Weatherick, 108, 113
 Hocutt v. Western Union Tel. Co., 741, 753a
 Hodge v. Lehigh Val. R. Co., 412, 731
 v. N. Y. Central R. Co., 425
 v. Rutland Ry. Co., 505
 Hodges v. Buffalo, 299
 v. Kimball (App. 2116)
 v. New Hanover Tr. Co., 521
 v. Percival, 60c, 719a
 v. St. Louis, etc. R. Co., 468

[References are to sections.]

- Hodges v. Southern Ry. Co., 518, 520
 v. Standard Wheel Co. 231
 (App. 2136)
 v. Waterloo, 274
- Hodgins v. Bay City, 253
- Hodgin v. Southern Ry. Co., 466
- Hodgkins v. Chappell, 606
 v. Eastern R. Co., 241
 v. Rockport, 323, 367
- Hodgkinson v. Ennor, 734
 v. Fernie, 322
- Hodgson v. Lynch, 619
- Hodnett v. Boston, etc. R. Co., 137,
 774 (App. 2151)
- Hodsoll v. Stallebrass, 115
- Hoehn v. Chicago, etc. R. Co., 520
- Hoek v. Allendale, 384
- Hoelzel v. Crescent City Ry. Co., 485c
- Hoelljes v. Interurban, etc. Ry. Co.,
 493
- Hoes v. New York, etc. Ry. Co. (App.
 2083)
- Hoey v. Dublin, etc. R. Co., 189, 215
 v. Felton, 28
 v. Natick, 367
- Hoff v. West Jersey R. Co., 673
- Hoffard v. Illinois, etc. Ry. Co., 457
- Hoffert v. West Turin, 369
- Hoffman v. Adams, 219
 v. Amer. Foundry Co., 195
 v. Chicago, etc. R. Co., 675,
 676, 679
 v. Clough, 216
 v. Dickinson, 186, 215
 v. Dickinson, 207h, 222
 v. King, 30, 674
 v. Land, 57
 v. N. Y. Central R. Co., 64,
 150, 151, 473, 513, 525
 v. Northern Pac. R. Co., 748
 v. Philadelphia R. Tr. Co., 56
 v. Tuolumne Water Co., 16,
 732
 v. Union Ferry Co., 114
- Hofnagle v. N. Y. Central R. Co., 8,
 34
- Hogan v. Central Pac. R. Co., 180
 v. Kentucky Union R. Co.,
 406, 414
 v. Manhattan R. Co., 56, 60
 v. Northfield, 606
 v. Smith, 195
 v. Tyler, 481b
 v. Winnebago Tr. Co., 485bb
- Hoge v. Raymond, 123
- Hoge v. Wilson, 216
- Hogenson v. St. Paul, etc. R. Co.,
 735
- Hogg v. Martin, 565
 v. Zanesville Canal Co., 333
- Hoggatt v. Bigley, 313
- Hogle v. H. H. Franklin Mfg. Co.,
 150
- Hogner v. Boston L. Ry. Co., 488
- Hohi v. Howett Motor Co., 236
- Holacek v. Sinclair & Co., 214a
- Holbert v. Philadelphia, 289, 354,
 363, 375
- Holbrook v. Utica, etc. R. Co., 25, 57,
 107, 516, 519
- Holbrow v. Wilkins, 602
- Holcomb v. Danby, 104
- Holdane v. Cold Springs, 333
- Holden v. Fitchburg R. Co., 178, 197
 v. Great Northern Ry. Co.,
 520
 v. Liverpool Gas Co., 113
 v. Missouri, etc. Ry. Co., 66
 v. Rutland, etc. R. Co., 423,
 662, 664
 v. Shattuck, 365, 634, 657
 v. Winn. Lake Cotton Co., 729
- Holder v. Chicago, etc. R. Co., 431,
 448
 v. Nashville, etc. R. Co., 140
- Hole v. Sittingbourne R. Co., 14, 176
- Holitza v. Kansas City, 367
- Holker v. Parker, 573
- Holladay v. Marsh, 659, 664
- Hollady v. Kennard, 39
- Hollahan v. Metropolitan St. Ry.
 Co., 516
- Holland v. Bartch, 370, 653
 v. Brown, 770
 v. McRae, etc. Co., 203, 231
 v. Oregon, etc. Ry. Co., 113
 v. St. Louis, etc. Ry. Co., 51,
 497, 513a, 576
 v. Sparks, 97
 v. Southern Pac. R. Co., 190
- Hollenbeck v. Berkshire R. Co., 139,
 767a
 v. Johnson, 626
 v. Missouri Pac. R. Co., 223
 v. Winnebago Co., 255, 256,
 285
- Hollender v. N. Y. Central R. Co.,
 468
- Holler v. Sanford Ross, 151
- Holley v. Torrington, 122
 v. Winoski Turnp. Co., 393
- Holliday v. Marsh, 659
 v. St. Leonard's, 326
- Hollidge v. Duncan, 26, 157
- Hollingsworth v. Fort Dodge, 375
 v. Saunders Co., 256
 v. Western U. Tel. Co., 754
- Hollinshed v. Yazoo, etc. Ry. Co., 7
- Hollis v. W. U. Tel. Co., 755
 v. Widener, 214a, 215

[References are to sections.]

- Hollister v. Donahoe, 747
 v. Hubbard, 617
 Holloran v. Union Iron Co., 209a
 Holloway v. Lockport, 376
 Holly v. Boston Gas Co., 47, 53, 74,
 77, 81, 692, 693
 Holman v. Boston Land Co., 110,
 668, 672, 679
 v. Chicago, etc. R. Co., 27, 62,
 427, 467
 v. Southern, etc. Co., 215
 v. Townsend, 338, 363, 371
 Holmes v. Allegheny Tr. Co., 508,
 521
 v. Birmingham, etc. Ry. Co.,
 54
 v. Carolina Cent. R. R. Co.,
 748, 749
 v. Central R. Co., 480
 v. Clarke, 91
 v. Corthell, 371
 v. Drew, 703, 706
 v. Hamburg, 367
 v. Lamberth, 591
 v. Mather, 647
 v. Missouri Pac. Ry. Co., 122
 v. Northeastern R. Co., 704,
 705
 v. Onion, 162
 v. Paris, 367
 v. Peck, 559
 v. South. Pac. Coast R. Co.,
 476, 483
 v. South. Pac. R. Co., 101
 v. Union Tel. Co., 144
 v. Wakefield, 64, 493
 Holmgren v. Twin City R. T. Co.,
 485c
 Holridge v. Mendenhall, 73a
 Holsman v. Boiling Spring Bleach-
 ing Co., 734
 Holstine v. Oregon, etc. R. Co., 64
 Holt v. Myers, 626, 628
 v. Pennsylvania R. Co., 481b
 v. Southwest, etc. Ry. Co.,
 495
 v. Spokane, etc. R. Co., 60c
 (App. 2060)
 v. Whatley, 108, 113
 Holton v. Daily, 770
 v. London, etc. R. Co., 514
 v. Waller, 709
 Holwerson v. St. Louis, etc. Ry. Co.,
 114a
 Holzhauer v. Sheeny, 708, 709
 Holtzman v. Hoy, 614
 Holyoke v. Grand Trunk R. Co.,
 499, 758
 Holzmänn v. Monell, 719
 Homan v. Liswell, 616
 Homan v. Stanley, 359, 703
 Home Telep. Co. v. North Man-
 chester Telep. Co., 556c
 Homer v. Everett, 704
 v. Watson, 736
 Homestake Mining Co. v. Fullerton,
 12, 185a
 Hommert v. Gleason, 310
 Hone v. Mammoth Min. Co., 61, 87,
 93
 Honegsberger v. Second Ave. R. Co.,
 71, 73, 74, 75
 Honey v. Chicago, etc. R. Co., 67
 Honlahan v. New American File Co.,
 219
 Honner v. Illinois, etc. R. Co., 180
 Honsee v. Hammond, 729, 734, 750
 Hood v. New Haven R. Co., 503, 544
 Hoodmacher v. Lehigh Valley Ry.
 Co., 132
 Hook v. Missouri Pac. Ry. Co., 90,
 476
 v. Worcester, etc. R. Co., 57
 Hooker v. Chicago, etc. R. Co., 483
 v. Miller, 97
 v. New Haven, etc. Co., 733
 v. New Haven, etc. Canal Co.,
 399, 402
 v. Rochester, 274
 Hooks v. Huntsville Ry., etc. Co.,
 485c
 Hoon v. Beaver Valley Tr. Co.,
 485bc
 Hooper v. Bacon, 741, 742
 v. Dora Coal, etc. Co., 717
 v. Goodwin, 313
 v. Johnstown, etc. R. Co., 73a,
 414
 v. Snead Iron Works, 195
 Hoosier, etc. Co. v. McCain, 207e
 Stone Co. v. McCain, 185,
 232
 Hoover v. Beech Creek R. Co., 207
 v. Chesapeake (App. 2104)
 v. Heim, 115
 v. Mapleton, 376
 v. Missouri Pac. R. Co., 675
 Hope v. Fall Brook Coal Co., 195
 v. Great Northern R. Co.,
 476, 478
 Hopkins v. Atlantic, etc. R. Co., 115,
 748, 749, 758, 764
 v. Rush River, 376
 v. Utah N. R. Co., 108
 v. Westcott, 526
 v. Willard, 573
 Bridge Co. v. Burnett, 207e
 Hopkinson v. Knapp, etc. Co., 111,
 772

[References are to sections.]

- | | |
|---|---|
| <p>Hoppe v. Chicago, etc. R. Co., 13,
72, 467</p> <p>Hopper v. Denver, etc. Ry. Co., 137,
494, 516
v. Reeve, 644</p> <p>Hopping v. Quin, 559, 567</p> <p>Horak v. Dougherty, 653b</p> <p>Horan v. Chicago, etc. Ry. Co., 207a,
207b
v. Gray Hardware Co., 203
v. Rockwell, 523</p> <p>Hord v. Holston R. Ry. Co., 688a,
750
v. Southern Ry. Co., 481b</p> <p>Horey v. Haverstraw, 335</p> <p>Horn v. Atlantic, etc. R. Co., 421
v. Baltimore, 283, 299
v. Baltimore, etc. R. Co., 482
v. Western U. Tel. Co., 531</p> <p>Hornbeck v. Westbrook, 256</p> <p>Hornbein v. Blanchard, 635</p> <p>Horne v. Meakin, 637
v. Old Colony R. Co., 207
v. Pudil, 303</p> <p>Horner v. Coffey, 258
v. Nicholson, 197
v. Watson, 717</p> <p>Hornsby v. Eddy, 241c</p> <p>Hornstein v. Rhode Island, etc. Co.,
485bb
v. United Rys., etc. Co., 520</p> <p>Horriggan v. Savannah Grocery Co.,
619</p> <p>Horsman v. Brockton, etc. Ry. Co.,
485c</p> <p>Hortensine v. Virginia, etc. Ry. Co.,
457, 460</p> <p>Horton v. Harvey, 704
v. Ipswich, 367, 376
v. Louisville, etc. Ry. Co.,
672, 673, 675
v. Nashville, 262
v. Norwalk, etc. R. Co., 104
v. Seaboard, etc. Ry. Co., 189
v. Sullivan, 735
v. Taunton, 355, 378
v. Trompeter, 376</p> <p>Hortsman v. Covington, etc. R. Co.,
412</p> <p>Hosack v. College of Physicians, 254</p> <p>Hoseth v. Preston Mill Co., 207</p> <p>Hosie v. Chicago, etc. R. Co., 185a,
197, 207h</p> <p>Hoskins v. Louisville, etc. R. Co.,
481, 485
v. Northern, etc. Ry. Co., 488
v. Phillips, 562</p> <p>Hoskinson v. Cent. Vt. R. Co., 666,
675</p> <p>Hosmer v. Old Colony R. Co., 505</p> | <p>Hot Springs R. Co. v. Dial, 182
v. Newman, 429
St. Ry. Co. v. Deloney, 493
v. Hildreth, 66
v. Johnson, 485a, 485ab</p> <p>Hotel Ass'n v. Walter, 114, 719</p> <p>Hoth v. Peters, 56, 108, 233</p> <p>Houck v. Wachter, 8, 371</p> <p>Houfe v. Fallon, 287
v. Fulton, 258, 333, 334, 346,
375, 379, 390, 393, 395</p> <p>Hough v. Grant's Pass. Power Co.,
203
v. Porter, 729
v. Railroad Co., 108, 205
v. Texas, etc. R. Co., 91, 185,
187, 192, 197, 204, 208, 210,
211, 214, 214a, 215</p> <p>Houghkirk v. Delaware, etc. Canal
Co., 137, 466, 769, 775
(App. 2082)</p> <p>Houghtaling v. Chicago, etc. Ry. Co.,
407
v. Shelly, 346</p> <p>Houghton v. Chicago, etc. R. Co.,
478
v. Loma Prieta Lbr. Co., 164,
168, 688a
v. Market St. Ry. Co., 494,
516</p> <p>Houlden v. Smith, 303</p> <p>Houlihan v. Connecticut River R.
Co., 133, 185a</p> <p>Hounsell v. Smyth, 97, 703, 705</p> <p>Hourigan v. Norwick, 291
v. Nowell, 117</p> <p>Housatonic R. Co. v. Knowles, 456</p> <p>House v. Cramer, 653, 653b, 653d
v. Houston Water Works Co.,
118, 265
v. Metcalf, 60b, 709a
v. Montgomery Co., 257
of Lords v. Baker, 214</p> <p>Houser v. Chicago, etc. R. Co., 232
(App. 2141)</p> <p>Houseman v. Girard, etc. Asso., 8,
117</p> <p>Houston v. Brush, 159, 192, 193,
197, 205, 223, 702
v. Budke Stamping Co., 223
v. Culver, 203
v. Dupree, 291
v. Gate St. R. Co., 492a
v. Hutchinson, 274
v. Isaacks, 368, 375
v. Texas, etc. R. Co., 241
v. Traphagen, 703
v. Vicksburg, etc. R. Co., 460,
480</p> <p>Elec. Co. v. Green, 742</p> |
|---|---|

[References are to sections.]

- Houston St. R. Co. v. Autrey, 408
 v. DeLesdernier, 359
 etc. Ry. Co. v. Anglin, 108, 222
 v. Atlas, etc. Works, 428
 v. Bird, 760
 v. Boehm, 758
 v. Boozer, 463*a*
 v. Bolling, 489, 523
 v. Bowen, 769
 v. Brin, 47, 464*a*
 v. Bryant, 519
 v. Bulger, 73, 73*a*, 146, 705
 v. Burnett, 207*a*
 v. Bush, 513
 v. Carson, 463
 v. Clemmons, 61, 523, 524
 v. Conrad, 207*e*
 v. Cowser, 108
 v. Crane, 493
 v. Dallas, 485
 v. Devainy, 525
 v. DeWalt, 207*h*
 v. Dotson, 501, 508
 v. Dunham, 193, 205
 v. Elec. Co., 1
 v. Fanning, 760
 v. Finn, 99
 v. Fowler, 207*i*
 v. Gorbett, 51, 102, 146
 v. Gorge, 495
 v. Greer, 497
 v. Hampton, 181, 225
 v. Hanks, 68, 484, 742, 758
 v. Harris, 520 (App. 2097)
 v. Hartwell, 758
 v. Insurance Co. (App. 2116)
 v. Jennings (App. 2187)
 v. Kauffman, 90, 475
 v. Keeling, 46, 488
 v. Laforge, 672
 v. Leslie, 742
 v. Loeffler, 774
 v. McNamara, 194, 216
 v. Malloy, 203
 v. Marcelles, 204
 v. Medlenka, 485
 v. Meyers, 207
 v. Miller, 218
 v. Moore, 61, 522
 v. Nixon, 467
 v. Norris, 497, 519
 v. O'Donnell, 88*a*, 482
 v. O'Hara, 207*e*
 v. O'Leary, 689, 775
 v. O'Neal, 13
 v. Oram, 205
 v. Parker, 407
 v. Patterson, 61
 v. Phillio, 485*d*, 512, 516
- Houston, etc. Ry. Co. v. Poras, 464
 v. Powell, 460
 v. Reason, 93
 v. Reasonover, 760
 v. Red Cross Stock Farm, 427
 v. Richards, 476, 494, 516
 v. Richart, 408, 743
 v. Rider, 235
 v. Sallee, 483
 v. Shepard, 742
 v. Simpson, 73, 78, 410, 434
 v. Smith, 53, 480, 484
 v. Stell, 493
 v. Stewart, 146, 478
 v. Summers, 497
 v. Swancey, 495
 v. Sympkins, 93, 457, 483
 v. Turner, 12*a*
 v. Van Ness, 419, 428
 v. Washington, 488, 513
 v. Willie, 758
 v. Wilson, 127*a*, 467
 v. White, 493
 v. Woodlock, 485*c*
 Hovden v. Seattle Elec. Co., 87
 Hoveland v. Chicago, etc. Ry. Co., 207*e*
 v. Hall Bros. R., etc. Co., 223*a*
 v. Nat. Blower Wks., 197
 Hovell v. Howell, 177
 Hover v. Barkhoof, 313, 314, 340, 374
 v. Chicago, etc. Ry. Co., 195
 v. Pennsylvania R. Co., 131
 Howard v. Bank of Metropolis, 587*a*
 v. Beldenville Lbr. Co., 186, 187, 193
 v. Benton, 700
 v. Delaware, etc. Canal Co., 774
 v. Grover, 607, 612
 v. Harris, etc. Plumbing Co., 65
 v. Hunter (App. 2064)
 v. Kansas City, etc. R. Co., 479
 v. New Madrid, 339, 376
 v. North Bridgewater, 350, 351, 352
 v. St. Paul, etc. R. Co., 463
 v. San Francisco, 265
 v. Snohomish Co., 368
 v. Union Freight R. Co., 359
 v. United States, 591
 v. Western U. Tel. Co., 543*a*, 756
 v. Worcester, 267
 Co. v. Legg, 257, 272, 369, 773

[References are to sections.]

- Howard Oil Co. v. Davis, 758
v. Farmer, 207*h*
- Howd v. Miss. Central R. Co., 193, 226
- Howe v. Castleton, 380
v. Leighton, 151, 653*a*
v. Mason, 303
v. Minneapolis, etc. R. Co., 477
v. Newmarch, 151
v. New Orleans, 262
v. Northern Pacific Ry. Co., 494, 516
v. Ohmart, 35, 706
v. Plainfield, 367
v. Sinclair, 120*a*
v. West Seattle, etc. Co., 34, 39
v. Young, 645
- Howell v. Commissioners (App. 2084)
v. Illinois Central Ry. Co. (App. 2072)
v. Lansing, etc. Ry. Co., 519
v. McCoy, 729, 734
v. Ransom, 566
v. Young, 574, 575
- Howells v. Landore Co., 227
- Howenstein v. Pacific R. Co., 13, 427
- Howes v. Rose, 690, 691
- Howey v. New England Navigation Co., 769
- Howington v. Madison Co., 392
- Howitt v. Philadelphia, etc. R. Co., 54
- Howland v. Edmonds, 373
v. Vincent, 703
- Howser v. Cumberland, etc. R. Co., 485
- Howsmen v. Trenton Water Co., 265
- Hoxie v. New York, etc. Ry. Co., 180 (App. 2056)
- Hoy v. Chicago, etc. R. Co., 673
v. Sterett, 729, 730
- Hoye v. Chicago, etc. R. Co., 466
- Hoyer v. North Tonawanda, 367
- Hoyle v. Excelsior Steam Laundry Co., 216
- Hoyleman v. Kanawha, etc. R. Co., 661
- Hoyt v. Danbury, 274
v. Hudson, 56, 108, 114, 262, 274, 729
v. Jeffers, 30, 666, 668, 675
v. N. Y., Lake Erie, etc. R. Co., 87, 472
v. Western U. Tel. Co., 755
- Hrebik v. Carr, 510
- Hubbard v. Boston, etc. R. Co., 417, 463*a*, 478
v. Chicago, etc. Ry. Co. (App. 2105)
v. Concord, 353, 376
v. Crawford Co., 256
v. Macon Ry., etc. Co., 217
v. Montgomery Co., 257
v. New York, etc. R. Co., 750
v. Switzer, 591
Specialty, etc. Co. v. Minneapolis, etc. Co., 740
- Hubbart v. Phillips, 562
- Hubbel v. Viroqua, 263
- Hubbell v. Yonkers, 356, 367
- Hubener v. Heide, 719*a*
- Huber v. Wilson, 203
v. Chicago, etc. R. Co., 432
- Hubert v. Bedell, 639
v. Groves, 371
- Huberwald v. Orleans Ry. Co., 135*a*
- Hubgh v. New Orleans, etc. R. Co., 65, 124 (App. 2064)
- Hubler v. Johnson, etc. Co., 206
- Huchting v. Engel, 121
- Huckshold v. St. Louis, etc. R. Co., 469
- Hudson v. Adin (App. 2088)
v. Chicago, etc. R. Co., 60*c*
v. East Tennessee, etc. R. Co., 213
v. Johnson, 573
v. Lynn, etc. R. Co., 65, 493 (App. 2068)
v. Mississippi, etc. Ry. Co. (App. 2157)
v. Ocean S. S. Co., 195
v. Roberts, 629, 631
v. Wabash R. Co., 113, 479
- Huerzeler v. Central, etc. R. Co., 72
- Huey v. Atlanta, 174
v. Gahlenbeck, 719
- Huezeler v. Central, etc. Ry., 485*b**c*
- Huff v. Ames, 78, 218, 223
v. Austin, 184*a*, 683
v. Ford, 160, 160*a*, 161, 162
v. Poweshiek Co., 257
- Hufford v. Grand Rapids, etc. R. Co., 151, 493
- Huffman v. Chicago, etc. R. Co., 190
v. Koppelkom, 625*a*
v. Marcy Mutual Telep. Co., 556*c*
v. San Joaquin Co., 256
- Hufft v. St. Louis, etc. Ry. Co., 457
- Huggard v. Glucose Refining Co., 743
- Huggins v. Southern Ry. Co., 202, 207
- Hughbanks v. Boston Inv. Co., 165

[References are to sections.]

- Hughes v. Auburn, 271 (App. 2084)
 v. Baltimore, etc. R. Co., 189, 262
 v. Bingham, 336
 v. Chicago, etc. R. Co., 506
 v. Delaware & H. Canal Co., 478 (App. 2091)
 v. Detroit, 289, 353
 v. Fayette Mfg. Co., 207*h*
 v. Fond du Lac, 368, 373
 v. Hannibal, etc. R. Co., 419, 448
 v. Harbor, etc. Bldg. Assn., 122, 343
 v. Iowa Central Ry. Co. (App. 2141)
 v. Lawrence, 363
 v. Louisville, etc. Ry. Co., 481*b*
 v. McCoy, 303
 v. Macfie, 73
 v. Monroe Co., 256, 266
 v. Muscatine, 53, 61
 v. Nashville, etc. R. Co., 435
 v. Providence, etc. R. Co., 279, 359
 v. Pullman Car Co., 497
 v. Western U. Tel. Co., 543*a*, 755, 756
 Hughlett v. Louisville, etc. R. Co., 521
 Hugo, etc. Co. v. Paiz, 206
 Huhn v. Missouri Pac. R. Co., 209*a*, 215
 Huizega v. Cutler, etc. Lumber Co., 760
 Hulbert v. Topeka, 133
 Hulehan v. Green Bay, etc. R. Co., 192, 193, 205
 Hulett v. St. Louis, etc. R. Co., 207*e*
 Hulen v. Chicago, etc. Ry., 207
 Hull v. East Line, etc. R. Co., 509
 v. Hall, 192
 v. Kansas City, 346, 379
 v. Richmond, 334, 337, 352, 353
 v. Roxboro, 253
 v. Seattle, etc. Ry. Co., 653*a*
 Humbolt, etc. Ass'n v. Ducker's Ex'rs., 559, 574
 Hume v. Ft. Halifax, etc. Co., 203
 v. New York, 281, 354, 367
 v. Oldacre, 122
 Humes v. Knoxville, 283
 Hummel v. Seventh St. Terrace Co., 700
 Hummer's Ex. v. Louisville, etc. Ry. Co., 88*a*
 Humphrey v. Douglass, 640
 v. Hathorn, 619
 Humphrey v. Wait, 708
 Humphreys v. Armstrong Co., 92, 256, 376
 v. Mears, 326
 v. Moulton, 735
 Humphries v. Brogden, 716
 v. Union, etc. Ry. Co., 343
 Hun v. Cary, 589
 Hund v. Geier, 71
 Hundhausen v. Bond, 175, 359
 Hungerford v. Bent, 709, 709*a*
 v. Chicago, etc. R. Co., 219*a*
 Hungerman v. Wheeling, 378
 Hunn v. Michigan Cent. R. Co., 186, 203*a*, 230, 233, 775
 Hunnewell v. Haskell, 56
 Hunsaker v. Borden, 256
 Hunt v. Boston, 253
 v. Chicago, etc. Ry. Co. (App. 2140)
 v. Conner, 770 (App. 2061, 2137)
 v. Fitzburgh, etc. Ry. Co., 463
 v. Hoboken Land, etc. Co., 744
 v. Lake Shore, etc. Ry. Co., 455
 v. Lowell Gas Co., 60*b*, 61, 95, 693
 v. Missouri R. Co., 31
 v. New York, 255, 287, 369
 v. Penn. R. Co., 166
 v. Pownal, 346, 355, 356, 378
 v. Salem, 370
 v. Vanderbilt, 168
 Hunter v. Caldwell, 565, 567
 v. Columbia, etc. R. Co., 413
 v. Cooperstown, etc. R. Co., 91, 519, 520
 v. Durand, 369
 v. Louisville, etc. Ry. Co., 520
 v. Montana, etc. Ry. Co., 467
 v. Phillips, 619
 v. Windsor, 593
 v. Weston, 334
 Huntington v. Bangor, etc. Ry. Co., 466
 v. Bartrom, 289
 v. Calais, 258, 289, 337, 373
 v. Folk, 376
 v. Rumhill, 753
 etc. Light Co. v. Beaver, 693, 698
 etc. R. Co. v. Decker, 189, 230 (App. 2091)
 Huntley v. Bulwer, 559
 Huntoon v. Trumbull, 67
 Huntress v. Boston, etc. R. Co., 464, 466, 481*b*
 Huntz v. Bd. of Com'rs., 256
 Hupfer v. Nat. Distilling Co., 54

[References are to sections.]

- Hurd v. Rutland, etc. R. Co., 418, 452
 Hurdle v. Missouri Pac. Ry. Co., 481*b*
 Hurdman v. Northeastern R. Co., 728
 Hurlburt v. Western Union Tel. Co., 756
 Hurlbut v. N. Y. Central R. Co., 506
 v. Wabash, etc. R. Co., 207*b*
 Hurley v. Bowdoinham, 369
 v. Eddingfield, 613
 v. N. Y., etc. Brewing Co., 742
 Hurst v. Burnside, 86
 v. Detroit R. Co., 137, 766 (App. 2070)
 Hurt v. St. Louis, etc. R. Co., 102, 510
 v. Southern R. Co., 491
 Huset v. Case Thresh. Mach. Co., 117*a*
 Hussey v. Coger, 193, 231, 233
 v. Ryan, 763
 Husson, Matter of, 561
 Husted v. Missouri Pac. Ry. Co., 774
 Hustede v. Atlantic Refining Co., 725
 Huston v. Cincinnati, etc. R. Co., 419, 443
 v. Council Bluffs, 363
 v. Iowa Co., 257
 v. Mitchell, 573
 Hutchens v. St. Louis, etc. Ry. Co., 480, 481*b*
 Hutcheson v. Chas. F. Parker & Co., 232
 v. Clark, 368
 v. Louisville, etc. Ry. Co., 464
 v. Real Estate Co., 749
 Hutching v. Littleton, 367
 Hutchings v. Inhabitants of Sullivan, 338
 Hutchingson v. Texas, etc. Ry. Co., 485*d*
 Hutchins v. Brackett, 321, 325
 v. Priestly, etc. Co., 719
 v. St. Paul, etc. R. Co., 766 (App. 2071)
 Hutchinson v. Boston Gas Co., 693
 v. Brand, 625
 v. Concord, 350
 v. Cummings, 708
 v. Granger, 731
 v. Guion, 91
 v. Methuen, 53
 v. Missouri Pac. Ry. Co., 475
 v. Olympia, 289
 v. Western, etc. R. Co., 250
 v. York, etc. R. Co., 180
 v. Ypsilanti, 363
 Huthsing v. Bousquet, 310
 Hutson v. King, 703
- Hutson v. New York, 281, 313, 334, 358, 374
 v. Southern, etc. Ry. Co., 482
 Hutton v. Windsor, 90, 769
 Huyek v. McNeerney, 302
 Huyett v. Phil., etc. R. Co., 672, 675, 676
 Hyams v. Webster, 359
 Hyatt v. Hannibal, etc. R. Co., 215
 v. N. Y., Lake Erie, etc. R. Co., 448
 v. Rondout, 262, 289, 356, 374, 393
 Hyde v. Boston, 336, 356
 v. Co. of Middlesex, 721
 v. Jamaica, 108, 258, 334
 v. Missouri Pac. R. Co., 480
 v. S. R. R. Co. (App. 2057)
 v. Union Pac. R. Co., 78 (App. 2099)
 v. Wabash, etc. R. Co., 131
 Park v. Gay, 104
 Hydes v. Ferry, etc. Co., 66
 Hydraulic Works v. Orr, 73, 698, 705
 Hyer v. Chamberlain, 429
 Hyland v. Southern, etc. Tel. Co., 191
 Hyman v. Nye, 514
 v. Pittsburg, etc. Ry. Co., 154*a*
 v. Tilton, 151
 Hynes v. San Francisco, etc. R. Co., 466*a*
 v. State, 367
 Hyson v. St. Louis, etc. Ry. Co., 208
- Iaicher v. New Orleans, etc. R. Co., 480
 Iba v. Hannibal, etc. R. Co., 435
 Ice, etc. Co. v. Bargholt, 375
 Ide v. Boston, etc. Ry. Co., 29*a*, 672, 674, 679, 747
 v. Bremer Co. Bank, 580
 Idel v. Mitchell, 708
 Igo v. Boston Elev. Ry. Co., 189
 Ihl v. Forty-second St. R. Co., 73, 73*a*, 74, 79, 137, 769
 Ikard v. W. U. Tel. Co., 756
 Ilfrey v. Flint, etc. R. Co., 207*e*
 v. Sabine, etc. R. Co., 39
 Illidge v. Goodwin, 35, 629, 634
 Illingsworth v. Boston El. Light Co., 698
 Illinois v. Boston, etc. Ry. Co., 516
 Car, etc. Co. v. Walsh (App. 2119)
 Smelting Co. v. Western U. Tel. Co., 754
 Steel Co. v. Brenshall, 207*h*
 v. Ryska, 202, 207*h*, 760

[References are to sections.]

- Illinois Steel Co. v. Schymanouski, 207*h*
 v. Sitar, 186
 v. Ziemkroski, 204
 Term. Co. v. Chopin, 238
 Term. Ry. v. Thompson, 459*b*
 Illinois, etc. R. Co. v. Able, 89, 521
 v. Abrams (App. 2158)
 v. Ackerman, 483
 v. Almon, 30, 750
 v. Arnold, 425
 v. Aroola, 480
 v. Axley, 513*a*
 v. Baches, 408
 v. Bailey, 672
 v. Baker, 429
 v. Bandy (App. 2060)
 v. Bauer, 493
 v. Barron, 459
 v. Beard, 417*a*
 v. Beebe, 488, 503
 v. Benton, 24
 v. Bentley, 415
 v. Benz, 773
 v. Bowles, 207
 v. Brown, 522
 v. Buchanan, 331
 v. Buckner, 88, 474, 481
 v. Carraher, 419, 705
 v. Coley, 463, 464
 v. Comfort, 207
 v. Copeland, 503
 v. Cox, 238
 v. Cragin, 57, 58, 93, 111, 114, 472
 v. Crider, 422
 v. Davidson, 46, 519, 743
 v. Dick, 62, 104, 464, 476
 v. Dickerson, 425, 455
 v. Doods, 748
 v. Dupree, 483
 v. Ebert, 481
 v. Eicher, 460
 v. Emerson, 207
 v. Finfrock, 476
 v. Finney, 436
 v. Finnigan, 95
 v. Foulks, 243
 v. Frazier, 678
 v. Frelka, 459, 459*b*
 v. Gilbert, 137, 203, 470
 v. Gillis, 27
 v. Goddard, 475
 v. Godfrey, 64, 480
 v. Goodwin, 435
 v. Grabill, 459
 v. Griffin, 485*d*, 887
 v. Guess (App. 2158)
 v. Gunterman, 500
 v. Hall, 480
 Illinois, etc. R. Co. v. Hamill, 65*a*, 66
 v. Hammer, 749
 v. Hanberry, 508
 v. Harper, 493
 v. Harris, 193
 v. Hart, 232
 v. Hays, 470
 v. Heisner, 407
 v. Hetherington, 13, 480
 v. Hobbs, 509
 v. Hoffman, 99, 471
 v. Houchins, 518, 760
 v. Hunter, 133, 241*c* (App. 2157, 2158)
 v. Hutchinson, 461, 480, 481
 v. Jackson, 493
 v. Jernigan, 73*a*, 481*a*
 v. Jewell, 189, 217, 221
 v. Johnson, 73, 73*a*, 457, 484, 495
 v. Jolly, 520
 v. Jones' Admr., 207*b*
 v. Kanouse, 444
 v. Keebler, 207*h*
 v. King, 144
 v. Kuhn, 494, 516, 517, 518
 v. Laloge, 490
 v. Langan, 207*h*
 v. Larson, 461, 471
 v. Latham, 151
 v. Latimer, 493
 v. McClelland, 666, 672, 676, 679
 v. McKay, 679
 v. McKee, 451*a*, 455
 v. McLeod, 66, 482 (App. 2072)
 v. Mann, 207*e*, 215
 v. Massey, 508, 520
 v. Meachem, 513*a*, 523
 v. Middlesworth, 100, 428
 v. Miller, 735, 750
 v. Mills, 672, 676, 678
 v. Minor, 512
 v. Morris, 478
 v. Morrissey, 190
 v. Murphy, 457, 467
 v. Neer, 203, 207*b*
 v. Noble, 100, 428
 v. Nowicki, 111, 112
 v. O'Connell, 410
 v. O'Keefe, 488, 523
 v. O'Neill, 1, 466, 467, 472, 476, 772
 v. Paradise, 414
 v. Patterson, 207
 v. Person, 427
 v. Pendergrass, 139
 v. Phelps, 27, 427, 428, 435
 v. Phillips, 60, 184, 410

[References are to sections.]

- Illinois, etc. R. Co. v. Porter, 494,
 516, 518
 v. Poston, 741
 v. Price, 219*a*, 410
 v. Prichett, 111, 223
 v. Read, 178, 505
 v. Schultz, 92, 473
 v. Sheehan, 512, 513
 v. Siler, 16*a*, 85*c*, 122, 680
 v. Slater, 72, 73, 463, 485, 772
 v. Slatton, 490, 520
 v. Spence, 233, 233*a*, 775
 v. Smiesni, 189
 v. Stassen, 207
 v. Stewart, 748
 v. Stith's Admx. (App. 2064)
 v. Sumkall, 467, 476
 v. Swearingen, 425, 438, 451*a*
 v. Swisher, 185
 v. Sutton, 60*a*
 v. Tandy, 237
 v. Thompson, 201
 v. Timmons, 182
 v. Treat, 490, 501
 v. Varnadore, 481*a*
 v. Vinson, 513*a*
 v. Wall, 410
 v. Warriner, 70, 73*a*, 772
 v. Watson, 482
 v. Welch, 199, 205
 v. Weldon, 771
 v. Winslow, 207, 497, 512, 516
 Ilott v. Wilkes, 720
 Ilwaco, etc. Nav. Co. v. Hedrick, 73,
 410
 Imhoff v. Chicago, etc. R. Co., 490
 Imhoof v. Northwestern Lbr. Co., 207
 Imler v. Springfield, 274, 287
 Imperial v. Wright, 334
 Impkemp v. St. Louis Tr. Co., 759
 Improvement Co. v. Munson, 56
 Ince v. East Boston Ferry Co., 112
 Independence v. Ott, 123
 v. Yakel, 384
 Indermaur v. Dames, 704, 719
 Indiana v. Gobin, 625*a*
 v. Woram, 249
 Car Co. v. Parker, 205, 232,
 233, 758
 Iron Co. v. Cray, 143
 Mfg. Co. v. Buskirk (App.
 2137)
 Natural Gas, etc. Co. v. Long,
 693
 v. O'Brian, 114*b*
 Pipe, etc. Co. v. Neusbaum,
 188
 etc. Co. v. Brown, 653*b*
 v. McMath, 692
 Refining Co. v. Mobley, 705
- Indiana, etc. R. Co. v. Barnhart, 13
 v. Burdge, 7, 19
 v. Craig, 672
 v. Gapen, 434
 v. Goar, 428
 v. Greene, 111, 114, 475
 v. Hammock, 476
 v. Harrell (App. 2137)
 v. Hawkins, 665, 666
 v. Hudelson, 464
 v. Leamon, 417*a*
 v. Maurer, 519
 v. Orr, 761*a*
 v. Overman, 113, 666
 v. Overton, 7
 v. Quick, 434, 436
 v. Sawyer, 434
 v. Schertz, 448
 v. Snyder, 206, 233*a*
 v. Wheeler, 463
 etc. Tr. Co. v. Keiter, 495
 v. McKinney, 494, 516
 v. Menze, 115
 v. Meyers, 469
 v. Ohne, 95
 v. Pheanis, 485*ab*
 v. Pring, 189
 v. Smith, 424*a*
 Indianapolis v. Caldwell, 94
 v. Cook, 377
 v. Emmelman, 370
 v. Huffer, 272
 v. Kingsbury, 334
 v. McClure, 334
 v. Mitchell, 376
 v. Murphy, 369
 v. Scott, 356, 369
 etc. Co. v. Andis, 488
 v. Dolb, 698
 v. Houlihan (App. 2137)
 etc. Abbattoir Co. v. Neid-
 linger, 187
 v. Temperly, 120
 Gas Co. v. Shumack (App.
 2136, 2137)
 Rapid Tr. Co. v. Foreman, 222
 St. Ry. Co. v. Antrobus (App.
 2061)
 v. Bolin, 485*bb*
 v. Bordenchecker, 73*a*
 v. Dawson, 500, 516
 v. Elliott, 422
 v. Galbreath, 461
 v. Guard, 434
 v. Hall, 425
 v. Harter, 435
 v. Haverstick, 523
 v. Marschke, 54
 v. Robinson, 501
 v. Schmidt, 94, 99

[References are to sections.]

- Indianapolis St. Ry. Co. v. Schom-**
 bery, 485abc
 v. Seerley, 49, 485c
 v. Zaring, 485c
 etc. Ry. Co. v. Cooper, 513
 v. Hockett, 151, 520
 v. Horst, 46, 61, 108, 495
 v. Irish, 424
 v. Johnson, 241
 v. Jones, 195a
 v. Keeley, 137
 v. Kinney, 190, 434
 v. Logan, 425
 v. Love, 184, 192
 v. McBrown, 448
 v. McClaren, 480, 483
 v. McClure, 428
 v. McKinney, 449
 v. Marshall, 424
 v. Means, 57
 v. Meek, 449
 v. Mustard, 752
 v. Neubacher, 467
 v. Oestel, 434
 v. Ott, 215
 v. Paramore, 58, 674
 v. Petty, 437
 v. Pitzer, 481a
 v. Robinson, 451a
 v. Rutherford, 519
 v. Shimer, 419, 451a, 455
 v. Snelling, 425
 v. Solomon, 445
 v. Stables, 102, 468
 v. Stout, 65, 87, 89, 133
 v. Thomas, 417a, 434, 455
 v. Toy, 184
 v. Truitt, 425, 450
 v. Watson, 56, 214a, 215
 v. Wilcox, 493
 v. Wright, 451a
 Union R. Co. v. Cooper, 154
 v. Neubacher, 466
 Water Co. v. American Straw-
 board Co., 734
 etc. Trans. Co. v. Andis, 232
 (App. 2137)
 v. Foreman (App. 2137)
 v. Kidd, 485a
 v. McKinney, 764
 v. Menz, 764
 etc. Trac. Co. v. Klentschy,
 491
 v. Lawson, 491
 v. Reeder, 764
 v. Smith, 455
Indig v. Nat. City Bank, 583
Industrial Lbr. Co. v. Bivens, 207h,
 215, 221
- Ingalls v. Adams Ex. Co., 99, 705a*
 v. Bills, 45, 51, 65, 89, 494,
 497, 519
Ingersoll v. Randall, 178
Ingebregtson v. N. D. Lloyd, S. S.
 Co., 193, 195, 207g, 233a
Ingerman v. Moore, 219a
Ingles v. Metropolitan St. Ry. Co.,
 760
Inglese v. New York, etc. Ry. Co.
 (App. 2172)
Ingraham v. Stockamore, 653a
Ingram v. Harvey, 705
Ingwersen v. Rankin, 708
Inhabitants of Swansey v. Chace, 384
Inland Coal Co. v. Swaggerty, 223
 etc. Coasting Co. v. Tolson, 93,
 99, 108
 Steel Co. v. Yedinak, 219
Inman v. Chicago, etc. R. Co., 419
 v. Elberton R. Co., 674, 675
 v. Potter, 723
 v. Reck, 100
Insurance Co. v. Seaver, 55
 v. Tweed, 26, 55, 666
Interline v. Miller, 574
International Ocean Tel. Co. v.
 Saunders, 543, 756
 Paper Co. v. Robin, 203
 etc. Ry. Co. v. Anchonda, 94
 v. Anthony, 497
 v. Arias, 219a
 v. Bell, 187
 v. Boykin, 770
 v. Brice, 206
 v. Bryant, 477
 v. Clark, 207h
 v. Cock, 498
 v. Cooper, 148, 154a, 513
 v. Davis, 485, 497
 v. Duncan, 516, 741
 v. Eckford, 54, 120a, 521
 v. Edwards, 90, 472, 473, 476,
 482
 v. Fels, 689
 v. Garcia, 88, 88a, 101, 481,
 749
 v. Gerren, 512
 v. Glover, 463, 773
 v. Graves, 476
 v. Haddox, 415
 v. Hall, 202, 457
 v. Halloran, 16, 407
 v. Hanna, 489
 v. Hester, 89
 v. Hinzle, 207b, 241d
 v. Hood, 761a
 v. Hughes, 448
 v. Kernan, 196, 204

[References are to sections.]

- International, etc. Ry. Co. v. Kindred, 114, 139 (App. 2097)
 v. Knight, 478
 v. Kuehn, 64, 475, 485
 v. Kuhn, 463
 v. Lee, 457
 v. Locke, 473
 v. MacVeagh, 138, 769, 771, 775
 v. McDonald, 463, 767
 v. McVey (App. 2098)
 v. Maxwell (App. 2098)
 v. Miller, 749
 v. Mulliken, 510
 v. Munn, 484
 v. Neff, 473, 477
 v. Neira, 471
 v. Prince, 523
 v. Rhoades, 508
 v. Royall, 208
 v. Russell, 455
 v. Ryan, 238
 v. Schubert, 1
 v. Shuford, 495
 v. Slusher, 728
 v. Smith, 463, 483, 493, 509
 v. Telephone Co., 748
 v. Thompson, 494, 500, 516, 518
 v. Timmerman, 676
 v. Tisdale, 760
 v. Trump, 184
 v. Washington, 513
 v. Welch, 46, 495
 Interstate Nat. Bank v. Ringo, 580*a*
 etc. R. Co. v. Fox, 215
 Inv. Co. v. McFarland, 209*a*
 Iola, etc. Co. v. Moore, 706
 Ionnone v. New York, etc. Ry. Co., 488, 490
 Iowa Gold, etc. Co. v. Diefenthaler, 208
 Ireland v. Cincinnati, etc. R. Co., 672
 v. Oswego, etc. Turnp. Co., 356, 386
 Ireson v. Pearman, 574
 Irey v. Pennsylvania R. Co., 475
 Irion v. Lewis, 303
 Irish v. Northern Pac. R. Co., 91
 v. Rockford, etc. R. Co., 451*a*
 Iron R. Co. v. Mowery, 516, 519
 etc. Co. v. Yanuska, 222
 Ironton v. Kelly, 176, 291
 Irvin v. Rushville Co-operative Telep. Co., 556*c*
 Irvine v. Flint, etc. R. Co., 202, 211, 213
 v. Wood, 120, 365, 368, 709*a*, 712
 v. Fowler & Wood, 120
 Irving v. Chicago, etc. Ry. Co., 468
 Irwin v. Judge, 162
 v. Louisville, etc. Ry. Co., 495, 512, 516
 v. McDowell, 617
 v. Reeves Pulley Co., 582
 v. Richardson, 731
 v. Sprigg, 108, 343, 709*a*
 Isaacs v. Third Ave. R. Co., 154, 513
 Isabel v. Hannibal, etc. R. Co., 71, 72, 99, 483
 Isbell v. Haywood Lbr. Co., 73
 v. New Haven, etc. R. Co., 93, 99, 428, 430
 Iseminger v. New York, etc. Ry. Co., 760
 Isham v. Broderick, 709*a*
 Island Coal Co. v. Risher, 186
 Isley v. Virginia Bridge, etc. Co., 518
 Isola v. Weber, 776
 Israel v. Clark, 497
 Ittner Brick Co. v. Ashby, 773 (App. 2078)
 Ivay v. Hedges, 707
 Ivens v. Cincinnati, etc. R. Co., 480
 Ives v. South Buffalo Ry. Co. 140*a*
 (App. 2164, 2170, 2171, 2194)
 Iveson v. Moore, 371
 Ivory v. Bank of Missouri, 580
 v. Deer Park, 53, 334, 338, 346, 356, 374
 Ivy v. Western U. Tel. Co., 542
 Ives v. Wisconsin, etc. Ry. Co. (App. 2196)
 Izlar v. Manchester, etc. Ry. Co., 485*d*, 501
 Izydorczyk v. Reading Car Wheel Co., 223
 Jacaud v. French, 570
 Jachetta v. San Pedro, etc. Ry. Co. (App. 2189)
 Jacker v. Chicago, etc. R. Co., 55
 Jackman v. Mills, 734
 Jackson v. Allegheny City, 285
 v. Amer. Tel. Co., 150, 157
 v. Bartlett, 573
 v. Bellevieu, 355, 378
 v. Boone, 367
 v. Buena Vista, 377
 v. Chicago, etc. R. Co., 189, 223*a*, 427, 672
 v. Crilly, 523
 v. Danaher, 203
 v. Fulton, 656
 v. Galveston, etc. Ry. Co., 29*a*, 85*a*
 v. Georgia R. Co., 207*h*, 211*a*
 v. Grand Av. R. Co., 495
 v. Greene County, 256

[References are to sections.]

- Jackson v. Greenville**, 375
 v. Grinnell, 376
 v. Hanson City, etc. Ry. Co.
 (App. 2075)
 v. Hartwell, 256
 v. Hyde, 56
 v. Jackson, 56*b*
 v. Kansas City Ry. Co., 457,
 460
 v. Kiel, 362, 750
 v. Missouri, etc. Ry. Co., 750
 v. Nashville, etc. Ry. Co., 417*a*
 v. Natchez, etc. Ry. Co., 51,
 497
 v. Norfolk, etc. Ry. Co., 232
 v. Old Colony Ry. Co., 154,
 513
 v. Old Dominion Min. Co., 191
 v. Owingsville, 262
 v. Pittsburgh, etc. R. Co., 131
 v. Pool, 369
 v. Rutland, etc. R. Co., 430,
 449
 v. Schmidt, 361, 748
 v. Second Ave. R. Co., 150,
 151
 v. Smithson, 629, 634
 v. Southern Ry. Co., 189
 v. Wagner, 350
 v. Wheeling, etc. Ry. Co., 202,
 207
 v. Wisconsin Tel. Co., 39, 698
 v. Union Bank, 582, 585, 598
 Co. v. Nichols, 60*a*
 Lbr. Co. v. Cunningham, 216
Jacksonville v. Drew, 298
 v. Lambert, 274
 Elec. Co. v. Bowden (App.
 2058)
 etc. R. Co. v. Cox, 412
 v. Garrison, 432
 v. Peninsular Land, etc. Co.,
 28, 58, 666, 672, 673, 674,
 675, 680
 v. Prior, 421, 455
 v. Southworth, 20, 49
 v. Wellman, 432
Jacoboski v. Grand Rapids, etc. R.
 Co., 56
Jacobs v. Bangor, 376
 v. Glucose, etc. Co., 769
 v. Humphrey, 622
 v. McDonald, 619
 v. Phillip-Henrici Co., 143
 v. Railway Co., 761*a*
 v. St. Joseph, 373
 v. Third Ave. Ry. Co., 493
 v. West End, etc. Ry. Co., 508
 v. Western U. Tel. Co., 548,
 553, 555
 Jacobsen v. Cornelius, 11
 Jacobsmeier v. Poggemoeller, 636
 Jacobsohn v. Belmont, 580
 Jacobson v. St. Paul, etc. R. Co., 471
 v. U. S. Gypsum Co., 207*e*
 Jacoby v. Chicago, etc. Ry. Co., 207*b*
 v. Ockerhausen, 631
 Jacques v. Bridgeport R. Co., 745
 Jaffa v. Ry. Co., 485*a*
 Jaffe v. Harteau, 683, 708, 709
 Jager v. Adams, 49
 v. Coney Island, etc. R. Co.,
 480
 Jagger v. German Amer. Bank, 581
 v. People's St. Ry. Co., 513,
 520
 James v. Emmett Min. Co., 241
 v. Fountain Inn Mfg. Co., 189,
 232
 v. Harrodsburg, 262
 v. Portage, 333
 v. Rapids Lbr. Co., 207*i*, 219*a*
 v. Richmond, etc. R. Co., 767
 (App. 2120)
 v. San Francisco, 258, 298,
 356, 375
 v. Western U. Tel. Co., 753*a*
 Jameson v. Taylor, 618
 Jamieson v. N. Y. & Rockaway R.
 Co., 675, 747
 Jammison v. Chesapeake, etc. R. Co.,
 518
 Janny v. Great Northern R. Co.,
 513*a*
 Jansen v. Atchison, 289, 343
 v. Great Northern Ry. Co.
 (App. 2155)
 v. Minneapolis, etc. Ry. Co.,
 500, 512, 516, 748
 Janvier v. Vandever, 622
 Jaques v. Great Falls Mfg. Co., 193,
 230, 231, 233*a*
 Jaquinta v. Citizens' Tr. Co., 481*a*
 Jardine v. Cornell, 493
 Jarman v. Chicago, etc. Ry. Co., 195
 Jarrell v. Wilmington, 353, 367
 Jarrett v. Atlanta, etc. Ry. Co., 520
 Jarvis v. Brooklyn El. Ry. Co., 207
 v. Hitch (App. 2137)
 Jaskoey v. Cons. Gas. Co., 164
 Jasper County v. Allman, 257
 Jayne v. Sebewaing Coal Co., 207
 Jean v. Pennsylvania Co., 735
 Jefferis v. Phila., etc. R. Co., 680
 Jeffers v. Annapolis, 485
 Jefferson v. Brady, 108
 v. Chapman, 102, 176, 356,
 368, 377
 v. Chicago, etc. Ry. Co., 459*a*
 v. Hartley, 625*a*

[References are to sections.]

- Jefferson v. Sault St. Marie, 363
 Co. v. St. Louis Co., 256
 Savings Bank v. Hendrix, 579,
 580*a*, 587*a*
 Ry. (Co. v. Rogers, 749
 Jeffersonville v. Gray, 285
 v. Louisville, etc. Ferry Co.,
 285
 etc. R. Co. v. Adams, 99, 435
 v. Avery, 436
 v. Bowen, 71, 74
 v. Dunlap, 421, 434, 448, 452
 v. Goldsmith, 97
 v. Hendricks, 133, 494, 495,
 508, 520
 v. Hendrickson, 89
 v. Huber, 434
 v. Lyon, 436, 451*a*
 v. Nichols, 437, 451*a*
 v. Parkhurst, 435
 v. Peters, 434
 v. O'Connor, 336
 v. Ross, 62
 v. Stout, 89
 v. Sullivan, 425, 438
 v. Underhill, 451*a*
 Jeffrey v. Bastard, 624
 v. Bigelow, 630, 633
 Jeffries v. Seaboard Air Line Co., 483
 (App. 2085)
 v. Western U. Tel. Co., 534,
 536
 Jeffry v. Keokuk, etc. R. Co., 87
 Jeffs v. Rio Grande, etc. R. Co., 55
 Jehle v. Ellicott Square Co., 164
 Jelinski v. Belt Ry. Co., 480
 Jellow v. Fore River, etc. Co., 189,
 192, 209*a*, 214*a*, 215
 Jemming v. Great Northern Ry. Co.
 (App. 2154)
 Jemnienski v. Lobdell Car Wheel Co.,
 207
 Jenkins, Appeal of, 617
 Ex parte, 625*a*
 v. Central R. Co., 472
 v. Hooper Irrigation Co., 728
 v. McGill, 623
 v. Mammoth Min. Co. (App.
 2188)
 v. Richmond, etc. R. Co., 241
 v. Southwestern Telep. and
 Teleg. Co., 754
 v. Turner, 418
 v. Waldron, 310
 v. Wilmington, etc. R. Co., 735
 Jenks v. Wilbraham, 378, 741
 Jenne v. Sutton, 262
 Jenner v. Joliffe, 313, 616, 621
 Jennett v. Louisville, 207*g*
 Jenney v. Brooklyn, 265, 287
 Jenney Elec. Co. v. Murphy, 209*a*
 Jennings v. Albion, 378
 v. Burton Co., 635
 v. Davis, 717
 v. Edgefield Mfg. Co., 203
 v. Iron Bay Co., 195
 v. Kansas City, 375, 376
 v. McConnell, 566
 v. Penn. R. Co., 676
 v. Philadelphia, etc. Ry. Co.,
 85*a*
 v. St. Joseph, etc. R. Co., 434
 v. St. Louis, etc. R. Co., 476,
 477
 v. Tacoma R. Co., 185*b*, 207
 v. Van Schaick, 359, 375, 703
 710
 v. Wayne, 85
 Jennison v. Kirk, 283
 Jensen v. Barbour, 165
 v. Michigan Cent. R. Co., 476
 v. Omaha, etc. Ry. Co. (App.
 2141)
 v. South Dakota, etc. Ry. Co.,
 421, 672, 749
 v. The Joseph Thomas, 186
 v. Waltham, 291
 Jenson v. Great Northern Ry. Co.,
 189
 Jerolman v. Chicago, Great Western
 R. Co., 1
 Jersey City v. Kiernan, 258, 287
 etc. Ry. v. Morgan, 493
 Jespersion v. Phillips, 668
 Jessen v. Sweigert, 120
 Jesser v. Gifford, 119
 Jessup v. Osceola County, 374
 v. Sloneker, 243
 Jeter v. Haviland, 573
 Jetter v. Harlem R. Co., 13, 92, 467
 Jewell v. Chicago, etc. R. Co., 61, 520
 v. Excelsior, etc. Mfg. Co.,
 187
 v. Grand Trunk R. Co., 157
 v. Kansas City Bolt, etc. Co.,
 164, 211*a*
 v. Mills, 625*a*
 v. New York, etc. Ry. Co., 525
 v. Parr, 56
 Jewett v. Keene, 767*a*
 v. Klein, 90
 v. New Haven, 265
 v. Kansas City, etc. R. Co.,
 428
 Jewhurst v. Syracuse, 334*a*, 356
 Job v. Harlan, 628
 Jobe v. Memphis, etc. R. Co., 476
 Joch v. Dankwardt, 53, 190, 761
 Jochem v. Robinson, 362
 Jock v. Columbia Ry. Co., 224

[References are to sections.]

- Joel v. Morison, 147
 Johannis v. National Accident Soc., 520
 Johanson v. Boston, etc. R. Co., 482
 v. Howells, 626
 v. Pioneer Fuel Co., 151
 John v. Bacon, 506
 v. Northern, etc. Ry. Co., 491, 495
 Diebold & Sons v. Wollborn, 236
 Johns v. Charlotte, etc. R. Co., 502
 v. Robinson, 622
 v. Stevens, 731
 Johnson, *Ex parte*, 189
 v. Agricultural Ins. Co., 58
 v. Alston, 569
 v. Ashland Water Co., 182, 222
 v. Atlantic, etc. R. Co., 407*a*, 412, 735
 v. Baca, 577
 v. Barber, 150, 244, 671
 v. Belden, 92, 313, 325
 v. Bellingham Bay Imp. Co., 113, 192
 v. Boston, 225
 v. Boston Towboat Co., 193
 v. Bruner, 53, 185
 v. Butte (App. 2162)
 v. Canal, etc. R. Co., 99, 480
 v. Charleston, etc. Ry. Co. (App. 2183)
 v. Chesapeake, etc. R. Co., 195, 207*b*, 460, 476
 v. Chicago, etc. R. Co., 73*a*, 114, 451*a*, 455, 667, 735, 750
 v. Coates Log. Co., 206
 v. Devoe Snuff Co., 207*e*, 221
 v. District of Columbia, 271, 274
 v. Duncan, 644
 v. Dunn, 573
 v. East Tennessee, etc. R. Co., 223
 v. Farmer (App. 2098)
 v. First Nat. Bank, 197, 206
 v. Friel, 359
 v. Gehbauer, 193
 v. Gray's Point, etc. Ry. Co., 735
 v. Guffy, etc. Co., 485
 v. Gulf, etc. R. Co., 66, 410, 473
 v. Helbing, 164, 168
 v. Holyoke, 752
 v. Hovey, 207, 207*b*
 v. Hudson River R. Co., 94, 107, 109, 111, 457, 461, 485*a*
 Johnson v. Husband, 54
 v. Irasburgh, 104
 v. Jordan, 735
 v. Lake Shore, etc. Ry. Co., 189, 190
 v. Lake Superior R. Co., 457, 481
 v. Lembeck, 120
 v. Lewis, 709*a*, 729, 730, 753.
 v. Lindsay, 225, 227
 v. Long Isl. R. Co., 775
 v. Louisville, etc. R. Co., 93, 475
 v. Lowell, 363
 v. McMillan, 703, 708
 v. Mammoth, etc. Co. (App. 2122)
 v. Manhattan R. Co., 60*b*, 369, 760
 v. Marquette, 378
 v. Minneapolis, etc. R. Co., 451*a*
 v. Missouri Pac. Ry. Co., 54, 56
 v. Motor Shingle Co., 218
 v. Netherlands Nav. Co., 225
 v. New Omaha, etc. El. Light Co., 73*a*
 v. New Orleans, 291
 v. New York, 653*a*, 653*c*
 v. N. Y. Central R. Co., 40, 47
 v. Northern Pac. R. Co., 486, 672, 676, 743
 v. N. W. Tel. Co., 31
 v. Oregon Short Line Ry. Co., 449, 466*a*
 v. Oregon, etc. Ry. Co., 222, 447
 v. Patterson, 97, 720
 v. People, 104
 v. Philadelphia, 346
 v. Phoenix Bridge Co., 132, 138 (App. 2083)
 v. Railroad Co. (App. 2085)
 v. Ramberg, 704
 v. Reading R. Co., 485*c*
 v. Rickford, 659
 v. Richmond, etc. R. Co., 116, 178, 197
 v. Rome Ry. Co., 85*a*
 v. St. Louis, 701
 v. St. Paul, 189, 369
 v. St. Paul, etc. R. Co., 84, 201, 241*c*, 523 (App. 2154)
 v. Salem Turnpike Co., 408, 387, 389
 v. Schlosser, 590, 592
 v. Smith Lbr. Co., 771
 v. Southern Pac. Ry. Co., 114, 120, 138, 455 (App. 2117)

[References are to sections.]

- | | |
|---|---|
| <p>Johnson v. Southern Ry. Co., 413,
424<i>a</i>, 485<i>d</i>, 771
 v. Spear, 159
 v. Springfield Ice Co., 727<i>a</i>
 v. Steam Gauge Co., 213, 702<i>a</i>
 v. State, 334
 v. Tacoma Lumber Co., 708
 v. Texas, etc. Ry. Co., 488
 v. Tillson, 102
 v. Troy, 739
 v. Union Pac. Coal Co., 223,
232
 v. Union Pac. Ry. Co., 238
(App. 2189)
 v. Washington Water Power
Co., 154
 v. Wells, 761
 v. West Chester, etc. R. Co.,
89
 v. Western, etc. Ry. Co., 175,
753<i>a</i>
 v. Western U. Tel. Co., 554
 v. White, 735
 v. Whitefield, 350
 v. Wing, 655, 664
 v. Winona, etc. R. Co., 51, 495
 v. Winston, 606
 Co. v. Carmen, 769</p> <p>Johnston v. Cedar Rapids, etc. Ry.
Co., 508
 v. Gwathney, 623
 v. Hastie, 164
 v. Hyre, 701
 v. New Omaha, 698
 v. Richmond, etc. R. Co., 222
 v. Sutton, 302</p> <p>Johnstown Cheese Mfg. Co. v. Veghte,
729</p> <p>Joliet v. Conway, 762
 v. Harwood, 175
 v. Looney, 368
 v. McCraney, 369
 v. Schufelt, 16<i>a</i>, 346, 378
 v. Verley, 262, 356
 v. Weston, 369
 etc. R. Co. v. Eich, 485<i>bd</i>
 v. Jones, 441
 v. Velie, 196</p> <p>Jolley v. Hawesville, 261</p> <p>Jolliffe v. Brown, 424, 432</p> <p>Jolly v. Detroit, etc. R. Co., 194, 207</p> <p>Jones, Matter of, 561
 v. Adams, 729
 v. Alabama Mineral R. Co.,
223
 v. Albany, 373
 v. Amer. Warehouse Co., 52,
208
 v. Andover, 104, 113, 334</p> | <p>Jones v. Baltimore, etc. R. Co., 506,
520
 v. Belt, 645
 v. Bird, 359
 v. Blair, 625
 v. Boston, 338, 350, 505
 v. Boyce, 519
 v. Carey, 632, 635, 639
 v. Chantry, 175, 361
 v. Charleston, etc. Ry. Co.,
480, 481<i>b</i>, 484
 v. Chicago, etc. R. Co., 424,
425, 429, 519, 520, 521
 v. Columbia, etc. R. Co., 419,
432
 v. Corporation of Liverpool,
160<i>a</i>
 v. Crawford, 207<i>e</i>
 v. Crow, 734
 v. Cumberland Telep., etc. Co.,
556<i>c</i>
 v. DeCoursey, 728
 v. Deering, 338, 350
 v. East Tennessee, etc. R. Co.,
477
 v. Emmett Min. Co., 207<i>e</i>
 v. Fay, 611
 v. Festenog R. Co., 668, 672
 v. Florence Mining Co., 219<i>a</i>
 v. Fort Worth, etc. Ry. Co.,
481<i>b</i>
 v. Franklin Co., 256
 v. Galena, etc. R. Co., 422
 v. Glass, 151
 v. Granite Mills, 195
 v. Harris, 483
 v. Henderson, 283
 v. Illinois, etc. Ry. Co., 479
 v. Kansas City, etc. Ry. Co.,
223
 v. Lake Shore, etc. R. Co.,
207<i>i</i>, 219
 v. Lancaster, 340
 v. Leonardt, 767, 773
 v. Lewis, 559
 v. Liverpool, 171
 v. Louisville, etc. R. Co., 62
 v. Loving, 249
 v. McMillan, 769
 v. McMinimy, 175
 v. McGuirk, 621
 v. Malvern Lumber Co., 222
 v. Manufacturing, etc. Co.,
207<i>e</i>
 v. Nashville, etc. Ry. Co., 448
 v. New Haven, 118, 256, 259,
350, 354
 v. N. Y. Central, etc. R. Co.,
58, 114, 184</p> |
|---|---|

[References are to sections.]

- Jones v. North Carolina R. Co., 93,
 428, 432
 v. North Wilkesboro, 262
 v. Old Dominion Cotton Mills,
 218
 v. Owen, 626
 v. Pennsylvania Ry. Co., 417
 v. Perry, 632
 v. ——— Ry. Co., 758
 v. Reynolds Tobacco Co.
 (App. 2085)
 v. Roberts, 203
 v. Robertson, 735
 v. Ryon, 140a
 v. St. Louis, etc. Packet Co.,
 195, 216
 v. St. Louis, etc. R. Co., 225,
 492, 505, 735
 v. Scullard, 160a
 v. Seaboard, etc. Ry. Co., 150
 v. Seattle, 373
 v. Seligman, 446
 v. Sheboygan, etc. R. Co., 453
 v. Sherwood, 628
 v. Snow, 355
 v. State, 636
 v. Sutherland, 207
 v. Swift, etc. Co., 644
 v. Tampa, 346
 v. Texas, etc. R. Co., 508, 751
 v. Troy, 363
 v. United States, 251
 v. United Tr. Co., 485bc
 v. Utica, etc. R. Co., 73, 764
 v. Vroom, 605
 v. Wabash, etc. R. Co., 735
 v. Waltham, 358
 v. Weihand, 151
 v. Werden, 303
 v. Westerhausen, 334
 v. Western U. Tel. Co., 542,
 556, 741, 753a
 v. Williamsburg, 253, 262
 v. Yazoo, etc. Ry. Co., 197
 Jonesboro, etc. Ry. Co. v. Cable, 406,
 750
 Jordan v. Asheville, 108
 v. Carberry, 636
 v. Chicago, etc. R. Co., 477
 v. New England, etc. Co.
 (App. 2150)
 v. New York, 338, 375, 501
 v. N. Y. & New Haven R. Co.,
 104, 502
 v. Peckham, 368
 v. St. Paul, etc. R. Co., 735
 v. Seattle, 742
 v. Welch, 412
 v. Wells, 190
 v. Wyatt, 669
- Jordon v. Cedar Rapids, etc. Ry. Co.,
 760
 v. Cincinnati, etc. R. Co., 133
 v. Crump, 97, 720
 v. Delaware, etc. Co., 750
 v. Gallup, 622
 v. Lassiter, 670
 Joslin v. Grand Rapids Ice Co., 160a,
 171, 760
 Joslyn v. Detroit, 289
 v. King, 588
 Joy v. Winnisimmet Co., 494
 Joyce v. Black, 60a
 v. Los Angeles, etc. Ry. Co.,
 508, 516, 520
 v. Martin, 120, 709a
 v. Metropolitan St. Ry. Co.,
 488, 490, 501, 516
 v. Worcester, 185, 207e
 Joyner v. Great Barrington, 351
 v. So. Carolina R. Co., 432
 Jucker v. Chicago, etc. R. Co., 742
 Judah v. McNamee, 603
 Judd v. Ballard, 686
 v. Cushing, 666, 702
 v. Hartford, 287
 v. New Britain, 373
 & Root v. New York, etc. R.
 Co., 727a
 Judge v. Cox, 632
 v. Meriden, 262, 287
 Judice v. Southern Pac. Co., 748
 Judkins v. Maine Cent. R. Co., 207
 Judson v. Borough of Winstead, 118
 v. Giant Powder Co., 689
 v. Great Northern R. Co., 476,
 482
 v. Hudson River R. Co., 61
 v. New Haven, etc. R. Co.,
 415
 v. Olean, 195
 Junction City v. Blades, 110
 June v. Boston, etc. R. Co., 483, 490
 Jung v. Stevens Point, 114, 375
 Jungnitsch v. Michigan Iron Co.,
 189, 190
 Junior v. Missouri Electric Co., 207
 Justice v. Pennsylvania Co., 232
 Jutte v. Hughes, 701a, 728
 Kaare v. Troy Steel Co., 195, 207e,
 209a
 Kaase v. Gulf, etc. Ry. Co., 490
 Kaes v. Mo. Pacific R. Co., 449
 Kahl v. Lene, 117
 v. Memphis, etc. R. Co., 131
 Kahle v. Hobein, 669
 Kahn v. Love, 708
 Kahner v. Otis Elev. Co., 117a, 683,
 690

[References are to sections.]

- | | |
|---|--|
| <p>Kaillen v. Northwestern Bedding Co., 219</p> <p>Kain v. Larkin, 62, 64</p> <p style="padding-left: 20px;">v. N. Y. & New England R. Co., 472</p> <p style="padding-left: 20px;">v. Roebling Constr. Co., 184a</p> <p style="padding-left: 20px;">v. Smith, 114, 120, 120a, 122, 207h, 210, 214, 215</p> <p>Kaiser v. Detroit, etc. Ry. Co., 408</p> <p style="padding-left: 20px;">v. Hahn Bros., 376</p> <p style="padding-left: 20px;">v. Hancock, 573</p> <p style="padding-left: 20px;">v. Hirth, 709, 712</p> <p style="padding-left: 20px;">v. St. Louis, 354</p> <p>Kalbfleisch v. Long Island R. Co., 85, 679</p> <p>Kalen v. Terre Haute, etc. Ry. Co., 761</p> <p>Kalbus v. Abbott, 474</p> <p>Kalembach v. Michigan Cent. R. Co., 451</p> <p>Kalis v. Detroit, etc. Ry. Co., 775</p> <p style="padding-left: 20px;">v. Shattuck, 708, 709</p> <p>Kalleck v. Deering, 245</p> <p>Kampi v. Cox, 189</p> <p>Kampmann v. Rothwell, 164, 174</p> <p>Kandelin v. Ely, 373</p> <p>Kane v. Boston Elev. Ry. Co., 66</p> <p style="padding-left: 20px;">v. Erie Ry. Co. (App. 2178)</p> <p style="padding-left: 20px;">v. Johnson, 745</p> <p style="padding-left: 20px;">v. Mitchell Transp. Co., 225, 775</p> <p style="padding-left: 20px;">v. N. Y. Elevated R. Co., 332</p> <p style="padding-left: 20px;">v. N. Y., New Haven, etc. Co., 743</p> <p style="padding-left: 20px;">v. New Haven, etc. R. Co., 91, 466, 477</p> <p style="padding-left: 20px;">v. Northern Cent. R. Co., 213</p> <p style="padding-left: 20px;">v. St. Louis, etc. R. Co., 207e</p> <p style="padding-left: 20px;">v. Savannah, etc. R. Co., 207b</p> <p style="padding-left: 20px;">v. Williams, 712</p> <p>Kanecko v. Atchison, etc. Ry. Co., 134a</p> <p>Kankakee Elec. R. Co. v. Lade, 426</p> <p style="padding-left: 20px;">etc. R. Co. v. Horan, 119, 750</p> <p style="padding-left: 20px;">Water Co. v. Reeves, 701a</p> <p>Kansas City v. Birmingham, 289, 358</p> <p style="padding-left: 20px;">v. Bradbury, 368</p> <p style="padding-left: 20px;">v. Brady, 291</p> <p style="padding-left: 20px;">v. Gilbert, 353</p> <p style="padding-left: 20px;">v. King, 287</p> <p style="padding-left: 20px;">v. Lehman, 253</p> <p style="padding-left: 20px;">v. Lemen, 291</p> <p style="padding-left: 20px;">v. Manning, 353</p> <p style="padding-left: 20px;">v. Orr, 336, 353, 358</p> <p style="padding-left: 20px;">v. Slangstrom, 122, 287, 733</p> <p style="padding-left: 20px;">Car Co. v. Sawyer, 195</p> <p style="padding-left: 20px;">Smelting, etc. Co. v. Taylor, 207a</p> <p style="padding-left: 20px;">etc. Ry. Co. v. Blaker Co., 680</p> | <p>Kansas City, etc. Ry. Co. v. Chamberlin, 680</p> <p style="padding-left: 20px;">v. Foster, 761a</p> <p style="padding-left: 20px;">v. Gallagher, 485c</p> <p style="padding-left: 20px;">v. Hammond, 202</p> <p style="padding-left: 20px;">v. Henson, 57</p> <p style="padding-left: 20px;">v. Kier (App. 2142)</p> <p style="padding-left: 20px;">v. Loosely, 166, 208</p> <p style="padding-left: 20px;">v. McGahey, 526</p> <p style="padding-left: 20px;">v. Matson, 705</p> <p style="padding-left: 20px;">v. Matthews, 520</p> <p style="padding-left: 20px;">v. Prunty, 93</p> <p>Kansas, etc. Coal Co. v. Brownlie, 190</p> <p style="padding-left: 20px;">v. Gabsky (App. 2054)</p> <p style="padding-left: 20px;">etc. Ry. Co. v. Becker, 22</p> <p style="padding-left: 20px;">v. Berry, 489</p> <p style="padding-left: 20px;">v. Brady, 679</p> <p style="padding-left: 20px;">v. Burton, 207, 207a, 241b (App. 2120)</p> <p style="padding-left: 20px;">v. Butts, 676, 678</p> <p style="padding-left: 20px;">v. Cook, 407, 476, 484, 750</p> <p style="padding-left: 20px;">v. Cranmer, 99, 483</p> <p style="padding-left: 20px;">v. Cravens, 427</p> <p style="padding-left: 20px;">v. Cutter, 133</p> <p style="padding-left: 20px;">v. Dorrough, 520</p> <p style="padding-left: 20px;">v. Dye, 207b</p> <p style="padding-left: 20px;">v. Fite, 748</p> <p style="padding-left: 20px;">v. Fitzsimmons, 73, 410</p> <p style="padding-left: 20px;">v. Flynn, 91</p> <p style="padding-left: 20px;">v. Henrie, 207</p> <p style="padding-left: 20px;">v. Herman, 460, 481a</p> <p style="padding-left: 20px;">v. Ingram, 428</p> <p style="padding-left: 20px;">v. Kier, 748</p> <p style="padding-left: 20px;">v. Kirksey, 197, 419</p> <p style="padding-left: 20px;">v. Lackay, 406</p> <p style="padding-left: 20px;">v. Landis, 453</p> <p style="padding-left: 20px;">v. Langley, 704</p> <p style="padding-left: 20px;">v. Little, 230, 761a</p> <p style="padding-left: 20px;">v. Loosley, 208</p> <p style="padding-left: 20px;">v. Lundin, 407</p> <p style="padding-left: 20px;">v. McDonald, 464a</p> <p style="padding-left: 20px;">v. Morrison, 526</p> <p style="padding-left: 20px;">v. Mower, 422</p> <p style="padding-left: 20px;">v. Peavey, 102, 178, 221</p> <p style="padding-left: 20px;">v. Phillibert, 108</p> <p style="padding-left: 20px;">v. Pirtle, 750</p> <p style="padding-left: 20px;">v. Riley, 393</p> <p style="padding-left: 20px;">v. Rogers, 750</p> <p style="padding-left: 20px;">v. Ryan, 187, 195</p> <p style="padding-left: 20px;">v. Sanders, 767</p> <p style="padding-left: 20px;">v. Salmon, 65, 233</p> <p style="padding-left: 20px;">v. Spencer, 421, 424</p> <p style="padding-left: 20px;">v. Stoner, 122, 464a</p> <p style="padding-left: 20px;">v. Twombly, 114</p> <p style="padding-left: 20px;">v. Webb, 195, 241b</p> <p style="padding-left: 20px;">v. Whipple, 73, 99</p> <p style="padding-left: 20px;">v. White, 523</p> <p style="padding-left: 20px;">v. Wiggins, 451a</p> <p style="padding-left: 20px;">v. Wood, 451a</p> <p>Kapaczynski v. Wells, 207h</p> |
|---|--|

[References are to sections.]

- Kappes v. Brown Shoe Co., 490
 Kappus v. Metropolitan St. Ry. Co., 485c
 Karahuta v. Schuylkill Trac. Co. (App. 2091)
 Karczewski v. Wilmington, etc. Ry. Co., 207g, 758
 Karl v. Juniata Co., 367
 v. Maillard, 719
 Karr v. Chicago, etc. R. Co., 421, 490
 v. Parks, 72, 73a, 83, 89, 115
 Karsen v. Milwaukee, etc. R. Co., 676
 Kaspari, Amdr. v. Marsh (App. 2105)
 Kastl v. Wabash Ry. Co., 225
 Kates v. Pullman Car Co., 526
 Kathmeyer v. Mehl, 653c
 Katzenstein v. City of Hartford, 374
 Katzinski v. Grand Trunk, etc. Ry. Co., 434
 Kauffman v. Cleveland, etc. R. Co., 114
 v. Maier, 56b, 207
 Kausz v. Ryan, 115
 Kavanagh v. Brooklyn, 274, 299
 Kavanaugh v. Janesville, 115, 376, 764
 Kaveney v. Troy, 363
 Kawiecka v. Superior, 289, 354
 Kay v. Metropolitan St. Ry. Co., 494, 516
 v. Pennsylvania R. Co., 10, 47, 72, 78, 458, 463, 766
 Kean v. Baltimore, etc. R. Co., 93, 472
 v. Detroit, etc. Mills, 190, 207h
 Keane v. Waterford, 363
 Kearner v. Tanner, 689
 Kearney v. Boston, etc. R. Co., 139, 767a
 v. Central, etc. Ry. Co., 413
 v. London & Brighton R. Co., 59, 60
 v. N. J. Central R. Co., 413
 v. State, 56b
 v. Thoenanson, 274
 Electric Co. v. Laughlin, 185a, 203, 219a
 Kearns v. Chicago, etc. R. Co., 216
 v. Sowden, 654
 Keating v. Boston, etc. R. Co., 763
 v. Cincinnati, 274
 v. Detroit, etc. R. Co., 7, 518
 v. Kansas City, 262
 v. Michigan Central R. Co., 91, 148
 Keating v. N. Y. Cent. R. Co., 519, 521
 v. Stevenson, 699
 Keatis v. Cadogan, 709
 Keatley v. Illinois Cent. R. Co., 241c (App. 2141)
 Keats v. Gas, etc. Co., 750
 v. Nat. Heeling Mach. Co., 203
 Keck v. Philadelphia, etc. Ry. Co., 459b
 Keech v. Baltimore, etc. Co., 418, 454
 Keefe v. Boston, etc. R. Co., 490
 v. Chicago, etc. R. Co., 99, 207
 v. Lee, 739
 v. Seattle Elec. Co., 485c
 Keegan v. Kavanagh, 207h
 v. Minneapolis, etc. Ry. Co., 742
 v. Western R. Co., 180, 192, 197
 Keeler v. Lederer Realty Co., 721
 Keeley v. Erie R. Co., 494
 v. Great Northern Ry. Co., 122, 773
 v. Portland, 262, 271, 287
 Keely Brewing Co. v. Parnin, 355
 v. Union Pac. Ry. Co. (App. 2075)
 Keen's Admr. v. Keystone, etc. Lbr. Co., 207g
 Keenan v. Brooklyn R. Co., 137, 772
 v. Edison Electric Co., 221
 v. Gutta Percha Mfg. Co., 630
 v. N. Y., Lake Erie, etc. R. Co., 207b
 v. Southworth, 321
 Keeny v. Oregon, etc. Ry. Co., 451a
 Keep v. Nat. Tube Co., 132
 Keever v. Mankato, 286
 Keffe v. Milwaukee, etc. R. Co., 73, 683, 705
 Kehler v. Schwenk, 11, 186, 186a, 195, 207h, 207i, 218
 Kehoe v. Allen, 195
 v. Marshall Field & Co., 148
 Keifner v. Pittsburg, etc. Ry. Co., 501
 Keightlinger v. Egan, 639
 Keigue v. Janesville (App. 2104)
 Keil v. Chatiers Co., 749
 Keim v. Union R., etc. Co., 13, 467
 Keiser v. Lehigh, etc. Ry. Co., 464
 Keist v. Chicago, etc. Ry. Co., 201
 Keital v. St. Louis Cable, etc. R. Co., 414
 Keith v. Easton, 350, 355
 v. Howard, 310

[References are to sections.]

- Keith v. Inhabitants of Millbury, 88a
 v. Keir, 155
 v. New Haven, etc. R. Co., 190, 231
 v. Pinkham, 523
 v. Walker Iron Co., 223
 v. Worcester, etc. Ry. Co., 88a
- Kelch v. State, 57
- Keliher v. Connecticut, etc. R. Co., 434
- Kell v. Nainby, 577
- Kelleher v. Milwaukee, etc. R. Co., 201
 v. Schmidt, etc. Mfg. Co., 164, 174
- Keller v. Gaskill, 219, 222
 v. Gilman, 764
 v. N. Y. Central R. Co., 56, 137
 v. Sioux, etc. R. Co., 60a
- Kelley v. Cable Co., 230
 v. Chicago, etc. R. Co., 114
 v. Columbus, 703
 v. Fond du Lac, 376
 v. Hannibal, etc. R. Co., 475
 v. Lawrence, 207
 v. Manhattan R. Co., 410
 v. Milwaukee, 262
 v. Ryus, 192
 v. Silver Springs, etc. Co., 207e
 v. Tarbox, 618
 v. Vicksburg, etc. Ry. Co., 508
- Kellier v. English Co., 207
- Kellney v. Missouri Pac. R. Co., 116, 482
- Kellogg v. Albany, etc. Ry. Co. (App. 2083)
 v. Chicago, etc. R. Co., 55, 92, 666, 678, 680
 v. Church Charity Foundation, 174
 v. Gilbert, 573
 v. Janesville, 289
 v. N. Y. Central R. Co., 114, 476, 477
 v. Northampton, 334
 v. Stephens Lbr. Co., 189
 v. Switchboard Supply Co., 214a
- Kellow v. Scranton, 353
- Kelly v. Barber Asphalt Co., 218
 v. Battle, etc. Co., 197
 v. Bemis, 303
 v. Benas, 704, 705, 706
 v. Brooklyn Heights R. Co., 485c
- Kelly v. Chicago, etc. Ry. Co., 516, 573
 v. Cohoes Knitting Co., 703
 v. Columbus, 356
 v. Doody, 375, 376
 v. Duluth, etc. R. Co., 472
 v. Erie Tel. Co., 204
 v. Hannibal, etc. R. Co., 57, 58, 114
 v. Hendrie, 480
 v. Hogan, 232
 v. Howell, 174
 v. Hudson Cos., 343, 703
 v. Johnson, 181
 v. Manhattan R. Co., 502, 506
 v. Michigan, etc. Ry. Co., 463
 v. Muhs Co., 705a
 v. New York, 144, 165, 166, 168, 173, 298
 v. N. Y. & Sea Beach R. Co., 56, 57, 497
 v. New Haven Steamboat Co. (App. 2127)
 v. Ohio, etc. R. Co., 769
 v. Otterstadt, 362
 v. Parker-Washington Co., 518
 v. Rhodes (App. 2116)
 v. Shelby R. Co., 203
 v. So. Minnesota R. Co., 417
 v. Tilton, 629, 639
 v. Tyra, 225
 v. Twenty-third St. R. Co., 774
 v. Union R. Co., 99
 Island, etc. Co. v. Pachuta (App. 2178)
- Kellyville Coal Co. v. Patraytis, 134a
- Kelsay v. Missouri Pac. R. Co., 476
- Kelsey v. Chicago, etc. R. Co., 666, 678
 v. Glover, 350, 352, 356, 375
 v. Jewett, 25, 57
 v. N. Y., etc. Ry. Co. (App. 2068)
 v. Staten Island Rapid Transit R. Co., 478
- Kelty v. Second Nat. Bank, 580
- Kelver v. N. Y. Central R. Co., 434
- Kemmish v. Ball, 633
- Kemp v. Burt, 558, 567
 v. Western U. Tel. Co., 553
- Kemper v. Louisville, 742
- Kenady v. Lawrence, 373
- Kendall v. Albia, 272, 376, 758, 759
 v. Boston, 58, 705
 v. Brown, 614
 v. Chicago, etc. Ry. Co., 745
 v. Council Bluffs, 257
 v. Johnson, 164, 175

[References are to sections.]

- Kendall v. Kendall, 654
 v. Stokes, 313
 v. Western U. Tel. Co., 531,
 542, 554
 Kendrick v. Fowle, 672, 680
 v. Seaboard Air Line Ry. Co.,
 481b
 Kenefick-Hammond Co. v. Rohr, 224,
 235
 Keng v. Baltimore, etc. R. Co., 114
 Kenna v. Central Pac. R. Co., 207
 Kennard v. Burton, 71, 87, 107, 652,
 654
 Kennayde v. Pacific R. Co., 476
 Kennedy v. Broun, 557
 v. Cecil Co., 94
 v. City of Chicago, 207e
 v. Chicago, etc. R. Co., 193
 v. Cumberland, 334
 v. Grace, 186
 v. Greenville, 376
 v. Laclede Gaslight Co., 205
 v. Lake Superior, etc. R. Co.,
 185a, 207
 v. Lansing, 358
 v. Manhattan R. Co., 207e,
 209a, 241
 v. New York, 285, 725
 v. N. Y. Central, etc. R. Co.,
 115
 v. Pennsylvania Co., 216
 v. Philadelphia, 375
 v. Ryall, 141, 246, 313, 515,
 690
 v. Savannah, 373
 v. Spring, 195
 v. Standard Sugar Refinery,
 767a
 v. Sullivan, 644
 v. Swift & Co., 207h, 215
 Kennenberg v. Alpena, 363
 Kennet's Petition, 283
 Kennett v. Durgin, 630
 v. Engle, 628
 Kenney v. Hannibal, etc. R. Co., 13,
 476, 478, 675, 676 (App.
 2074)
 v. N. Y. Cent. R. Co., 492,
 504, 505
 Kennon v. Gilmer, 514, 631, 758
 Kenny v. Barns, 723
 v. Cunard Steamship Co., 195,
 233
 v. Meddough, 201
 Kensington v. Wood, 273
 Kent v. Dawson Bank, 583
 v. Lincoln, 60b, 373
 v. Wilmington, 367
 Mfg. Co. v. Zimmerman, 207g
- Kentucky, etc. Bridge Co. v. Quin-
 kert, 508, 519
 Heating Co. v. Hoad, 739
 Hotel Co. v. Camp, 73a, 719a
 Wagon Mfg. Co. v. Duganics,
 197
 etc. Co. v. Leonard, 705
 etc. R. Co. v. Ackley, 238
 v. Biddle, 761
 v. Conner, 432
 v. Gastineau, 73a
 v. Smith, 102, 461, 463
 v. Talbot, 432
 v. Thomas, 61, 102, 108, 523
 Kenworthy v. Ironton, 376, 393
 Kenyon v. Cedar Rapids, 373
 v. Western U. Tel. Co., 755
 Keokuk v. Dist. of Keokuk, 343, 384
 Packet Co. v. Henry, 492a,
 521
 Kepperly v. Ramsden, 168
 Kerbodle v. Western Union Tel. Co.,
 542
 Kerker v. Betterndorf, etc. Wheel
 Co., 203, 206
 Kerling v. Van Dusen, 773
 Kern v. De Castro Sugar Rfg. Co.,
 28, 195
 Kernodle v. W. U. Tel. Co., 542
 Kerns v. Chicago, etc. R. Co., 216
 Kerr v. Boston Elev. Ry. Co., 485a,
 519
 v. Boston, etc. Ry. Co., 480
 v. Brooklyn, 259
 v. Forgue, 73
 v. Pennsylvania R. Co., 133
 v. O'Connor, 628, 638
 v. West Shore R. Co., 737
 Kerrigan v. Chicago, etc. Ry. Co.,
 187, 193
 v. Hart, 55
 v. Pennsylvania, etc. Ry. Co.,
 760
 v. South Pac. R. Co., 503
 Kersey v. Kansas, etc. R. Co., 190,
 241
 Kershan v. Gates, 637
 v. Ladd, 579
 Kerwacker v. Cleveland, etc. R. Co.,
 61, 63, 99, 100, 102, 419, 656
 Kesee v. Chicago, etc. R. Co., 679,
 680
 Kesler v. Smith, 766
 Kessel v. Butler, 760
 Kessler v. Lockwood, 632, 635
 Kester v. W. U. Tel. Co., 756
 Ketcham v. Cohn, 175
 Ketterman v. Dry Forks Ry. Co., 54,
 56
 Keutgen v. Parks, 75

[References are to sections.]

- Kevern v. Providence Min. Co., 186
 Kewance v. Depew, 89, 102
 Keyes v. Bank of Hardin, 579
 v. Cedar Falls, 377
 v. Marcellus, 352, 356
 v. Minneapolis, etc. R. Co., 761
 Keyser v. Chicago, etc. R. Co., 458, 466a, 481a, 483
 Keystone Bridge Co. v. Newberry, 235
 Kiander v. Brookline Gas Co., 704
 Kibele v. Philadelphia, 286, 287, 369, 693
 Kidder v. Barker, 623
 v. Dunstable, 346, 644
 Kidson v. Bangor, 287
 Kidwell v. Houston, etc. R. Co., 204
 Kiefer v. Brooklyn, etc. Ry. Co., 523
 v. Grand Trunk, etc. Ry. Co. (App. 2083)
 Kieffer v. Hummelstown, 346
 Kiernan v. New Jersey Ice Co., 151
 v. New York, 356
 Kies v. Erie, 265, 272
 Kiesel v. Ogden, 287
 Kightinger v. Western Union Tel. Co., 756
 Kilbane v. Westchester R. Co., 654
 Kilby v. Erwin, 750
 Kilduff v. Boston El. Ry. Co., 490
 Kiley v. Chicago City Ry. Co., 493 (App. 2196)
 v. Kansas City, 262, 354, 369
 v. Rutland Ry. Co., 193, 195
 v. Western U. Tel. Co., 534, 550, 553, 555, 755
 Killea v. Foxon, 195, 225
 Killian v. Augusta, etc. R. Co., 197, 225
 v. Southern Ry. Co. (App. 2084)
 Killien v. Hyde, 89
 Killion v. Power, 723
 Kilpatrick v. Grand Trunk Ry. Co., 223a
 Kilmer v. ——— Ry. Co., 449
 Kilroy v. Delaware, etc. Canal Co., 225
 v. Foss, 207
 Kimbal v. Minneapolis, etc. Ry. Co., 481b
 Kimball v. Bath, 356, 358
 v. Boston, 370
 v. Conolly, 592
 v. Cushman, 161
 v. Davis, 619
 v. Northern Elec. Co., 758
 v. Perry, 618
 v. Rutland, etc. R. Co., 550
 Kimberly v. Howland, 742
 Kimbro v. Edmondson, 622
 Kimbrough v. Boswell, 243
 v. State, 386
 Kimmer v. Weber, 197, 224, 230, 241
 Kimic v. San Jose Gatos, etc. Ry. Co., 54, 60a
 Kincade v. Chicago, etc. Ry. Co. (App. 2140, 2141)
 Kincaid v. Hardin Co., 255, 256, 257
 v. Kansas City, etc. R. Co., 410
 Kinchelo v. Priest, 579
 King v. Boston, etc. R. Co., 218
 v. Brown, 618, 619
 v. Central, etc. Ry. Co., 490
 v. Chicago, etc. Ry. Co., 206
 v. Colon Tp., 375
 v. Ford, 686
 v. Ford River Lbr. Co., 219a
 v. Fourchy, 567
 v. Granger, 287
 v. King, 217
 v. Livermore, 169
 v. Missouri Pacific R. Co., 53
 v. N. Y. Central R. Co., 144, 173
 v. Nichols, 625a
 v. Norcross, 665, 668, 703
 v. Ohio, etc. R. Co., 410, 512
 v. Oregon, etc. Ry. Co., 472
 v. Orser, 618
 v. Oshkosh, 358
 v. St. Landry, 256
 v. Seaboard, etc. Ry. Co. (App. 2131)
 v. Southern Ry. Co., 486
 v. Thompson, 110
 v. Tiffany, 733
 v. Vicksburg, 359
 v. Wabash R. Co., 99
 v. Woodstock Iron Co., 219
 Kingsbury v. Dedham, 355
 Kingsley v. Bloomingdale, 378
 Kingston v. Fort Wayne, etc. Ry. Co., 110
 Kinlen v. Metropolitan St. Ry. Co., 485ab
 Kinnaird v. Standard Oil Co., 734
 Kinnard v. Willmore, 619
 Kinnare v. Chicago, 281, 480
 Kinnear Mfg. Co. v. Carlisle, 231
 Kinney v. Central R. Co., 178, 232, 505
 v. Corbin, 207
 v. Crocker, 466
 v. Folkerts, 743, 758, 760
 v. Louisville R. Co., 512
 v. North Carolina Ry. Co., 413

[References are to sections.]

- Kinney v. South Shore, etc. Co., 693
 v. Tekemah, 334a
 v. Troy, 363
 Kinnion v. Davies, 629
 Kinnison v. Carpenter, 303
 Kinsey v. Jones, 340
 v. Kinston, 339
 Kinsley v. Lake Shore R. Co., 526
 v. Morse, 376
 Kinyon v. Chicago, etc. Ry. Co., 463
 Kipperly v. Ramsden, 107
 Kippes v. Louisville, 291
 Kirby v. Boylston, etc. Asso., 14,
 343, 710
 v. Penn. R. Co., 244
 v. President Del. & H. C. Co.,
 60
 v. Western U. Tel. Co., 531,
 542, 554
 Lbr. Co., Receivers v. Lewis
 (App. 2098)
 v. Montgomery, 188
 v. Owens (App. 2098)
 Kirchner v. Oil City St. Ry. Co., 523
 v. Smith, 709a
 Kird v. New Orleans, etc. Ry. Co.,
 501, 516
 Kirk v. Atlantic, etc. R. Co., 235
 v. Glover, 573
 v. Homer, 353, 369
 v. Norfolk, etc. R. Co., 433
 v. Santa Barbara Ice Co., 176
 v. Seattle Elec. Co., 151, 744
 Kirkham v. Bank of America, 579
 v. Wheeler-Osgood Co., 760
 Kirkpatrick v. Knapp, 343
 v. Illinois, etc. Ry. Co., 436
 v. Metropolitan St. Ry. Co.,
 164
 v. N. Y. Central R. Co., 53,
 204
 v. St. Louis, etc. Ry. Co., 217
 Kirksey v. Pryor, 619
 Kirkwood v. Finigan, 702
 Kirtley v. Chicago, etc. R. Co., 484
 Kirzikowsky v. Speering, 147a
 Kiser v. Suppe, 168, 175
 Kismie v. San Jose, etc. Ry. Co., 516
 Kissenger v. N. Y. & Harlem R. Co.,
 466
 Kistler v. Thompson, 716
 Kistner v. Amer., etc. Foundry, 214a,
 215
 v. Indianapolis, 26, 262, 289
 Kitchell v. Brooklyn R. Co., 73a
 Kitchen v. Carter, 56, 702
 v. Ritter, etc. Co., 706
 Kitchens v. Elliott, 634
 Kittredge v. Bellows, 619
 v. Elliott, 628, 632
- Kittredge v. Milwaukee, 258
 Klanowski v. Grand Trunk R. Co.,
 92, 471
 Klapproth v. Baltic Pier, etc. Co.,
 709a
 Klatt v. Foster Lbr. Co., 27a, 215
 v. Milwaukee, 356, 369
 Klauder v. McGrath, 122
 Klebe v. Parker Distl. Co., 195
 Kleffman v. Dry Dock, etc. Co., 522
 Kleiber v. People's R. Co., 89
 Klein v. Dallas, 258, 289, 368
 v. Jewett, 490, 525, 758
 v. St. Louis Tr. Co., 751
 v. Thompson, 759
 Kleinberg v. Schween, 705
 Kleinfelt v. Somers, etc. Co., 223a
 Kleinpeter v. Castro, 594, 602
 Klenberg v. Russell, 634
 Klenk v. Oregon, etc. Ry. Co., 493
 Kleopfert v. City of Minneapolis, 291,
 368
 Kleps v. Bristol Mfg. Co. (App.
 2171)
 Klepsch v. Donald, 688a, 767, 773
 Kline v. Abraham, 208
 v. Central Pac. R. Co., 64, 151,
 493, 520
 v. Elec. Tr. Co., 485b
 v. Minnesota Iron Co. (App.
 2154)
 v. State, 398
 v. W. U. Tel. Co., 756
 Kling v. Buffalo, 363, 376
 v. Kansas City, 334
 Klinger v. United Tr. Co., 494, 516,
 518
 Klipper v. Coffey, 104
 Klochinski v. Shores Lumber Co.,
 232
 Klopff v. Western Union Tel. Co., 542
 Klotz v. Winona, etc. Ry. Co., 463
 Klutts v. St. Louis, etc. R. Co., 31
 Knahtla v. Oregon, etc. R. Co., 55,
 232
 Knapp, Matter of, 561
 v. Sioux City, etc. R. Co., 31,
 89, 197, 758
 Knauff v. San Antonio Tr. Co., 494
 Knauss v. Brua, 713
 Kneeland v. Beare, 120
 Knelling v. Roderick Lion Mfg. Co.,
 117a, 690
 Knickel v. Chicago, etc. Ry. Co., 674
 Knickerbocker Ice Co. v. De Hass,
 632
 v. Forty-second St., etc. Co.,
 332
 v. Gardiner Dairy Co., 748
 v. Gray, 203

[References are to sections.]

- Knickerbocker Ice Co. v. Smith, 203
 Knight v. Abert, 418, 655, 703, 705
 v. Albemarle, etc. R. Co., 56
 v. Brown, 735
 v. Chicago, etc. R. Co., 672, 675
 v. Cooper, 184, 207*b* (App. 2104)
 v. Fox, 169
 v. Kansas City, 369 (App. 2091)
 v. Lanier, 653*b*
 v. Metropolitan Ry. Co., 519
 v. Missouri Lead, etc. Co. (App. 2076)
 v. N. Y., etc. R. Co., 448
 v. Overman Wheel Co., 207*g*
 v. Pontchartrain R. Co., 65
 v. Portland, etc. R. Co., 45, 495, 499, 505
 v. Toledo, etc. R. Co., 451*a*
 Knightlinger v. Egan, 631
 Knights v. Quarles, 574
 Knightstown v. Musgrove, 66, 289
 Knisley v. Pratt, 114*b*, 685
 Knoop v. Alter, 702
 Knopf v. Philadelphia, etc. Ry. Co., 476, 478, 482
 Knott v. McGilvray (App. 2055)
 v. Peterson, 775
 v. Wagner, 686
 Knour v. Wagoner, 640
 Knowles v. Central, etc. Ry. 393
 v. Crampton, 61, 645
 v. Muller, 632
 v. Muscatine, 336
 v. Norfolk R. Co., 493, 749
 Knowlton v. Bartlett, 618
 v. Des Moines, etc. Elec. Co., 698
 v. Milwaukee R. Co., 104
 v. Pittsfield, 350
 Knox v. Amer. Rolling Mill, 203, 209*a*
 v. Golding, 367
 v. Hall Steam Power Co., 719*a*
 v. N. Y., Lake Erie, etc. R. Co., 39*a*
 v. Pioneer Coal Co., 207
 Co. v. Montgomery, 257
 Knoxville v. Bell, 289
 Tr. Co. v. Lane, 154, 513
 v. Mullins, 485*bd*
 etc. R. Co. v. Acuff, 61, 140, 482, 483
 v. Wyrick, 769
 Knapfle v. Knickerbocker Ice Co., 13, 340
 Knutter v. N. Y., etc. Ry. Co., 232
 Kobe v. No. Pacific R. Co., 434
 Koch v. Ashland, 363, 376
 v. Fox (App. 2083)
 v. Sackman Inv. Co., 175, 750
 Koegel v. Missouri Pac. Ry. Co., 480, 484, 485
 Koehne v. New York, etc. Ry. Co., 497
 Koelsch v. Philadelphia Co., 35, 287, 690, 693
 Koener v. St. Louis Car Co., 203, 232, 238
 Koester v. Ottumwa, 289
 Kohn v. Lovett, 97, 703
 v. McNulta, 196, 197
 Kohner v. Capital Tr. Co., 516
 Kokomo v. Mahan, 274
 etc. Ry. Co. v. Studebaker, 377
 Kolb v. Huntsville, 287
 v. Klages, 632
 v. Knoxville, 287, 374
 v. O'Brien, 313
 Koller v. Chicago, etc. Ry. Co., 198*a*
 Kollock v. Madison, 289, 341, 359
 Kolsti v. Minneapolis, etc. R. Co., 53, 73
 Koney v. Ward, 639
 Koons v. St. Louis, etc. R. Co., 71, 73, 410
 v. Western U. Tel. Co., 541
 Koontz v. Oregon R. Co., 675, 676
 Konold v. Rio Grande, etc. Ry. Co., 202, 207*e*
 Konoski v. Delaware, etc. Ry. Co., 236
 Kopelka v. City of Bay City, 258, 289
 Koplan v. Boston Gaslight Co., 693, 696
 Koplitz v. St. Paul, 65*a*
 Kopper v. City of Yonkers, 338, 339
 Koppf v. Northern Pac. R. Co., 412
 Korber v. Ottman, etc. Co. (App. 2171)
 Koreis v. Minneapolis, etc. Ry. Co., 211 (App. 2155)
 Kornetzski v. Detroit, 367
 Korrad v. Lake Shore, etc. R. Co., 137, 475, 482
 Korte v. St. Paul Coal Co., 703
 Kortlang v. Mt. Vernon, 363
 Kosmak v. New York, 287
 Kossman v. St. Louis, 352
 Kotera v. Amer. Smelting, etc. Co., 207*g*
 Kotz v. Illinois, etc. Ry. Co., 407*a*
 Kountz v. Brown, 748
 Kovarik v. Saline Co., 367
 Kowalski v. Chicago, etc. Ry. Co., 77, 463*a*
 Kraft v. Citizens Bank, 584

[References are to sections.]

- Kral v. Burlington, etc. Ry. Co., 742
 Kramer v. Brooklyn, etc. Ry. Co., 520
 v. Delaware, etc. Ry. Co., 520
 v. Los Angeles, 744
 v. Market St. R. Co., 133
 Kramm v. Stockton Elec. Ry. Co.,
 63, 481b
 Krans v. Baltimore, 287
 Krantz v. Rio Grande R. Co., 513
 Kranz v. Long Island R. Co., 192, 233
 Krause v. Davis Co., 257
 v. Merrill, 375
 v. Morgan, 207a
 Kraut v. Frankfort, 31
 Krebs Mfg. Co. v. Brown, 751
 v. Minneapolis, etc. R. Co.,
 451a
 Kreger v. Bismarck, 299
 Krehmeyer v. St. Louis Tr. Co., 122,
 485
 Kreider v. Lancaster, etc. Tp. Co., 85a
 v. Louisville, etc. Ry. Co., 208
 Kreig v. Wells, 73a
 Kreigh v. Westinghouse, 186, 187
 Kreis v. Missouri Pac. R. Co., 484
 Kremer v. New York Edison Co., 186
 Krenzar v. Pittsburgh, etc. R. Co.,
 481a
 Kreuziger v. Chicago, etc. R. Co.,
 762
 Krey v. Schlussner, 719
 Krieger v. Aurora, etc. Co., 61
 Krippner v. Biebl, 666, 669
 Kriwinski v. Pennsylvania Ry. Co.,
 479
 Kroener v. Chicago, etc. R. Co., 207a
 Krogg v. Atlanta, etc. R. Co., 60a,
 230
 Krogstad v. Northern Pac. R. Co.,
 233
 Krom v. Schoonmaker, 121
 Kroll v. Moritz, 618
 Kronzer v. Spencer, etc. Co., 189
 Kroy v. Chicago, etc. R. Co., 207h,
 209a, 221
 Kruegel v. Cobb, 302, 303
 v. Jones, 303
 v. Murphy, 591, 592
 Krueger v. Bronson, 86
 v. Omaha, etc. Ry. Co., 99,
 520
 Kruse v. Chicago, etc. R. Co., 195
 Krzywoszynski v. Consol. Gas Co.,
 697
 Kucera v. Merrill Lomber Co., 73a,
 185a
 Kuch v. Baltimore, etc. Ry. Co., 451a
 Kudick v. Lehigh Val. R. Co., 202,
 241
- Kugon v. Minneapolis, etc. Ry. Co.,
 742
 Kuhn v. Chicago, etc. R. Co., 99, 451a
 v. Delaware, etc. Ry. Co., 93,
 191
 v. Jewett, 30, 666
 v. Walker, 379
 v. Walker Tp., 356
 Kuhnen v. Union R. Co., 485a, 485b,
 485c
 Kuhns v. Wisconsin, etc. R. Co., 60c
 Kujara v. Irving, 231 (App. 2171)
 Kumler v. Junction R. Co., 224, 241
 Kummel v. Germania Sav. Bank, 588
 Kunkel v. Minneapolis, etc. Ry. Co.,
 484
 v. St. Paul, etc. Ry. Co., 464
 Kunz v. Oregon Ry., etc. Co., 463,
 472
 v. Troy, 73, 281, 296, 346, 369
 Kunza v. Chicago, etc. R. Co. (App.
 2196)
 Kuphal v. Western Montana, etc. Co.,
 218
 Kurpgeweit v. Kirby, 748
 Kushes v. Ginberg, 708a
 Kurt v. Lake Shore, etc. Ry. Co., 463
 Kurz Ice Co. v. Milwaukee, etc. R.
 Co., 676, 678
 Kutner v. Fargo, 749
 Kuttner v. Central, etc. Ry. Co., 516
 v. Lindell R. Co., 66
 Kwiotkowski v. Chicago, etc. R. Co.,
 476
 v. Grand Trunk R. Co., 481b
 Kyle v. Abernathay, 313
 v. Chicago, etc. Ry. Co., 761
 v. Lehigh Valley Ry. Co., 460
 v. Ohio River Co., 744
 v. Southern Electric, etc. Co.,
 359
 Kyne v. Wilmington, etc. R. Co., 74,
 355, 359
 Kyser v. Kansas City, etc. R. Co.,
 434, 436
 LaBelle v. Rhode Island Co., 774
 Lacas v. Detroit R., 520, 759
 Lackawanna Steel Co. v. Pioneer S.
 S. Co., 725
 etc. R. Co. v. Chenewith, 466a,
 500
 v. Doak, 58, 672, 675
 Laekin v. Delaware, etc. Canal Co.,
 434
 Lackland v. North Missouri R. Co.,
 359, 362
 La Clef v. Concordia, 260, 262
 Lacock v. Parker, 699
 Lacon v. Page, 353
 Lacour v. New York, 273, 744

[References are to sections.]

- Lacrocy v. N. Y., Lake Erie, etc. R. Co., 14, 193, 202, 207*b*, 217
- Lacy v. Winn, 653
- Ladd v. Brockton St. Ry. Co., 201
 v. Foster, 89, 766
 v. French, 340
 v. Minneapolis, etc. R. Co. (App. 2196)
 v. New Bedford, etc. R. Co., 184, 187, 497
 v. New York, etc. Ry. Co., 459*c*
- Ladilaw v. Sage, 762
- Ladonceur v. Northern Pac. R. Co., 476
- La Duke v. Exeter, 346
 v. Hudson, etc. Telep. Co., 193 (App. 2171)
- Laethem v. Fort Wayne, etc. R. Co., 485*a*
- Lafayette v. Allen, 265
 v. Larson, 367
 v. Nagle, 274
 v. Timberlake, 262
 v. Weaver, 60*c*
 Bridge Co. v. Olsen, 189
 etc. R. Co. v. Adams, 102, 460, 463
 v. Huffman, 74
 v. Shriner, 418, 430, 434, 435, 451*a*
- Lafferty v. Hannibal, etc. R. Co., 448
 v. Third Ave. Ry. Co., 73, 73*a*
- Laffery v. United States Gypsum Co., 164
- Laffin, etc. Powder Co. v. Tearney, 689, 701*a*
- Lafflin v. Buffalo, etc. R. Co., 60*b*, 195, 502, 510, 519, 673
- Lafitte v. New Orleans R. Co., 145, 513
 v. Southern Ry. Co., 63
- La Flamme v. Detroit, etc. R. Co., 451*a*
- Lafourche Pkt. Co. v. Henderson, 207*h*
- Lagerman v. New York Cent. Ry. Co., 480
- La Grange v. Southwestern Tel. Co., 555, 556
- Lagrone v. Mobile, etc. R. Co., 226
- Lahey v. Central Park R. Co., 485*c*
- Lahner v. Williams, 260*a*
- Laible v. New York, etc. Ry. Co., 426
- Laicher v. New Orleans R. Co., 88
- Laing v. Colder, 516, 739
- Laird v. Atlantic Coast, etc. Co., 359
 v. Pittsburgh Tr. Co., 493
 v. Otsego, 355, 373
- Laitinen v. Shenango, etc. Co., 231
- Lake v. Milliken, 28, 31, 55, 122, 378
 v. Mining Co., 207*h*
 v. Shenango Furnace Co., 209*a*
 Erie, etc. R. Co. v. Acres, 486
 v. Arnold, 500, 516
 v. Barclay, 470
 v. Bell, 232
 v. Bradford, 473, 484
 v. Carson, 459
 v. Clark, 678
 v. Cloes, 761*a*
 v. Cotton, 520
 v. Craig, 197
 v. Cruzen, 675, 678
 v. Helmerick, 675
 v. Kirts, 675
 v. Kneadle, 434
 v. McFall, 672
 v. McHenry, 193
 v. Mackey, 73, 479
 v. Matthews, 7
 v. Mays, 493
 v. Middlecoff, 675
 v. Mugg, 769
 v. Norris, 427
 v. Zoffinger, 468
 Roland R. Co. v. McKewen, 485*a*
 Shore, etc. Ry. Co. v. Barnes, 463, 464
 v. Bodemer, 49, 64, 484
 v. Boyts, 66
 v. Brown, 513*a*, 523
 v. Clemens, 479
 v. Conway, 758
 v. Ehlert, 189, 475
 v. Ehlerly, 189
 v. Elbert, 769
 v. Frantz, 466
 v. Franz, 463, 466
 v. Hart, 90
 v. Hessions, 51*c*, 137 (App. 2060)
 v. Hundt, 458
 v. Johnsen, 102, 743
 v. Johnson, 463
 v. Johnston, 215, 463
 v. Kelsey, 519
 v. Knittal, 207*e*, 207*b*
 v. Lavalley, 191, 233
 v. McCormick, 184, 195
 v. McIntosh, 415, 473
 v. Miller, 69, 88, 107
 v. Murphy, 202
 v. Orndorff, 493
 v. Parker, 93, 95
 v. Pero (App. 2178)
 v. Pinchin, 473, 479
 v. Prentice, 749
 v. Reynolds, 773

[References are to sections.]

- Lake Shore, etc. Ry. Co. v. Rosenweig,
 151, 742, 749
 v. Saltzman, 495
 v. Spangler, 178
 v. Stupak, 189, 190, 209
 v. Sunderland, 472
 v. Teeters, 488, 505
 v. Wahlers, 673
 Side, etc. R. Co. v. Kelly, 673,
 676
 Superior Iron Co. v. Erickson,
 144, 174, 207a
 St. L. Ry. Co. v. Burgess, 490
 Lakey v. Texas, etc. Ry. Co. (App.
 2187)
 Lakin v. Oregon Pac. R. Co., 157
 v. Willamette Val., etc. R.
 Co., 413
 Lamar Co. v. Clements, 334
 Lamb v. Cedar Rapids, 367
 v. Littman, 189
 v. Lyon, 497
 v. Old Colony R. Co., 426
 v. Southern Ry. Co., 481b
 v. Union Ry. Co., 140a
 Lambert v. Alcorn, 736
 v. Ensign, etc. Ry. Co. (App.
 2104)
 v. Mississippi Pulp Co., 195
 v. Pembroke, 334a, 369
 v. Sandford, 573
 v. Southern Pac. Co., 475, 483
 Lambeth v. Joffrion, 621
 v. North Carolina R. Co., 519,
 520, 523
 Lambkin v. Southeastern R. Co., 39
 Lambrecht v. Pfizer, 190
 Lamline v. Houston, etc. R. Co., 508
 Lamman v. Feusier, 625a
 Lammers v. Great Northern Ry. Co.,
 464
 Lammert v. Chicago, etc. R. Co., 473
 Lammi v. Milford, etc. Quarries, 206
 Lampert v. Laclede Gas Co., 118
 Lampkin v. Louisville, etc. R. Co.,
 513
 Lamond v. Sea Coast Canning Co.,
 745
 Lamoureux v. Fournier, 202
 Lamoreux v. Luzerne Co., 257
 Lamotte v. Boyce, 216
 Lampe v. San Francisco, 274
 Lamphear v. New York, etc. Ry. Co.,
 464, 484
 Lampton v. Cedartown Co., 164, 168
 Lamson v. Amer. Axe, etc. Co., 211a
 Lanark v. Dougherty, 51c, 102
 Lancaster v. Atchison, etc. Ry. Co.
 (App. 2161)
 Lancaster v. Conn. Mut. Life Ins. Co.,
 175, 701
 v. Walter, 376
 etc. Co. v. Jones, 732
 Canal Co. v. Parnaby, 285,
 399
 Lanci v. Boston Elev. Ry. Co. (App.
 2069)
 Land v. Fitzgerald, 704, 706
 Landa v. McDermott, 644
 v. Traders' Bank, 580a, 582
 Landau v. New York, 262
 Landolt v. Norwich, 363
 Landon v. Humphrey, 606, 607
 Landridge v. Levy, 38
 Landrigan v. Brooklyn, etc. Ry. Co.,
 525
 Landru v. Lund, 358, 703
 Landsberger v. Magnetic Tel. Co.,
 755
 Lane v. Atlantic Works, 13, 31, 35,
 99, 107, 122
 v. Bryant, 60a
 v. Cotton, 319, 321
 v. Crombie, 107, 375
 v. Crosby, 303
 v. Finn, 24a
 v. Hancock, 338, 350, 356,
 367, 369
 v. Hitchcock, 119
 v. Kansas City, etc. R. Co.,
 433
 v. Lewiston, 361, 375
 v. Minnesota Agric. Soc., 629
 v. Missouri Pac. R. Co., 93
 v. Storke, 559
 v. Syracuse, 345
 v. Wheeler, 346
 v. Woodbury, 256, 267
 Bros. v. Bauserman, 232
 Laney v. Chesterfield Co., 62, 375,
 376
 Lang v. Bailes, 195
 v. Holiday Creek R. Co., 417
 v. Houston St., etc. Ry. Co.
 (App. 2083)
 v. Missouri, etc. Ry. Co., 463,
 470
 v. N. Y., Lake Erie, etc. R.
 Co., 151, 763
 Langabauch v. Anderson, 708
 Langan v. Atchison, 353, 376
 v. Iron, etc. R. Co., 492a
 v. St. Louis, etc. R. Co., 90,
 92
 Langdon v. Potter, 573
 Lange v. Benedict, 303
 v. Missouri Pac. Ry. Co., 85a,
 481a

[References are to sections.]

- Lange v. Schoettler, 766, 767 (App. 2055)
 Langenfeld v. Union Pac. Ry. Co., 188, 457
 Langford v. United States, 249, 251
 Langhoff v. Milwaukee, etc. R. Co., 13, 467
 Langhorne v. Turman, 688*a*, 701
 Langin v. N. Y. & Brooklyn Bridge Co., 499
 Langley v. City Council of Augusta, 287, 291
 v. Western U. Tel. Co., 531
 Langlois v. Buffalo, etc. R. Co., 466*a*
 v. Cohoes, 370
 v. Dunn Worsted Mills, 218, 223*a*
 Lanigan v. N. Y. Gas Co., 696
 Laning v. N. Y. Central R. Co., 91, 189, 190, 192, 204, 208, 215, 230
 Lannen v. Albany Gas Co., 81, 697
 Lanphier v. Phipos, 558, 606
 Lansing v. Coney Isl. R. Co., 495
 v. Smith, 8, 365, 371, 737
 v. Stone, 665
 v. Toolan, 258, 271
 Lantry Sons v. Lowrie, 209*a*
 Lapham v. Curtis, 16, 17, 701*a*
 v. Rice, 345
 Lapiere v. Beaubien, etc. Co., 191
 La Pierre v. Chicago, etc. R. Co., 207*e*, 209*a*
 LaPlaca v. Lake Shore, etc. Ry. Co. (App. 2172)
 Lapointe v. Middlesex R. Co., 516
 LaPontney v. Shedden, etc. Co., 654
 LaPorte v. Osborne, 354
 v. Wells, 727*a*
 Co. v. Ellsworth, 380
 Lappread v. Detroit, 368
 Lapsley v. Union Pac. R. Co., 66, 468
 Laragay v. East Jersey Pipe Co., 204, 224, 235
 Laramie Co. v. Albany Co., 254
 Laredo Elec. Ry. Co. v. Hamilton, 408
 Larich v. Moies, 216, 233
 La Riviere v. Pemberton, 65
 Larkin v. Burlington, etc. R. Co., 66
 v. O'Neill, 60*b*, 704, 719*a*
 v. Saginaw Co., 256
 Larmore v. Crown Point Iron Co., 8, 97, 705
 Larock v. Ogdensburgh, etc. R. Co., 144
 Larrabee v. Sewall, 86
 Larsen v. Home Telep. Co., 747
 v. Lackawanna Steel Co., 207*e*
 Larsen v. Leonardt, 206
 v. Magne-Silica Co., 207*b*
 v. Postel Tel., etc. Co., 753*a*, 754
 v. Sedro-Wooley, 376
 Larsh v. Des Moines, 368, 376
 Larson v. Brooklyn Heights Ry. Co. (App. 2171)
 v. Center Creek Min. Co., 207*h*
 v. Central R. Co., 60
 v. Grand Forks, 289, 354
 v. Illinois Cent. R. Co., 241*c*
 v. Metropolitan R. Co., 167
 v. Red River Transp. Co., 683, 704, 706
 v. St. Paul, etc. R. Co., 207, 207*e*
 v. Tobin, 361
 Larue v. Farron Hotel Co., 709*a*
 Larussi v. Missouri Pac. Ry. Co., 132*a*
 Lary v. Cleveland, etc. R. Co., 97, 705
 Larzalere v. Kirchgessner, 767
 Lasala v. Holbrook, 701
 La Salle v. Koska, 207*c*
 v. Porterfield, 367
 v. Thorndike, 762
 Lasker Real Estate Assn. v. Hatcher, 176
 Lasky v. Canadian Pac. R. Co., 54, 184, 230, 233, 233*a*
 Lassiter v. Western U. Tel. Co., 556
 Lasure v. Graniteville Mfg. Co., 220
 Latch v. Rumner R. Co., 517
 Latham v. Roach, 704
 Lathan v. Western Union Tel. Co., 755
 Lathrop v. Central, etc. R. Co., 336
 Latimer v. General Elec. Co., 203, 209*a*
 Latremouille v. Bennington, etc. R. Co., 209*a*, 221, 223
 Lattin v. Smith, 303
 Latty v. Burlington, etc. R. Co., 434
 Laub v. Chicago, etc. Ry. Co., 501
 Lauber v. Lynch, 485
 Laude v. Chicago, etc. R. Co., 449
 Laudeman v. Russell, 690
 Lauder v. St. Clair Tp., 393
 Laudie v. Western Union Tel. Co., 540
 Laue v. Madison, 369
 Lauer v. Palms, 683, 760
 Laugabough v. Anderson, 689
 Laughner v. Pointer, 173, 699
 Laughlin v. Eaton, 115
 v. McCaulley (App. 2090)

[References are to sections.]

- Laughlin v. St. Louis, etc. Ry. Co., 99,
457, 475
v. Street R. Co., 53
Laumier v. Francis, 735
Laun v. St. Louis, etc. Ry. Co., 472
Launstein v. Launstein, 735
Laurel v. Blue, 291
Laurie v. Silsby, 729
Co. v. McCullough, 87, 518,
704, 706
Lauristen v. American Bridge Co., 1
Laury v. Northern Pac. Term. Co.,
480, 481b
Lauson v. Town of Fond du Lac, 66,
377
Lauterer v. Manhattan Ry. Co., 501,
520
Lavallee v. St. Paul, etc. R. Co., 241c
Laverenz v. Chicago, etc. R. Co., 93,
477
Laverone v. Mangianti, 628
Lavery v. Manchester, 346
Law v. Ewell, 557
v. Kingsley, 334a, 343
v. Missouri, etc. Ry. Co., 480
Lawall v. Groman, 562, 574
Lawler v. Baring Boom Co., 16
Lawlor v. French, 630
Lawless v. Connecticut River R. Co.,
87, 204, 214
Lawrence v. Chicago, etc. Ry. Co.
(App. 2104)
v. Combs, 659
v. Fox, 118, 543
v. Great Northern R. Co., 395
v. Green, 487, 516, 519
v. Hagemeyer, 207g, 215
v. Harrison, 572, 576
v. Heidbreder, 739
v. Jenkins, 39
v. McCalmot, 587
v. McGregor, 40
v. Milwaukee, etc. R. Co., 436
v. Mt. Vernon, 334, 350
v. New Bedford, 358
v. Potts, 568
v. Sherman, 313
v. Stonington Bank, 582
v. Texas, etc. Ry. Co., 207g
(App. 2187)
Lawrenceburgh v. Wesler, 336
etc. R. Co. v. Montgomery,
61, 523
Laws v. No. Carolina, etc. R. Co.,
419
Lawson v. Chicago, etc. R. Co., 492,
523
v. Conaway, 613
v. Elec. Light Co., 203
v. Merrill, 60, 719
- Lawson v. Seattle, 265
v. Shreveport W. Works Co.,
359, 706
v. State, 619
v. Truesdale, 185, 197, 207a
Lawton v. Erwin, 619
v. Giles, 676
v. Herrick, 744
v. Little River, etc. R. Co.,
489
v. Little Rock, etc. R. Co., 8
v. Waite, 245
Lawyer v. Smith, 671
Lax v. Darlington, 89
Lay v. Midland R. Co., 416
v. Postal Tel., etc. Co., 756
v. Richmond, etc. R. Co., 99
Layne v. Chesapeake, etc. Ry. Co.,
490, 513
v. Ohio River R. Co., 419, 430
Layzell v. Sommers Coal Co., 190
Lazarus v. Toronto, 721
Lazell v. Kapp, 654
Lea v. Durham, 480
Leach v. Lynch, 656
v. Owensboro, etc. Ry. Co.,
485ab
League v. Stadley, 704
Leahan v. Cockran, 721
Leahy v. Davis (App. 2076)
Leak v. Rio Grande, etc. R. Co., 54
Leake v. Georgia Pac. R. Co., 476
Leame v. Bray, 18, 644
Learned v. Castle, 721
v. Tangeman, 729
Learoyd v. Godfrey, 704, 705
Leary v. Boston, etc. R. Co., 185,
210, 211a
v. Fitchburg, etc. R. Co., 485,
516
v. Woodruff, 725
Leather Manufacturers' Bank v.
Morgan, 588
Leathers v. Blackwell, etc. Tobacco
Co. (App. 2085)
Leavenworth v. Hatch, 66
Coal Co. v. Batchford, 698a
Lodge v. Byers, 700
etc. R. Co. v. Forbes, 100
v. Rice, 87, 468, 476
Leavitt v. Terre Haute R. Co., 426,
467, 474
Lebanon v. McCoy, 207h, 209a, 217
v. Oleott, 283
Light Co. v. Leap, 159, 692
etc. Co. v. Lanham Lbr. Co.,
757
Le Bahn v. N. Y. Central R. Co.,
207b

[References are to sections.]

- Le Bar v. New York, etc. Ry. Co., 132
 Le Baron v. Joslin, 107, 654
 Le Beau v. Telephone, etc. Co., 375
 Lebeau v. Dyerville Mfg. Co., 61
 Le Blanc v. Orleans Ice Mfg. Co., 359
 Lechman v. Hooper, 116
 Lechner v. Newark, 653
 Le Clair v. New York, etc. Ry. Co., 518
 Le Clare v. St. Paul, etc. R. Co., 91
 Lederman v. Pennsylvania R. Co., 73a, 485
 Ledgerwood v. Webster City, 368
 Ledig v. Germania Brewing Co., 645
 Ledyard v. Jones, 619, 623
 v. Ten Eyck, 333
 Lee v. Ayrton, 572
 v. Barkhamsted, 350, 358, 367
 v. Berne, 367
 v. Boston, etc. Ry. Co., 509
 v. Brooklyn, etc. Ry. Co., 435
 v. Burk, 633
 v. Central R. Co., 207e
 v. Chicago, etc. Ry. Co., 476, 477
 v. Detroit, etc. Works, 180
 v. Dixon, 567
 v. Foley, 649
 v. Hardeway, 619
 v. Huff, 303
 v. International, etc. Ry. Co., 111
 v. Jones, 60, 370
 v. Knapp (App. 2075)
 v. Leighton Co., 113
 v. Minneapolis, etc. R. Co., 421, 424, 451a
 v. Missouri Pac. Ry. Co., 223
 v. Northwestern Ry. Co., 469
 v. Powell Bros., 207b
 v. Publishers' Co., 114, 719a
 v. Riley, 365, 627
 v. St. Louis, etc. Ry. Co., 184a
 v. Sandy Hill, 299
 v. Southern Pac. R. Co., 120a, 214, 413
 v. Troy, etc. Gas Co., 109, 111, 113, 114
 v. Union R. Co., 37, 355
 v. Vacuum Oil Co., 689, 693
 v. Van Voorhis (App. 2084)
 v. Western U. Tel. Co., 541, 543
 v. Woolsey, 207h, 213
 Co. v. Yarbrough, 256
 Leebrick v. Republican Val., etc. R. Co., 424
- Leeds v. Amherst, 740
 v. Met. Gas Co., 740, 760
 v. Richmond, 298
 Lefler v. Western Union Tel. Co., 540a
 Le Forest v. Tolman, 132, 628
 Legg v. Britton, 140
 Legge v. New York, etc. Ry. Co., 475, 490, 501
 Leggett v. Illinois Central Ry. Co., 58
 Le Grande v. Wilkes Barre, etc. Co., 705
 Lehigh Bridge Co. v. Lehigh Coal, etc. Co., 16
 Co. v. Hoffors, 262, 274
 etc. Coal Co. v. Hayes, 214
 etc. R. Co. v. Greiner, 94
 etc. Ry. Co. v. Dupont, 503, 518
 Valley Coal Co. v. Jones, 60a
 Valley R. Co. v. McKeon, 55, 666
 Valley Ry. Co. v. Delackesa, 459b
 Valley Trans. Co. v. City of Chicago, 253, 367
 Lehman v. Bagley, 215
 v. Brooklyn, 58, 73a
 v. Brooklyn R. Co., 761, 766, 769
 v. Chicago, etc. Ry. Co., 61, 94a, 193
 v. Eureka Iron, etc. Works, 73
 Co. v. Siggeman, 207i
 Lehn v. San Francisco, 274
 Lehner v. Pittsburg Rys. Co., 519
 Lehr v. Steinway, etc. R. Co., 523
 Lehto v. Atlantic Min. Co., 219a
 Leiber v. Chicago, etc. R. Co., 750
 Leidlein v. Meyer, 735
 Leidy v. Quaker City, etc. Co., 727a
 Leigh v. Omaha R. Co., 630
 v. Omaha St. R. Co., 56
 v. Westervelt, 332
 Leighton v. Sargent, 605, 612, 614, 761
 v. Wheeler, 1
 Leinkauf v. Lombard, 485
 Leishman v. Brighton, etc. R. Co., 54
 v. Union Iron Works, 232
 Leistriz v. American Zylonite Co., 218
 Leitzel v. Harrisburg, Tr. Co., 485b
 Le Lievre v. Gould, 8
 Leland v. Western Union Tel. Co., 754
 Leman v. New York, 299

[References are to sections.]

- Le May v. Canada Pac. R. Co., 241a
 v. Missouri Pac. R. Co., 464
 Lemen v. Kansas, etc. Ry. Co., 672
 Lemman v. Spokane, 375
 Lemmon v. Chanslor, 51, 516
 v. Chicago, etc. R. Co., 425
 Lemon v. Hayden, 334
 Lendberg v. Brotherton Iron Min.
 Co., 207
 Lendo v. Chicago Ry. Co., 480
 Lenkewicz v. Wilmington City Ry.
 Co., 481b, 518
 Lennon v. Chicago, etc. Ry. Co., 520
 v. Rawitzer, 57
 Lent v. N. Y. Central, etc. R. Co.,
 87, 524
 Lentz v. Carnegie, 750
 v. City of Dallas, 743
 Lenz v. Aldrich, 710
 Lenzen v. New Braufels, 265
 Leonard v. Collins, 185, 187
 v. Columbia Nav. Co., 132
 v. Fitchburg R. Co., 752
 v. Joline, 85a
 v. Mallory (App. 2127)
 v. Minneapolis, etc. Ry. Co.,
 114
 v. N. Y., Albany, etc. Tel. Co.,
 529, 532, 534, 537, 544, 754,
 755
 v. St. Louis, etc. Trans. Co.,
 493
 v. Storer, 708, 710
 Leoni v. Taylor, 256
 Leonoroditz v. Ott, 626
 Leopard v. Chesapeake, etc. Canal
 Co., 401
 v. Lawrence, etc. Mills, 219
 Leopold v. Delaware, etc. Canal Co.,
 54
 Lepnick v. Gaddis, 705, 706
 Leppard v. Western Union Tel. Co.,
 542
 Lerner v. Philadelphia, 375
 Le Roy v. Blauvelt, 622
 Lesan v. Maine Central R. Co., 90,
 476
 Leslie v. Highlands, etc. Min. Co.,
 747
 v. Lewiston, 71, 74
 v. Pound, 120
 v. Rich Hill Coal Co., 717
 v. Wabash Ry. Co., 428
 v. Wilson, 22
 Lessard v. Stram, 729, 735
 Lesser v. Wunder, 602
 Cotton Co. v. St. Louis, etc.
 Ry. Co., 672
 Lessoff v. Gordon, 144, 151
 Lester v. Highlands, etc. Co., 750
- Lester v. Pittsford, 25, 53, 57, 108
 v. Western Union Tel. Co.,
 543
 Lettis v. Horning, 635
 Letts v. Hoboken R., etc. Co., 151
 Leu v. St. Louis. Tr. Co., 520
 Levan v. Atlantic, etc. Ry. Co., 493
 Levelsmeier v. St. Louis, etc. Ry.
 Co., 485c
 Levenson v. Pullman Car Co., 526
 Leveret v. Shreveport Belt Ry. Co.,
 494, 518
 Levidow v. Starin, 515
 v. Goodwin, 359
 Levine v. Brooklyn, etc. Ry. Co., 516
 v. Metropolitan St. Ry. Co.,
 74
 Co. v. Rutherford, 359
 Leviness v. Post, 146
 Levins v. Bancroft, 232
 v. New York, etc. Ry. Co.,
 526b
 Levy v. Campbell, 495
 v. Metropolitan St. Ry. Co.,
 113
 v. New York, 262
 v. Rosenblatt, 203
 v. Salt Lake City, 286, 289
 Lewark v. Carter, 618
 v. Parkinson, 495, 758
 Lewenthal v. New York, 274
 Lewin v. Lehigh Valley R. Co., 77
 (App. 2084)
 Cole, etc. Co. v. Western U.
 Tel. Co., 754
 Lewine v. Interborough Rapid Tr.
 Co., 749
 Lewis v. Atlanta, 367
 v. Boston Salt Co., 223a
 v. Cleveland, etc. Ry. Co., 73
 v. Delaware, etc. Canal Co.,
 91, 488, 493, 520
 v. Eastern R. Co., 458
 v. Emery, 189
 v. Flint, etc. R. Co., 28
 v. Fremont, etc. R. Co., 428
 v. Gallivan Bldg. Co., 207e
 v. Galveston, etc. Ry. Co., 408
 v. Gamage, 573
 v. Houston Elec. Co., 110, 490
 v. Hughes, 689
 v. London, etc. R. Co., 509,
 520
 v. Long Island Ry. Co., 66,
 417, 467
 v. Mammoth Min. Co., 146
 v. Montgomery, 241b
 v. New Orleans, 291
 v. N. Y., Lake Erie, etc. R.
 Co., 214a, 215, 417, 468

[References are to sections.]

- Lewis v. N. Y., New England, etc. R. Co., 215
 v. N. Y. Sleeping Car Co., 525
 v. Northern Pac. Ry. Co. (App. 2162)
 v. Palmer, 303
 v. Pennsylvania Ry. Co., 488
 v. Puget Sound R. Co., 480
 v. Raleigh, 260
 v. St. Louis, etc. R. Co., 205
 v. Samuel, 559
 v. Schultz, 669, 671
 v. Seifert, 202, 207*e*, 232, 233*a*
 v. Springfield, 272
 v. State, 249, 250, 251, 260
 v. Stein, 734
 v. Terry, 117
 v. Western U. Tel. Co., 543
 Lewy v. Yonkers, 354
 Lexington, etc. Ry. Co. v. Herring, 488
 v. Huffman, 127
 Leydecker v. Brintnall, 710
 Leyden v. N. Y. Central R. Co., 436
 Libaire v. Minneapolis, etc. Ry. Co., 115, 467, 764
 Libby v. Hopkins, 584*a*
 v. Maine Central R. Co., 406, 407
 v. Scherman, 185*a*, 207*g*, 233
 Lichtenberger v. Merriden, 353
 Liddle v. Keokuk, etc. R. Co., 445
 Liebrecht v. Crandell, 653*e*
 Liedke v. Moran, 217
 Lienau v. Dinsmore, 587*a*
 Liermann v. Chicago, etc. R. Co., 87
 Light v. Chicago, etc. R. Co., 207*h*
 v. Detroit Ry. Co., 761*a*
 Lightfoot v. Winnebago Tr. Co., 66
 Ligon v. John A. Beck Salt Co., 221
 Liles v. Cawthorn, 731
 v. Fosburg Lbr. Co. (App. 2173)
 Lilienthal v. Campbell, 313
 Lily v. Boyd, 753
 Lillibridge v. McCann, 485, 666
 Lillstrom v. Northern Pac. R. Co., 417
 Lilly v. Charlotte, etc. R. Co., 135
 v. N. Y. Central R. Co., 186, 197
 Limekiller v. Hannibal, etc. R. Co., 132, 133
 Liming v. Illinois Cent. R. Co., 85*e*, 679
 Limpus v. London Omnibus Co., 145, 146
 Linch v. Pittsburgh Tr. Co., 523
 v. Sagamore Mfg. Co., 207*h*
 Linek v. Scheffel, 632, 639
- Lincoln v. Barre, 53
 v. Beckman, 760
 v. Boston, 262, 358
 v. Buckmaster, 20
 v. Calvert, 356, 368
 v. Central, etc. Ry. Co., 758
 v. Detroit, 287
 v. Hapgood, 303, 310
 v. Janesch, 703
 v. Power, 376
 v. Saratoga, etc. R. Co., 760
 v. Smith, 353, 369
 v. Walker, 108, 289
 v. Woodward, 369
 Tr. Co. v. Shepperd, 516
 v. Webb, 495, 516
 Rapid Transit Co. v. Nichols, 89, 359
 etc. R. Co. v. Sutherland, 735
 Lind v. Uniform Stave, etc. Co., 223*a*
 Lindall v. Bode, 223
 Lindeberg v. Crescent Min. Co., 207*i*
 Lindeman v. N. Y. Central, etc. R. Co., 91
 Lindholm v. St. Paul, 262
 Lindler v. Southern Ry. Co., 27*a*, 426
 Lindley v. Fries Mfg. Co., 653*a*
 v. Polk Co., 256, 260*a*
 Lindquist v. King's, etc. Plaster Co., 207*b*
 Lindsay v. Connecticut, etc. R. Co., 57
 v. Oregon, etc. Ry. Co., 115, 761*a*
 v. Pennsylvania Ry. Co., 476
 v. Southern, etc. Ry. Co., 524
 v. Winn, 653
 Lindsey v. Chicago, etc. R. Co., 523
 v. Danville, 764
 v. Des Moines, 367
 v. Leighton, 699, 710
 v. Tioga Lbr. Co., 202
 Lindvall v. Woods, 195, 232, 233
 Line v. Taylor, 628, 632
 Lineoski v. Susquehanna Coal Co., 221, 230
 Linfield v. Old Colony R. Co., 417, 463, 467
 Ling v. Great Northern Ry. Co., 705
 Linick v. Nutting, 1
 Link v. Phila., etc. R. Co., 476
 v. Sheldon, 606
 Linn v. Dubuque Borough, 748
 Linnberg v. Rock Island, 73
 Linnehan v. Rollins, 165, 166
 v. Sampson, 85, 85*e*, 630, 639
 Lintz v. Holy Terror Min. Co., 135
 Linsley v. Bushnell, 365, 758
 Linton Coal Mining Co. v. Persons, 207*a*, 207*e*

[References are to sections.]

- Lion, The, 172
 Lipe v. Blackwelder, 640
 Lipfeld v. Charlotte, etc. R. Co., 413
 Lipp v. Otis, 773 (App. 2082)
 Lipscomb v. City of Bessemer, 334a
 v. Houston, etc. Ry. Co., 769
 (App. 2098)
 Liscomb v. New Jersey R. Co., 506
 Lisonbee v. Monroe Irr. Co., 728
 Lissa v. Goodkind, 723
 Lissak v. Croker Est. Co., 60a
 Litchfield v. Vernon, 332
 Littaur v. Narragansett Pier R. Co.,
 476
 Little v. Barreme, 322
 v. Carolina Cent. R. Co., 483
 v. Central District, etc. Co.,
 66
 v. Dusenberry, 502
 v. Hackett, 66
 v. Holyoke, 285
 v. Lathrop, 655, 659
 v. McAdaras, 708
 v. Madison, 263, 355
 v. Summerlee Iron Co., 182
 v. Superior, etc. R. Co., 99,
 485a
 v. Town of Iron River, 367
 v. Wirth, 710
 Miami R. Co. v. Fitzpatrick,
 204
 v. Stevens, 224, 226, 233b
 v. Wetmore, 150
 Rock v. Willis, 274, 291
 Rock Tr. Co. v. Nelson, 513a
 Rock, etc. R. Co. v. Barry,
 202, 233a
 v. Blewitt, 475, 476
 v. Cagle, 196
 v. Chapman, 731, 735
 v. Dick, 99
 v. Duffey, 184, 193, 216
 v. Eubanks, 108, 178
 v. Finley, 419
 v. Harrell, 516
 v. Haynes, 99, 484
 v. Henson, 432, 463
 v. Holland, 432, 463
 v. Kimbro, 508
 v. Lawton, 492a
 v. McQueeney, 457
 v. Miles, 492, 523
 v. Moseley, 204, 217
 v. Payne, 432
 v. Perry, 56
 v. Putsche, 761
 v. Russell, 476
 v. Smith, 482
 v. Tankersly, 520
 v. Townsend, 178, 184
 Little Rock, etc. R. Co. v. Trotter, 429
 v. Turner, 432
 v. Voss, 217
 Tel. Co. v. Davis, 757
 Littlefield v. Brown, 625
 v. Norwich, 369
 Car, etc. Co., The, v. Romine,
 Admr. (App. 2060)
 Littlejohn v. Fitchburg R. Co., 491,
 502
 Littleton v. Bacon, 55
 v. Richardson, 355, 384
 Littlewood v. New York, 140
 Liutz v. Denver City Tram., 485ab
 Lively, The, 744
 Livermore v. Camden Co., 289
 v. Freeholders, etc., 256
 Liverpool, etc. Co. v. Phoenix, etc.
 Ins. Co., 543a
 Livezey v. Schmidt, 735
 Livingston v. Adams, 729, 732
 v. Cox, 577
 v. Radcliff, 573
 v. Wabash R. Co., 483 (App.
 2075)
 Lloyd v. Albermarle, etc. R. Co., 99,
 463
 v. Catlin Coal Co., 716
 v. Hannibal, etc. R. Co., 520
 v. Lloyd, 741
 v. New York, 254, 287
 v. Ogleby, 652
 v. Pacific R. Co., 434
 v. St. Louis, etc. R. Co., 62,
 484
 etc. Co. v. Mathes, etc. Co.,
 665
 Loar v. Heinz, 340
 Lobb v. Seattle, etc. Ry. Co., 516
 Lobdell v. New Bedford, 367, 368
 Loberg v. Amherst, 352, 358
 Lock v. First Div., etc. R. Co., 61
 Locke v. First Div. St. Paul, etc. R.
 Co., 428, 655
 v. St. Paul, etc. R. Co., 418,
 428
 v. State, 398
 Lockhart v. Lichtenhaler, 66
 v. Little Rock, etc. R. Co.,
 120a, 207a, 413
 Lockwood v. Chicago, etc. R. Co., 463
 v. Dover, 259, 286, 287, 289
 v. N. Y. Lake Erie, etc. R.
 Co., 137, 769
 v. Tennant, 186, 207e
 Locust, etc. Iron Co. v. Gorrell, 717
 Lodwick Lbr. Co. v. Taylor (App.
 2098, 2187)
 Loeb v. Attica, 104

[References are to sections.]

- Loeber v. Roberts, 668
 Loehmer v. North Chicago, etc. Ry. Co., 516
 Loeser v. Humphrey, 645, 742
 Loewer v. Sedalia, 393
 Lofdahl v. Minneapolis, etc. R. Co., 480
 Lofrano v. N. Y. & Mt. Vernon Water Co., 219a
 Lofsten v. Brooklyn, etc. Ry. Co., 56
 Lofton v. Vogles, 65
 Loftus v. Union Ferry Co., 60b, 367, 496, 511
 Logan v. Atlantic, etc. Ry. Co., 120a, 413, 459
 v. Gedney, 419
 v. Metropolitan St. Ry. Co., 494, 516
 v. New Bedford, 356
 v. N. Carolina R. Co., 233, 413, 459
 v. People, 334
 v. St. Louis, etc. Ry. Co., 448
 v. Wabash, R. Co., 85c, 675, 741, 758
 v. W. U. Tel. Co., 756
 v. Weltmer, 606
 Logansport v. Dick, 175, 298
 v. Justice, 368, 369
 etc. Gas Co. v. Coate, 31
 etc. R. Co. v. Caldwell, 436
 Logue v. Link, 639
 Lohman's Estate, In re (App. 2106)
 Lohner v. Williams, 253
 Lohr v. Phillipsburg, 367, 368, 369
 Loid's Admx. v. J. S. Rogers Co., 207e
 Loker v. Brookline, 105, 340, 352, 363
 Lombar v. East Tawas, 374
 Lombard v. Chicago, 353
 v. Lenox, 761
 v. Oliver, 310
 etc. R. Co. v. Christian, 518
 Water Wheel Governor Co. v. Great Northern Paper Co., 151
 Lomas v. New York City Ry. Co., 516
 London v. Chicago, etc. Ry. Co., 66
 & Northwestern R. Co. v. Skerton, 416
 Lone Star Brewing Co. v. Willie, 195
 Long v. Chicago, etc. Ry. Co. (App. 2188)
 v. Coronado R. Co., 207, 209a
 v. Fulton Contr. Co., 215
 v. Illinois, etc. Ry. Co., 207h
 v. Kansas City, etc. Ry. Co., 765
 Long v. Lehigh, etc. Ry. Co., 488
 v. Louisville, etc. Ry. Co., 734
 v. McCabe, 189
 v. Milford, 96
 v. Missouri Pac. Ry., 482
 v. Morrison, 607
 v. Orsi, 559, 567
 v. Richmond, 157
 Longenecker v. Pennsylvania R. Co., 108
 Longford v. Jones, 606
 Longmeid v. Holliday, 116
 Longmore v. Great Western R. Co., 521
 Longpre v. Big Blackfoot, etc. Co., 189, 193
 Longworth v. Lederie, 334
 Lookout, etc. Iron Co. v. Lea, 225
 Loomis v. Hollister, 147a
 v. Lake Shore, etc. Ry. Co., 481b
 v. Pearson, 39
 v. Terry, 97, 98, 628, 629, 632, 639
 Looney v. Joliet, 368
 v. McLean, 710
 Loop v. Litchfield, 117, 690
 Loper v. W. U. Tel. Co., 756
 Lopes v. Sahuque, 62
 Lopez v. Cent., etc. Mining Co., 108, 216
 Lorange v. Hillyer, 627
 Loranger v. Lake Shore, etc. R. Co., 195
 Lord v. Carbon Iron Co., 717
 v. Hamilton, 568
 v. Hingham Nat. Bank, 587a
 v. Inhabitants of Wakefield, 207g
 v. Maine, etc. Ry. Co., 748
 v. Mobile, 353
 v. Pueblo Smelting and Refining Co., 207
 v. Wormwood, 640, 659, 660
 Lore v. American Mfg. Co., 61
 Lorence v. Ellensburg, 367
 Lorentz v. Robinson, 185, 186, 207h
 Lorenz v. Burlington, etc. Ry. Co., 472
 v. New Orleans, 369
 v. Tisdale, 653a
 Lorie v. Adams, 56b
 Lorillard v. Monroe, 338
 v. Monroe Co., 256, 262, 291
 Lorimer v. St. Paul City R. Co., 11, 241a (App. 2154)
 Loring v. Kansas City, etc. R. Co., 207
 v. Worcester, etc. R. Co., 675
 Lorman v. Benson, 333

[References are to sections.]

- Lorts, etc. Mill Co. v. Weil, 204
 Lortz v. N. Y. Central R. Co., 478,
 481, 481b
 Los Angeles Cemetery Ass'n v. Los
 Angeles, 274, 518
 Tr. Co. v. Conneally, 485c
 Losee v. Buchanan, 16, 17, 60, 668,
 683, 690, 701a
 v. Clute, 8, 117
 v. Watervliet R. Co., 508
 Lothrop v. Fitchburg R. Co., 207
 Lotz v. Hanlon, 146
 Loucks v. Chicago, etc. R. Co., 461,
 463, 474, 478
 Loud v. Lane, 224
 Louft v. Pyle Co., 1
 Lough v. Davis, 244
 Loughlin v. State, 231, 233a
 Loughran v. Des Moines, 742
 Loughrey v. Pennsylvania Ry. Co.,
 480
 Louis v. Union Pac. R. Co., 675
 Louisiana v. Jumel, 249
 v. New Orleans, 254, 261
 etc. Lbr. Co. v. Brown, 61
 etc. Ry. Co. v. Crumpler, 495
 v. Fitzgerald, 203
 v. Jones (App. 2058)
 v. Miles, 203, 219
 v. Ratcliffe, 472, 476
 v. Reeves, 756
 Louisville v. Gimpel, 287
 v. Hart, 31
 v. Michels, 354
 v. Norris, 272
 v. Shanahan, 298
 Canal Co. v. Murphy, 108,
 401, 705
 Hotel Co. v. Kaltenbrun, 22
 Term. Co. v. Jacobs, 709a
 etc. Ry. Co. v. Armstrong, 65a,
 207h, 215
 v. Ballard, 46, 418, 427, 429,
 513, 749
 v. Baker, 54
 v. Banks, 198
 v. Bates, 195
 v. Bays, 457
 v. Bean, 3, 135a
 v. Beaucamp, 730
 v. Belcher, 422, 440
 v. Berg, 524
 v. Berkey, 186, 202
 v. Berry, 485, 773
 v. Binion, 219a
 v. Bisch, 523
 v. Black, 483, 676
 v. Bodine, 464, 468
 v. Boland, 203
 v. Bouldin (App. 2120)
- Louisville, etc. Ry. Co. v. Bowler, 233
 v. Brantle, 233b
 v. Breckenridge, 493
 v. Breeden, 413
 v. Breedlove, 189
 v. Brown, 233b, 238
 v. Bryant, 207b
 v. Burke, 139, 480
 v. Campbell, 195, 760
 v. Calvert, 77
 v. Case, 66, 758
 v. Caudle, 445
 v. Cavens, 233b, 235
 v. Cayce, 509
 v. Cheatham, 166
 v. Clark, 61, 237
 v. Clarke, 769
 v. Cleaver, 476
 v. Cockerel, 410
 v. Cochran, 429
 v. Coleman, 461
 v. Collins, 99, 233b
 v. Commonwealth, 413, 463
 v. Coniff, 62
 v. Conrad, 493
 v. Cook, 480
 v. Cooley's Admr., 198
 v. Cottengim, 488, 493
 v. Coulton, 222
 v. Cox's Admr., 769
 v. Crawford, 90, 480
 v. Creek, 66, 67
 v. Creighton, 483, 769
 v. Crunk, 485d, 492a, 508,
 520
 v. Cummins, 463
 v. Dalton, 672
 v. Daniel, 457, 480
 v. Davis, 27a, 187, 241d
 v. Depp, 520
 v. Donahue, 750
 v. Donaldson, 513
 v. Douglas, 513
 v. Douglass, 154
 v. Dunkin, 64
 v. Eaden, 748
 v. Eakins' Admr., 520
 v. Earl, 207a, 748
 v. Ellis, 493
 v. Engleman, 468
 v. Engleman's Admr., 464
 v. Etzler, 439
 v. Faylor, 505
 v. Fitzgerald (App. 2121)
 v. Fleming, 103, 481, 510
 v. Filbern, 180
 v. Foley, 207b, 217
 v. Forrest, 493
 v. Fort, 672, 747
 v. Fox, 93, 518

[References are to sections.]

Louisville, etc. Ry. Co. v. Frawley,	Louisville, etc. Ry. Co. v. Kingman,
104, 219, 219a, 760	488, 499
v. French, 460, 478	v. Knocke, 485ab
v. Freppon, 459c	v. Kohlruss, 750
v. Gaines, 493	v. Korbe, 508
v. Gardner's Admr., 769	v. Krey, 484
v. Garrett, 749	v. Krinning, 30, 666, 680
v. Gimpel, 287	v. Kupper, 512
v. Goben, 493	v. Lahr, 232
v. Goetz, 108, 114	v. Lee, 470, 510, 520
v. Gollihur, 769	v. Lile, 205
v. Goodbar, 455	v. Lockridge, 107
v. Goss (App. 2119)	v. Logan, 493
v. Gower, 53	v. Lohges, 483
v. Greenwell's Admr., 207e	v. Long, 748
v. Greer, 748	v. Lucas, 410, 468, 473, 476, 478, 506
v. Gutenkunz, 94	v. Lumpkin, 207
v. Hackman, 417	v. Lyon, 468
v. Hahn, 201	v. McClish, 90, 110, 485
v. Hailey, 513a	v. McCombs, 457, 460, 481
v. Hairstown, 480	v. McCorkle, 676
v. Hall, 87, 198, 199, 208, 429, 748	v. McCoy, 46, 47, 457, 495 (App. 2064)
v. Hanning, 207b, 207g	v. McEwan, 512, 518
v. Harrodsburg, 415	v. McMillen, 207e, 209a
v. Hart, 208, 434, 678	v. Malone, 457, 675, 676, 680
v. Hathaway, 457	v. Malloy, 13, 66, 85a, 463
v. Hawthorn, 225	v. Markee, 207b, 470
v. Haynes, 237	v. Martin, 225, 233a
v. Hays, 735	v. Mason, 95
v. Heck, 232	v. Melton, 458, 469
v. Hendricks, 516	v. Miller, 207i, 216, 460, 472, 475, 476, 674, 675, 678
v. Herndon's Admr., 202	v. Milton, 418, 442
v. Hibbitt, 233b, 237	v. Mitchell, 480, 490, 508, 520, 675
v. Hinder, 195	v. Molloy Admx., 463, 464, 475
v. Hine, 486	v. Moore, 233a
v. Hodge, 415, 735	v. Mothershed, 207, 207b
v. Holland, 207, 481b	v. Mounce, 207b
v. Holsapple, 509, 520	v. Mulligan, 66
v. Howard, 103, 468	v. Natchez, etc. R. Co., 676
v. Hughes, 175, 176	v. Nitsche, 30, 666, 668
v. Hull, 756	v. Northington, 742
v. Humphrey's Admr., 485	v. Orr, 85b, 187, 194, 207g, 222, 241d, 767 (App. 2052)
v. Hurst, 434	v. Ousler, 427
v. Hurt, 7, 93, 99	v. Park, 495
v. Jackson, 748	v. Payne, 501
v. Johnson, 346, 485ab, 493	v. Pearce, 56
v. Jones, 57, 516, 742	v. Pearson, 207b
v. Katzenberger, 526	v. Pedigo, 516
v. Keiffer, 35	v. Pendleton, 182, 705
v. Keith, 520, 742	v. Petty, 195
v. Kelly, 185a, 211, 524	v. Phillips, 433, 480
v. Kelly's Admr., 749 (App. 2063)	v. Pitt, 135
v. Kelsey, 432	v. Posey, 431
v. Kelton, 431	v. Potts, 471
v. Kempner, 221	
v. Kenley, 186, 206, 221	
v. Kice, 429	
v. Kimble's Admx., 466	

[References are to sections.]

- Louisville, etc. Ry. Co. v. Price, 471, 472
- v. Quinn, 758
 - v. Raines, 213
 - v. Rammacker, 508
 - v. Ray, 485*a*
 - v. Reagan, 185*a*, 207*b*, 410
 - v. Reese, 676
 - v. Reidmond, 431
 - v. Red, 54
 - v. Rice, 427, 428, 431
 - v. Richards, 476
 - v. Richardson, 60*a*, 207*b*, 241*b* (App. 2120)
 - v. Ricketts, 521
 - v. Ritter, 495, 499
 - v. Roberts, 426
 - v. Robertson, 235
 - v. Robinson, 180, 236, 241
 - v. Roth, 749
 - v. Rush (App. 2061)
 - v. Samuels, 672
 - v. Santford, 113
 - v. Satterwhite, 476, 478
 - v. Schmetzer, 90, 480
 - v. Schmidt, 426, 451, 461
 - v. Scott's Admr., 488
 - v. Sears, 73*a*, 74, 485
 - v. Shanklin, 336
 - v. Shanks, 72, 93
 - v. Sheets, 238
 - v. Shivell, 89
 - v. Short, 680
 - v. Sickings, 519
 - v. Simmons, 421, 432
 - v. Simpson, 748
 - v. Simrall's Admr., 769
 - v. Smith, 174, 176, 225, 432, 672, 760
 - v. Smith, 485*d*, 680
 - v. Snyder, 31, 46, 495, 497
 - v. Spain, 436
 - v. Sparks, 750
 - v. Spenn, 678
 - v. Stanger, 426
 - v. State, 359
 - v. Stewart, 751
 - v. Stommell, 62, 65, 90, 107, 476, 478, 482
 - v. Stone, 461
 - v. Street, 749
 - v. Stuber, 488
 - v. Stutts, 195, 207*e*
 - v. Sullivan, 493, 673
 - v. Sullivan Timber Co., 672, 680
 - v. Sumner, 441
 - v. Taylor, 472, 676
 - v. Tegner (App. 2052)
 - v. Thomas, 436, 448
- Louisville, etc. Ry. Co. v. Thompson, 471, 488
- v. Tow, 164
 - v. Trammell, 767
 - v. Treadway, 501, 506
 - v. Tucker, 198*a*
 - v. Ueltschi, 463*a*
 - v. Utz, 207*a*, 207*b*
 - v. Van Arsdell, 483
 - v. Wade, 493
 - v. Wagner (App. 2136)
 - v. Ward, 204, 207*b*, 217
 - v. Watson, 64
 - v. Weams, 11, 51
 - v. Webb, 73*a*, 101, 482
 - v. White, 57
 - v. Whitesell, 62, 451*a*
 - v. Williams, 196, 419, 451*a*, 457, 483, 484
 - v. Wilson, 207*b*, 223
 - v. Wolfe, 94, 506, 519, 748
 - v. Womack, 481*b*
 - v. Wood, 91, 151, 508, 513, 739, 758
 - v. Woods, 54, 207*b*
 - v. Wright, 198, 772 (App. 2061)
 - v. Yniestra, 108
 - v. York, 769
 - v. Young, 99
 - v. Zeigler, 418
 - v. Zink, 434
- New Orleans, etc. R. Co. v. Mask, 508
- & N. R. Co. v. Hawkins, 217
- etc. N. R. Co. v. Wallace, 207
- etc. Turnp. Co. v. Nashville, etc. Turnp. Co., 385
- Lounsberry v. Bridgeport, 115
- Louth v. Thompson, 703
- Love v. Atlanta, 266
- v. Hall, 568
 - v. Raleigh, 299
 - v. Storke, 753
- Lovegrove v. Brighton, etc. R. Co., 57, 241
- Loveland v. Gardner, 702
- Lovejoy v. Boston, etc. R. Co., 201
- v. Campbell, 147*a*
 - v. Dolan, 652
- Lovell v. De Bardelaben (App. 2052, 2121)
- v. Howell, 216
- Loverty v. Hambrick, 218
- Lovenguth v. Bloomington, 86, 375, 376
- Lovett v. Salem, etc. R. Co., 73*a*, 83, 99, 473
- Lovingston v. Bauchens, 158
- Low v. Grand Trunk R. Co., 725, 726

[References are to sections.]

- Low Moor Iron Co. v. La Bianca** (App. 2102)
 v. Alabama, etc. Ry. Co., 432
 v. Chicago, etc. R. Co., 207*a*, 207*b*, 775
 v. Guard, 702
 v. Prospect Hill Cemetery, 734
 v. Salt Lake City, 97, 98, 285, 698
 v. Southern Ry. Co., 207*b*, 223*a*
 v. Yello County Co., 748
Lowell v. Boston, etc. R. Co., 24*a*, 173, 384, 414, 699
 v. Glidden, 384
 v. Moscow, 335
 v. Proprietor of Locks and Canals, 401
 v. Short, 365, 384
 v. Spaulding, 343, 353
Lowenstein v. Missouri Pacific Ry. Co., 408, 760
Lowenthal v. Vicksburg, etc. Ry. Co., 497
Lower v. Franks, 615
 v. Segal, 133 (App. 2090)
Lowery v. Brooklyn, etc. R. Co., 408
 v. Huntington, etc. Co. (App. 2171)
 v. Manhattan R. Co., 26, 29*a*, 30, 37, 60, 355, 426, 676
 v. Rowland, 750
 v. Western U. Tel. Co., 739, 753*a*
Lowry v. Guilford, 569
 v. Thompson, 249
Lowndes v. City Nat. Bank, 589
Loyd v. Columbus, 299
Luby v. Hudson River R. Co., 60*a*, 518
Lucas v. Coulter, 708
 v. Mich. Central R. Co., 749
 v. Milwaukee, etc. R. Co., 61
 v. New Bedford R. Co., 492*a*, 508, 520
 v. N. Y. Central R. Co., 135
 v. Pennsylvania Co., 122
 v. Western U. Tel. Co., 755
Lucco v. N. Y. Central R. Co., 197
Luce v. Holloway, 164, 168
Lucey v. Ingram, 172
 v. Hannibal Oil Co., 207, 209*a*
Lucia v. Meech, 661
Luckel v. Century Bldg. Co., 719*a*
Luckenbach, The M. E., 186, 742
Lucot v. Rodgers, 735
Lucy v. Chicago, etc. R. Co., 512
Ludlow v. Fargo, 289, 368
 v. Yonkers, 744
Luebke v. Berlin Mach. Works, 209*a*, 218
 v. Chicago, etc. R. Co., 202
Luede v. Mukwa, 378
Luedtke v. Jeffery, 649, 654
Lugner v. Milwaukee Ry. Co., 488
Luke v. Brooklyn, 261
Lukin v. Godsall, 750
Lumberman's Mut. Ins. Co. v. Kan. City, etc. Ry. Co., 30
Lumbly v. Backus Mfg. Co., 363
Lumley v. Caswell, 217
Lumpkin v. Southern R. Co., 207
Luna v. Missouri, etc. Ry. Co., 485
Lund v. Hersey Lumber Co., 197
 v. Tyngsborough, 60*a*, 355, 375
Lunde v. Cudahy Pkg. Co., 207*g*, 518
Lundeen v. Livingston Electric Light Co., 16*a*, 354
Lundergon v. New York, etc. Ry. Co., 66*a*, 472
Lundquist v. Duluth R. Co., 241
Lunt v. Northwestern R. Co., 466, 473
Lupher v. Atchison, etc. Ry. Co., 488
Lusk v. Peck, 120, 708*a*, 709*a*
Luther v. Banks, 590
 v. Winnisimmet Co., 729, 735
 v. Worcester, 363
Lutphen v. Hedden, 343
Lutton v. Vernon, 367, 375
Luttrell v. Hazen, 146, 155
Lutz v. Atlantic, etc. R. Co., 129
 v. Louisville, etc. Ry. Co., 501, 508
Luvenguth v. Bloomington, 86, 375, 376
Lux v. Haggin, 729
Lyberg v. Northern Pac. R. Co., 215
Lyddy v. St. Louis, etc. R. Co., 13
Lydston v. Rockingham Light, etc. Co., 375
Lyendecker v. Martin, 619
Lygo v. Newbold, 705
Lyle v. National Home, etc., 331
Lyles v. Western U. Tel. Co., 540*a*, 756
Lyman v. Amherst, 376
 v. Dale, 628
 v. Edgerton, 592, 593
 v. Gipson, 659
 v. Hampshire, 122, 376
 v. Union R. Co., 485*a*
Lyme Regis v. Henley, 118
Lynch v. Allyn, 203, 207*g*, 241*b*
 v. Baltimore, etc. Ry. Co., 437
 v. Boston, 338
 v. Boston & A. R. Co., 207

[References are to sections.]

- Lynch v. Commonwealth, 557, 559, 620
 v. Cowell, 569, 573
 v. Davis, 609
 v. Elektron, 704
 v. Erie, 376
 v. Grayson, 633
 v. Hubbard, 343, 703
 v. Knight, 761
 v. Knoop, 136
 v. Lynn Box Co., 54
 v. McNally, 628, 631, 639
 v. Metropolitan R. Co., 71, 73, 73a, 129, 145, 516, 644a (App. 2075)
 v. New Rochelle, 346, 485c
 v. New York, 93, 262, 274, 275, 375
 v. N. Y. Cent. R. R. Co., 499, 500
 v. Nurdin, 31, 34, 35, 73, 219
 v. Second Ave. R. Co., 113
 v. Smith, 73, 74, 79
 v. St. Joseph, etc. R. Co., 464, 484
 v. Stone, 402
 v. Willard, 557
 v. Wilson, 574
 Lynchburg Tel. Co. v. Bokker, 698
 Lynde v. Lynde, 559
 Lynds v. Clark, 702
 Lynn v. Adams, 340
 v. Omaha Pkg. Co., 215
 Lynne v. Western U. Tel. Co., 756
 Lyon v. Cambridge, 356
 v. Charleston, etc. Ry. Co., 207
 v. Grand Rapids, 374, 376
 v. Logansport, 353, 375
 Lyons v. Bay City, etc. Ry. Co., 88a
 v. Boston, etc. Ry. Co., 500
 v. Boston Towage Co., 207e
 v. Brookline, 370
 v. Cleveland, etc. R. Co., 135, 137
 v. Desotelle, 104
 v. Erie R. Co., 31, 86
 v. Jos. T. Ryerson & Son, 238
 v. Merrick, 365, 627, 634, 635
 v. Ry. Co., 115
 v. Red Wing, 376
 v. Rosenthal, 58, 60
 Lytle v. Crescent News Hotel Co., 151
 Lyttle v. Chicago, etc. R. Co., 195, 206, 207a, 215
 McAdams v. Sutton, 628
 McAdoo v. Richmond, etc. R. Co., 46, 480
 McAdory v. Louisville, etc. R. Co., 775
 McAfee v. Walker, 659
 McAlan v. Trustees of New York, etc. Bridge Co., 520
 McAllaster v. Bailey, 617
 McAllen v. Western U. Tel. Co., 753a
 McAllister v. Albany, 358
 v. Burlington, etc. R. Co., 480
 v. Clement, 23, 602
 v. Hammond, 644
 v. Jung, 73, 705
 v. People's Ry. Co., 495, 497
 McAlpin v. Powell, 73, 97, 702a, 707
 McAnally v. Pennsylvania, etc. Ry. Co., 472
 McAndrew v. Electric Tel. Co., 547, 550, 553
 McAndrews v. Burns, 180, 234, 236
 v. Collerd, 9
 v. Montana Union R. Co., 215
 McArthur v. Green Bay, etc. R. Co., 104
 v. Pease, 623
 v. Saginaw, 258, 289
 McAuley v. Boston, 363
 McAuliff v. New York Cent. Ry. Co., 475
 v. Victor, 260a
 McAunich v. Mississippi, etc. R. Co., 93, 523 (App. 2140)
 McBride v. Illinois Central Bank, 243
 v. New York Tunnel Co. (App. 2171)
 v. Northern Pac. R. Co., 111
 v. Union Pac. R. Co., 233
 McCabe v. Amer. Woolen Co. (App. 2068)
 v. Chicago, etc. R. Co., 410
 v. Interurban St. Ry. Co., 485c
 v. McGuire, 618
 v. Mayesville, etc. Ry. Co., 481b
 v. Montana, etc. Ry. Co., 208, 211
 v. Narragansett Elec., etc. Co., 769, 771 (App. 2093)
 v. O'Connor, 121, 699, 709a
 Const. Co. v. Wilson, 207
 McCadden v. Abbott (App. 2104)
 McCafferty v. Dock Co., 225
 v. Spuyten, etc. R. Co., 173, 175
 McCaffery v. Mossberg Mfg. Co., 117a, 690
 McCaffrey v. Tamm Bros. Glue Co., 236
 v. Twenty-third St. R. Co., 56

[References are to sections.]

- McCahill v. Detroit R. Co., 73a, 523
 v. Kipp, 35, 122, 629, 634
 v. New York Tr. Co., 139
 McCaig v. Erie R. Co., 57, 60
 McCain Co. v. Kingsley, 197
 v. Majestic Bldg. Co., 709a
 McCaldin v. Parke, 59, 60b, 725, 726
 McCall v. Chamberlain, 421, 445
 v. N. Y. Central R. Co., 476
 McCalla v. Multnomah County, 256
 McCallum v. Long Island R. Co.,
 468, 477
 v. McCallum, 207
 McCampbell v. Cunard S. S. Co.,
 209a, 216, 233
 McCamus v. Citizens' Gas Co., 359
 McCandless v. Chicago, etc. R. Co.,
 57, 414, 436
 v. McWha, 430, 605, 606, 608,
 615
 McCann v. Consol. Trac. Co., 146
 v. Newark, etc. R. Co., 55
 v. Sixth Ave. R. Co., 73a
 v. Thilemann, 705
 v. Tillinghast, 150
 v. Waltham, 295
 McCaraher v. Commonwealth, 592
 McCarragher v. Proal, 653
 v. Rogers, 60b, 73, 193, 218,
 223
 McCarroll v. Kansas City, 358
 McCarten v. Flagler, 703
 McCarthy v. Boston, 291, 299
 v. Boston Duck Co., 57
 v. Chicago, etc. R. Co., 131
 v. Claffin, 195
 v. Consol. Ry. Co., 485a,
 485bb
 v. Far Rockaway, 287
 v. Foster, 705
 v. Heiselman, 144
 v. New England Order, etc.,
 137
 v. Oshawa, 353
 v. Philadelphia, etc. Ry. Co.,
 760
 v. Portland, 165, 258, 338, 370,
 379
 v. Spring Valley Coal Co.,
 207e
 v. Syracuse, 703
 v. Young, 636
 McCarty v. Lockport, 363
 v. New York Cent. Ry. Co.,
 480, 484
 v. St. Louis, etc. Ry. Co., 494
 v. Western U. Tel. Co., 531,
 542
 McCaskill v. Elliott, 629, 631
- McCaslin v. Lake Shore, etc. R. Co.,
 520
 McCarvel v. Sawyer, 704, 705
 McCaughna v. Owosso, etc. Co., 698
 McCaughey v. Providence, 291
 v. Tripp, 291
 McCaul v. Western U. Tel. Co., 540a
 McCauley v. New York, 647
 v. Norcross, 184a
 v. Philadelphia Tr. Co., 485c
 v. Smith, 719
 v. Tennessee Coal, etc. Co., 523
 McCawley v. Furness, etc. Co., 178
 McCerren v. Alabama, etc. R. Co.,
 426
 McCharles v. Horn Silver Mining
 Co., 209a, 222
 McClain v. Brooklyn R. Co., 87, 408,
 472, 485c
 v. Lewiston, etc. Fair Ass'n,
 758
 McClallen v. Adams, 612
 McClammy v. Spokane, 376
 McClanagan v. St. Louis, etc. Ry.
 Co., 501, 516
 McClarey v. Sioux, etc. R. Co., 40,
 375
 McClarin v. Grenzfelder, 609
 McClarney v. Chicago, etc. R. Co.,
 193, 197
 McCleary v. Frantz, 686
 v. Kent, 174
 v. Lowell, 104
 McClellan v. Gerrick, 217
 v. St. Paul, etc. R. Co., 667
 McClelland v. Louisville, etc. R. Co.,
 472
 v. Scroggin, 668
 McClenaghan v. Brock, 494, 685
 McCleneghan v. Omaha, etc. R. Co.,
 731, 741
 McClenry v. Inverarity, 313
 McCloskey v. Chautauqua Ice Co.,
 645
 v. Moies, 338, 363
 McClung v. Dearborne, 146
 McClure v. Red Wing, 274
 v. Sparta, 353
 McCollum v. South Omaha, 363, 373
 McConnell v. Dewey, 256
 v. Flanders, 621
 v. Lemly, 709a
 v. Pennsylvania Ry. Co., 193,
 207g, 459c
 v. Slappey, 747
 McCooley v. New York, etc. Ry. Co.
 (App. 2068)
 McCook Irr., etc. Co. v. Crews, 729
 McCool v. Galena, etc. R. Co., 437
 v. Grand Rapids, 379

[References are to sections.]

- McCoombs v. Akron, 274
 McCord v. Atlanta, etc., Ry. Co., 516
 v. High, 313
 v. Ossining, 355
 v. Western U. Tel. Co., 539a
 McCormack v. Sornberger, 665
 McCormick v. Anistali, 706
 v. Burt, 323
 v. Chicago, etc. R. Co., 425
 v. Detroit, etc. Ry. Co., 501
 v. Horan, 735
 v. Kansas City, etc. R. Co., 412, 427
 v. Monroe, 375
 v. Ottumwa, etc. Ry. Co., 485c
 v. Robin, 339, 350, 375
 v. Washington, 380
 v. Winters, 735
 Machine Co. v. Burandt, 215, 719
 McCoster v. Long Island, etc. R. Co., 231
 McCosker v. Weatherbee, 635
 McCoull v. Manchester, 263, 286, 358
 McCoun v. N. Y. Central R. Co., 158
 McCourt v. Covington, 274
 McCowen v. Gulf, etc. Ry. Co., 457
 McCoy v. California, etc. R. Co., 451a
 v. Philadelphia, etc. R. Co., 113, 749
 v. So. Pacific R. Co., 449, 450, 451a
 McCracken v. Conso. Tr. Co., 485a (App. 2091)
 v. Smathers, 606
 McCready v. South Carolina R. Co., 672, 676
 McCreary v. Boston, etc. R. Co., 417
 McCreery v. Willett, 625
 McCrorey v. Thomas, 343
 McCue v. National Starch Co., 219a
 McCullom v. Atlanta City, etc. Ry. Co., 520
 v. Blackhawk County, 257, 336
 McCullough v. Shoneman, 144
 McCully v. Clarke, 53, 57, 665
 McCummins v. Chicago, etc. R. Co., 676
 McCune v. Missoula, 358
 McCurrie v. Southern, etc. Ry. Co., 46
 McCutcheon v. Homer, 262, 289
 McDade v. Chester, 262
 McDaniel v. Highland Ave. R. Co., 523
 v. Hutcheson, 739
 McDermott v. Amer. Brew. Co., 151
 v. Boston Elev. Ry. Co., 73a
 McDermott v. Chicago, etc. R. Co., 408
 v. Iowa Falls R. Co., 185a, 207
 v. Kentucky Cent. R. Co., 484
 v. Kingston, 358, 368
 v. Severe, 485, 758
 McDonald, Matter of (App. 2084)
 v. Alabama, etc. Ry. Co., 207
 v. Ashmead, 334a
 v. Boston, etc. R. Co., 520
 v. Chemical Nat. Bank, 584
 v. Chicago, etc. R. Co., 217, 480, 506, 510
 v. Duluth, 368
 v. Eagle Mfg. Co., 230
 v. Franchere, 151
 v. Great Northern Ry. Co., 452
 v. Harris, 606
 v. Illinois Cent. R. Co., 509
 v. International, etc. R. Co., 64, 114, 457, 460, 482
 v. Jodfrey, 629
 v. Kansas City, etc. R. Co., 521
 v. Lockport, 384
 v. Long Isl. R. Co., 508, 521
 v. Lovell, 207i
 v. Mallory, 131 (App. 2084)
 v. Mass. Gen. Hospital, 266, 331
 v. Metropolitan St. Ry. Co., 516, 518 (App. 2083)
 v. Michigan Cent. R. Co., 206
 v. Montgomery R. Co., 61, 93, 108, 485, 516, 520, 523
 v. O'Reilly, 164
 v. Pittsburgh, etc. R. Co., 136
 v. Roder, 653b
 v. Savoy, 111
 v. Standard Oil Co., 189
 v. State, 561
 v. Toledo, 363
 v. Toledo R. Co., 485a
 v. Toledo St. R. Co., 359
 v. Yoder, 653a, 653b
 McDonnel v. Elias Brewing Co., 61, 654
 McDonnell v. Pittsfield, etc. Ry. Co., 731b
 v. Wallsend Coal, etc. Co., 207a
 McDonough v. Boston, etc. Ry. Co., 519
 v. Lanpher, 188, 719a
 v. Metropolitan R. Co., 520
 v. Milwaukee, etc. R. Co., 434
 v. New York, etc. Ry. Co., 30
 v. Reilly, etc. Co., 704, 705
 v. Virginia City, 262, 289

[References are to sections.]

- McDougall v. Campbell, 557
 v. Central, etc. R. Co., 108, 111
 v. Salem, 370
- McDowell v. N. Y. Central R. Co., 425
- McDuffie v. Boston, etc. Ry. Co., 207*g*
 v. Lake Shore, etc. R. Co., 478
- McDyer v. Eastern Pennsylvania Rys. Co., 769
- McEachern v. Boston, etc. Ry. Co., 73
- McElhaney v. Gilleland, 625*a*
- McElligott v. Randolph, 188, 203*a*, 207*a*, 232
- McElroy v. Albany, 291
 v. Iowa, etc. Ry. Co., 526
 v. Nashua, etc. R. Co., 413, 486, 495, 502
- McEniry v. Waterford, etc. R. Co., 241
- McEnty v. Metropolitan St. Ry. Co., 485*bb*
- McEwen v. Atlanta, etc. Ry. Co., 516
- McFadden v. Chicago, etc. Ry. Co., 501
 v. Kingsbury, 340
 v. Santa Anna, etc. R. Co., 67
- McFarland v. Benton, 591
 v. Crary, 577
 v. Elmira, etc. Ry. Co., 485*bc*
 v. Sayen, 665
 v. Swiart, 702
 v. Water, etc. Co., 485*bc*
- McFeat v. Philadelphia, etc. Ry. Co., 769
- McFee v. Vicksburg, etc. R. Co., 748, 749
- McFern v. Gardner, 653*a*, 653*c*
- McGaffigan v. Boston, 369
- McGahan v. Indianapolis Gas Co., 693
 v. St. Louis, etc. Ry. Co. (App. 2075)
- McGahey v. Citizen's Ry. Co., 94
- McGahie v. McLennen, 644
- McGarr v. National, etc. Worsted Mills, 115, 763
- McGarrahan v. New York, etc. R. Co., 741, 742
- McGarrigan v. New York, etc. Ry. Co., 742
- McGarry v. Holyoke St. Ry. Co., 151
 v. Loomis, 74, 79, 370
 v. N. Y. & Harlem R. Co., 630, 631
- McGary v. Lafayette (App. 2064)
- McGatrlick v. Wason, 104, 161, 197
- McGearty v. Manhattan R. Co., 502
- McGeary v. Eastern R. Co., 73*a*
- McGee v. Boston Cordage Co., 192, 193
 v. Consolidated R. Co., 485*c*
 v. Missouri, etc. R. Co., 509, 513
 v. Wabash R. Co., 73, 99, 464, 469, 475
 v. Young, 653
- McGeehan v. Hughes, 223
- McGeehee v. Norfolk, etc. Ry. Co., 688
- McGettigan v. Potts, 701
- McGhee v. McCarley, 513
 v. Drisdale, 493
 v. White, 477
- McGibbon v. Baxter, 668
- McGill v. Cleveland, etc. Co., 214*a*, 215
 v. Compton, 705
 v. Monette, 115
- McGinn v. Pittsburgh, etc. R. Co., 478
 v. Platt, 60*b*
- McGilvray v. West End R. Co., 513
- McGinity v. New York, 367
- McGinley v. Levering, 232
- McGinnes v. Allison Realty Co., 291
- McGinness v. Canada So. Bridge Co., 195, 197
- McGinnis v. Medway, 271
- McGinty v. Athol Reservoir Co., 195
 v. Waterman, 208
- McGlynn v. Brodie, 209*a*
- McGoldrick v. N. Y. Cent., etc. R. Co., 375, 721
- McGonigle v. Canty, 203
 v. Kane, 197
- McGoran v. New York, etc. Ry. Co., 475
- McGorrah v. New York, etc. Ry. Co., 758
- McGouley v. St. Louis Tr. Co., 485*ba*
- McGourty v. DeMarco, 375
- McGovern v. Central Vermont R. Co., 54, 203, 212, 230
 v. Columbus Mfg. Co., 241*c*
 v. N. Y. Central R. Co., 73, 90, 466, 471, 473, 477, 481*a*
 v. Standard Oil Co., 92, 211
- McGowan v. Boston, 363
 v. Chicago, etc. R. Co., 28, 186, 187
 v. International, etc. Ry. Co. (App. 2098)
 v. Larsen, 737
 v. St. Louis Ore, etc. Co., 755
 v. St. Louis, etc. R. Co., 52
 v. International, etc. R. Co., 766, 767
- McGrail v. Kalamazoo, 369

[References are to sections.]

- McGrath v. Bloomer, 61, 337
 v. City, etc. R. Co., 104
 v. Delaware, etc. Ry. Co., 195
 v. Detroit, etc. R. Co., 434
 v. Hudson River R. Co., 53, 57
 v. Merwin, 104
 v. Michaels, 151
 v. New York, etc. Ry. Co. (App. 2093)
 v. N. Y. Central R. Co., 13, 62, 87, 96, 417, 459, 466, 467
 v. N. Y. & New England R. Co., 207b
 v. N. Pacific R. Co., 13
 v. Philadelphia, 476
 v. St. Louis, 174, 175, 298
 v. Texas, etc. R. Co., 216
 v. Walker, 703, 709a
 McGraw v. Marion, 253, 291
 McGregor v. Boyle, 262
 v. Brown, 623
 v. Rhode Island Co., 739
 Gregory v. Prescott, 56b
 McGrell v. Buffalo Office Bldg., 719a
 McGrew v. Stone, 16, 21, 28, 46
 McGrieken v. Western N. Y., etc. Ry., 188
 McGroarty v. Wanamaker, 207b
 McGrow v. Chicago, etc. Ry. Co., 516
 McGuerty v. Hale, 60a, 195
 McGuigan v. Ry. Co., 477
 McGuinness v. Butler, 73
 v. New York, 285
 McGuinness v. Worcester, 363, 377
 McGuire v. Chicago, etc. R. Co., 73a
 v. Grant, 144, 160, 701, 750
 v. Hudson R. R. Co., 476, 477
 v. Ringrose, 629
 v. Spence, 370, 375, 703, 709a
 v. Vicksburg, etc. R. Co., 72, 461
 v. Waterloo, etc. Co., 231
 McGurn v. Grubman, 626
 McHarge v. Newcomer, etc. Co., 168, 176
 McHenry Coal Co. v. Snedden, 748
 McHugh v. Manhattan Ry. Co. (App. 2171)
 v. Schlosser, 775
 McIlhaney v. Southern Pac. Ry. Co., 480
 McIlvaine v. Lantz, 663
 McIwaine v. Metropolitan St. Ry. Co., 769
 McIntire v. Plaisted, 640
 v. Roberts, 35, 719
 St. R. Co. v. Bolton, 183
 McIntosh v. Bullard, 302, 313
 v. Chicago, etc. R. Co., 112
 v. Jones, 232
 McIntosh v. Missouri Pac. R. Co., 207e
 v. Slade, 172
 McInturf v. Western U. Tel. Co., 754
 McIntyre v. N. Y. Central R. Co., 91, 137, 248, 473, 519, 520, 524, 769, 771
 v. Orner, 653a, 653b, 654
 v. Pfandler, etc. Co., 706
 v. Trumbull, 618
 McIver v. Florida, etc. Ry. Co., 493
 McKaig v. Northern Pac. R. Co., 233a
 McKay v. Buffalo, 291
 v. New England Dredg. Co. (App. 2065)
 v. Southern Bell Tel. Co., 122, 359
 v. Western U. Tel. Co., 754
 McKean v. Chicago, etc. Ry. Co., 57
 v. Colorado Fuel Co., 195 (App. 2126)
 McKee v. Bidwell, 58, 60c, 355
 v. Chicago, etc. R. Co., 203
 v. Delaware, etc. Canal Co., 399, 729, 731
 v. New York, 367
 v. Tourtellotte, 207h
 McKeigue v. Janesville (App. 2105)
 McKellar v. Detroit, 289, 353, 363
 McKeller v. Monitor, 96, 367, 369
 McKelvey v. Chesapeake, etc. R. Co., 215 (App. 2104)
 McKenna v. Alabama, etc. Ry. Co., 472
 v. Baessler, 667
 v. Martin, 712
 v. St. Louis, 265
 McKenzie v. United States Ry., etc. Co. (App. 2075)
 v. Cheetham, 709
 v. Northfield, 376
 McKeon v. Citizens' R. Co., 150
 McKerley v. Red R., etc. Ry. Co., 485
 McKernan v. Manhattan R. Co., 493
 McKibbin v. Bax, etc. Co., 690
 McKillop v. Duluth St. R. Co., 408
 McKimble v. Boston, etc. R. Co., 107, 521
 McKinley v. Chicago, etc. R. Co., 150, 154, 425
 v. Louisville, etc. Co., 493
 McKinney v. Blakeley, 619, 625a
 v. Carson, 739
 v. Chicago, etc. R. Co., 481
 v. Irish Northern R. Co., 185
 v. Jewett, 555
 v. Neil, 89, 514, 516
 v. Ohio, etc. R. Co., 445, 446
 v. Western Stage Co., 115

[References are to sections.]

- | | |
|---|--|
| <p>McKinnie v. Kilgallon, 719a
 McKinnon v. Norcross, 11, 193
 McKinster v. Bank of Utica, 580, 581
 McKinstry v. St. Louis Tr. Co., 501, 508
 McKissock v. St. Louis, etc. R. Co., 58
 McKivergan v. Alexander, etc. Co. (App. 2196)
 McKnight v. Iowa, etc. Ry. Constr. Co. (App. 2140)
 McKone v. Mich. Cent. R. Co., 485d, 506
 v. Wood, 635
 McKonkey v. Chicago, etc. R. Co., 460
 McKune v. Santa Clara Lumber Co., 478
 v. Santa Clara Valley Mill, 60
 McLain v. Lewiston, etc. Ass'n, 85a, 628, 629
 v. St. Louis, etc. Ry. Co., 758
 McLamb v. Wilmington, etc. Ry. Co. (App. 2084)
 McLane v. Botsford, 727a
 v. Sharpe, 494, 652
 McLaren v. Atlantic, etc. R. Co., 492a
 v. Boston L. Ry. Co., 501
 v. Canada Cent. R. Co., 679
 v. Williston, 209a
 McLarney v. Long Island R. Co., 213
 McLaughlin v. Armfield, 13, 702a
 v. Bangor, 749a
 v. Charlotte, etc. R. Co., 359
 v. Corey, 363, 760
 v. Hebron Mfg. Co., 769
 v. Phila. Traction Co., 374, 376
 McLaury v. McGregor, 90, 377
 McLean v. Atlantic, etc. R. Co., 103 (App. 2070)
 v. Blue Point Co., 241a
 v. Burbank, 514
 v. Fiske Wharf, etc. Co., 708
 v. Omaha, etc. Ry. Co. (App. 2078)
 Co. Coal Co. v. McVey, 772
 McLemore v. West End, 338, 352
 McLeod v. New York, etc. Ry. Co., 201, 421
 v. Pac., etc. Telep. Co., 556c
 v. Lewiston, 739
 McMahon v. Chicago City Ry. Co., 154
 v. Chicago, etc. Ry. Co., 512, 513
 v. Davidson, 31, 60, 66, 516
 v. Dubuque, 253, 750
 v. Hetch-Hetchy, etc. Ry. Co., 678
 v. McHale, 223</p> | <p>McMahon v. New York, 79, 83, 135
 v. Northern Cent. R. Co., 73, 74, 108, 479
 v. Port Henry Ore Co., 210, 215
 v. Second Ave. R. Co., 118, 341, 408
 McManus v. Carmichael, 333
 v. Crickett, 151
 v. Finan, 656
 v. Lancashire, etc. R. Co., 505
 v. Metropolitan St. Ry. Co., 519
 v. Oregon Short Line Ry. Co., 207
 v. Woolverton, 644
 McMarshall v. Chicago, etc. R. Co., 459b, 477, 481
 McMaster v. Ill. Central R. Co., 235
 v. Montana R. Co., 419, 429
 McMellen v. Union News Co., 218
 McMichael v. Federal Printing Co., 192, 223
 McMillan v. Burlington, etc. R. Co., 73
 v. Eastman, 319
 v. Federal St. R. Co., 748
 v. Spider Lake Saw Mill, etc. Co., 134a
 v. Union Brick Co., 187
 v. Western U. Tel. Co., 753a, 754
 McMann v. Illinois, etc. Co., 219a
 Marble Co. v. Black, 89
 McMorris v. New York, 341
 McMullan v. Edison Electric Co., 698
 McMullen v. Carnegie Bros. & Co., 196
 v. Pennsylvania R. Co., 481a
 v. Steele, etc. Co., 470
 McMurray v. Marsh, 573
 v. St. Louis, etc. Ry. Co., 135a, 238
 McMurtray v. Louisville, etc. R. Co., 520
 McNabe v. United Railways, 472
 McNair v. Manhattan R. Co., 759
 McNalley v. Metropolitan St. Ry. Co., 520
 McNally v. Cohoes, 367, 369
 v. Colwell, 11, 665
 v. Kerswell, 619
 v. Boston, etc. Ry. Co., 60
 v. Clintonville, 346
 v. Great Northern R. Co., 513a
 v. Logan, 217
 v. MacDonough, 195, 241a
 v. N. Y. Central R. Co., 481b, 482
 v. Taft, 734</p> |
|---|--|

[References are to sections.]

- McNally v. Village of Clintonville, 739
 McNarra v. Chicago, etc. R. Co., 679
 McNaughton v. Caledonian R. Co., 61, 94
 McNaughton v. Illinois, etc. Ry. Co., 501
 McNeal v. Pittsburg, etc. R. Co., 474
 McNeil v. Boston, 285
 v. Boston Ice Co., 73a, 74
 v. Crucible Steel Co., 164
 v. Durham, etc. Ry. Co., 486
 v. Girardeau, 758
 v. N. Y., Lake Erie, etc. R. Co., 216
 McNerney v. Reading, 353
 McNeven v. Arnott, 705
 McNevens v. Lowe, 606, 607
 McNish v. Peekskill, 334, 356, 377
 McNown v. Wabash R. Co., 472
 McNulta v. Enoch, 508, 509
 v. Lockridge, 481b
 McNulty v. Ludwig, etc. Co., 168
 v. New Orleans, etc. Ry. Co., 480
 v. St. Louis, etc. Ry. Co., 469
 McNutt v. Livingston, 590, 591
 McPadden v. N. Y. Central, etc. R. Co., 11, 494
 McPeak v. Missouri Pac. R. Co., 520
 McPhee v. Scully, 190, 207a, 241b (App. 2151)
 v. United States, etc. Co., 617, 624
 McPeck v. Western Union Tel. Co., 617, 753a, 754
 McPheeters v. Hannibal, etc. R. Co., 419
 McPherson v. Great Northern Ry. Co., 207, 207e
 v. St. Louis, etc. R. Co., 197, 771
 MacPherson v. Western Union Tel. Co., 546
 v. Page, 244
 McPheters v. Moose River Log Co., 735
 McPhillips v. McGrath, 591
 McQuade v. St. Louis, etc. Ry. Co., 485c
 McQueen v. Central, etc. R. Co., 61, 239
 v. Elkhart, 363
 McQueeney v. Norcross, 235 (App. 2127)
 McQuerry v. Metropolitan St. Ry. Co., 500, 511
 McQuigan v. Delaware, etc. R. Co., 207
 McQuilken v. Central, etc. R. Co., 74, 108, 112
 McQuillan v. Seattle, 377
 McQuisten v. Detroit, etc. Ry. Co., 769
 McRickard v. Flint, 13, 467, 719
 McRose v. Bottyer, 336
 McSherry v. Canandaigua, 333, 368
 McTeer v. Lebow, 303
 McVee v. Watertown, 73a, 369
 McVeety v. St. Paul, etc. R. Co., 489
 McVey v. Illinois, etc. Ry. Co. (App. 2072, 2158)
 McVickle v. Conkle, 56b
 McVoy v. Knoxville, 93
 Maas v. Fauser, 645
 Mabb v. Stewart, 741
 Mabry v. City Elec. Ry. Co., 761a
 Macbeath v. Ellis, 573
 Macaulay v. New York, 87, 654
 Mace v. Boedker (App. 2141)
 v. Reed, 486, 749
 Mack v. Bensley, 730
 v. Houston, etc. Ry. Co., 705
 v. St. Paul, etc. R. Co., 89
 v. South Bound Ry. Co., 483
 v. Town of Shawangunk, 393
 Mackay v. N. Y. Central R. Co., 87, 477, 478
 v. Salt Lake City, 367
 Mackersy v. Ramseys, 582
 Mackey v. Baltimore, etc. R. Co., 207b
 v. Monahan, 119
 v. Vicksburg, 705
 Mackie v. Central R. Co., 425
 v. West Bay City, 373, 375
 Mackin v. Alaska Refrigerator Co., 195, 219
 v. Boston, etc. R. Co., 204, 226, 231
 v. People's R., etc. Co., 510
 Mackorvick v. Kansas City, etc. Ry. Co., 472
 Macomber v. Nichols, 333, 395,
 v. Taunton, 351, 358, 367
 Macon v. Macon, etc. R. Co., 254
 etc. Ry. Co. v. Barnes, 497
 v. Davis, 62, 99, 103, 451a, 454, 463
 v. McConnell, 679
 v. Mason, 760
 v. Mayes, 459, 502 (App. 2131)
 v. Moore, 508, 523
 v. Sester, 419
 v. Vaughn, 436, 437
 Mad River R. Co. v. Barber, 178, 180, 184, 208, 214, 233b
 v. Butler, 215
 Madara v. Shamokin, etc. Elec. Ry. Co., 494, 516

[References are to sections.]

- Madden v. Chesapeake & O. R. Co., 230, 233, 235, 241
v. Cincinnati, etc. Ry. Co. (App. 2104)
v. Lehigh Valley Coal Co., 716
v. Minneapolis, etc. R. Co., 197
v. Occidental S. S. Co., 223
v. Port Royal, etc. R. Co., 510
v. Wilcox, 219
- Maddox v. Hudgeons, 618
v. Randolph Co., 373
- Madison v. Baker, 369
Co. v. Brown, 257, 376
R. Co. v. Bacon, 180
etc. R. Co. v. Whiteneck, 421
- Madisonville v. Bishop, 261
v. Stewart, 377
etc. Ry. Co. v. Thomas, 728
etc. Ry. Co. v. Cates, 741
- Maehren v. Great Northern Ry. Co., 207b
- Maereker v. Brooklyn, etc. Ry. Co., 523
- Magagnos v. Brooklyn Heights Ry. Co., 749
- Magar v. Hammond, 114, 150
- Magarity v. Wilmington, 274, 289
- Mageau v. Great Northern Ry. Co., 764
- Magee v. Chicago, etc. R. Co., 207
v. Oregon R., etc. Co., 493
v. North Pac. R. Co., 207a, 222
v. Troy, 358
- Magie v. Cutts, 60b
- Maginnis v. N. Y. Central R. Co., 460, 463
- Magliani v. Minnesota, etc. Ry. Co., 207
- Magner v. Truesdale, 476
- Magoffin v. Missouri Pac. R. Co., 129, 492
v. Missouri Pac. Ry. Co. (App. 2074)
- Magone v. Portland Mfg. Co., 203, 218, 219
- Magoon v. Boston, etc. R. Co., 479
- Magor v. Chadwick, 734
- Magrane v. St. Louis, etc. Ry. Co., 516, 523
- Magouirk v. Western Union Tel. Co., 539a
- Maguire v. Cartersville, 734
v. Fitchburg R. Co., 112
v. Middlesex R. Co., 87
v. Sheehan, 741
- Mahaffey v. New York, etc. Ry. Co., 750
- Mahan v. Everett, 92
- Mahar v. N. Y., New Haven, etc. R. Co., 520
- Maher v. Atlantic, etc. R. Co., 476
v. Boston & A. R. Co., 199
v. Central Park, etc. R. Co., 111, 521
v. Manhattan R. Co., 60
v. Steuer, 164
v. Winona, etc. R. Co., 426, 434, 448
- Mahl v. Michigan, etc. Ry. Co. (App. 2088)
- Mahler v. Norwich, etc. Tr. Co., 131
- Mahnke v. Freer, 646, 653c
- Mahogany v. Ward, 346
- Mahoney v. Atlantic, etc. R. Co., 413, 459
v. Cooke, 698
v. Dore, 114, 197, 209, 209a, 211a, 214
v. Libbey, 343, 705
v. Maxfield, 653b
v. Metropolitan R. Co., 87, 376
v. N. Y. & New England R. Co., 241b
- Mahoning Ore, etc. Co. v. Bloomfelt, 134a, 209a
- Mahanoy v. Scholly, 257
- Maher v. Benedict, 144
- Maia's Admr. v. Eastern State Hospital, 331
- Maier v. Randolph, 146
- Mailhot v. Pugh, 729
- Maiorano v. Baltimore, etc. Ry. Co., 134a
- Mairs v. Manhattan Real Est. Ass'n, 701a, 723, 747
- Major v. Burlington, etc. Ry. Co. (App. 2140)
- Maker v. Slater Mill Co., 13, 702a
- Malcolm v. Fuller, 231, 241b
v. Richmond, etc. R. Co., 508, 523
- Malden, etc. R. Co. v. Charleston, 301, 345
- Maley v. Shattuck, 322
v. Western Union Tel. Co., 756
- Mali v. Lord, 145, 151
- Mallach v. Ridley, 145
- Mallock v. Derby, 705
- Mallott v. Laufman, 201
- Mallory v. Griffey, 108
- Malloy v. Hibernian Sav. Soc., 703
v. Staten Isl. Rapid Tr. R. Co., 725
v. Walker, 368, 378
- Malmsten v. Marquette, 66
- Malone v. Boston & Alb. R. Co., 484
v. Gerth, 559

[References are to sections.]

- Malone v. Hathaway, 204, 226, 230, 231
 v. Hawley, 192, 217, 223
 v. Knowlton, 627
 v. Pittsburgh, etc. R. Co., 525, 761a
 v. Texas, etc. Ry. Co., 60a
 Maloney v. Hayes, 709a, 712
 v. Winston, 207c
 Malott v. Hawkins, 476
 v. Shimer, 139 (App. 2061)
 Maloy v. Port Royal, etc. R. Co., 241c
 v. St. Paul, 376
 v. Wabash, etc. R. Co., 88
 Maltby v. Chicago, etc. R. Co., 417
 Maltrom v. People's Drain Co., 750
 Manchester v. Hartford, 333, 353, 367
 etc. R. Co. v. Fullarton, 426
 v. Wallis, 418, 449
 Mancuso v. Cataract Construction Co., 195
 Mandel v. Wheeler, 207
 Manderschied v. Dubuque, 289
 Mandeville v. Reynolds, 317
 Mills v. Dale, 705
 Mangam v. Brooklyn R. Co., 54, 72, 73, 74, 82
 Mangan v. Atterton, 34, 73, 74, 684
 Manger v. Shipman, 629
 Mangerton, The, 92
 Mangum v. North Carolina Ry. Co., 501
 Manhattan, The, 726
 Trust Co. v. Sioux City, etc. Ry. Co. (App. 2140)
 Tr. Co. v. New York, 726
 Manier v. Western Union Tel. Co., 543, 554, 753a
 Manion v. Richmond Ice Co., 74
 Mankey v. Chicago, etc. Ry. Co., 427
 Manks v. Moore, 214a
 Manley v. Boston, etc. R. Co., 475, 477
 v. St. Helen's Canal Co., 365, 396, 401
 Manly v. Wilmington, etc. R. Co., 73, 99, 644a
 Mann v. Delaware, etc. Canal Co., 189, 204, 230, 233a
 v. Fuller, 708
 v. Illinois Cent. Trac. Co., 209a
 v. Missouri, etc. Ry. Co., 481a
 v. Oriental Print Works, 207i, 226
 v. Pere Marquette Ry. Co., 673
 v. Phila, Tr. Co., 523
 Mann v. St. Thomas, 354
 v. Vermont Cent. R. Co., 406, 417
 v. Weiland, 66, 632
 v. Williamson, 656
 Car Co. v. Dupre, 758
 Mannier v. New York, etc. Ry. Co., 493
 Manning v. Adams, 161
 v. Chicago, etc. R. Co., 209
 v. Conway (App. 2068)
 v. Hogan, 195
 v. Lowell, 274
 v. Springfield, 271, 287
 v. West End St. Ry. Co., 73a
 v. Wilkin, 564
 Manser v. Collins, 614a
 v. Eastern Counties R. Co., 497
 Mansfield v. Moore, 51c, 334a, 367, 368
 Coal, etc. Co. v. McEnery, 65, 87, 222, 766
 Manson v. Eddy, 466a
 v. Manhattan R. Co., 457
 Manufacturing Co. v. Bradley (App. 2098)
 v. Morrissey, 208, 215
 v. Ott, 232
 Manville v. Cleveland, etc. R. Co., 241
 v. Western U. Tel. Co., 553, 555, 755
 Manwell v. Burlington, etc. R. Co., 451, 455
 Manzi v. Washburn Wire Co., 209a, 222
 Manzoni v. Douglas, 56, 647
 Mapes v. Union, etc. Ry. Co., 99
 Marah v. Minnesota Brewing Co., 703
 Marble v. Ross, 87, 97, 102, 103, 639
 v. Worcester, 31, 346, 355
 Marcantis v. Murry, 73
 March v. Kansas City, etc. Ry. Co., 66
 v. Phoenixville, 376
 v. Portsmouth, etc. R. Co., 395
 v. Walker (App. 2098)
 Marchek v. Klute, 73, 708a
 Marcum v. Three States Lbr. Co., 214a, 215 (App. 2121)
 Marden v. Boston, etc. R. Co., 475
 v. Portsmouth, etc. Ry. Co., 485a, 485c
 Marean v. N. Y., Susquehanna, etc. R. Co., 209
 Mareau v. Vanatta, 639
 Marfell v. New So. Wales R. Co., 434

[References are to sections.]

- Marietta, etc. R. Co. v. Stephenson, 449, 451a, 634
 Marine Ins. Co. v. St. Louis, etc. R. Co., 362
 Marini v. Graham, 371
 Marino v. Lehmaier, 219
 Marion v. Chicago, etc. R. Co., 64, 758
 City Ry. Co. v. Buboise, 485*bd*
 Co. v. Riggs, 256
 Mark v. Fritsch, 653*a*
 v. Hudson River Bridge Co., 86, 740
 v. St. Paul, etc. R. Co., 477
 Markel v. Western U. Tel. Co., 543, 755, 757
 Marker v. Mitchell, 719*a*
 Market v. St. Louis, 353
 Markey v. Louisiana, etc. Ry. Co., 413, 459
 v. Queens Co., 256
 Markham v. Houston, etc. Navigation Co., 66, 248
 Markin v. Priddy, 418, 655, 656, 664
 Marklewitz v. Olds Motor Works, 219
 Markowitz v. Metropolitan St. Ry. Co., 66
 Marks v. Harriett Cotton Mills (App. 2085)
 v. Long Island R. Co., 760
 v. Petersburg R. Co., 475, 481
 v. Rochester R. Co., 233
 v. Shoup, 620
 Marpesia, The, 57
 Marquet v. La Duke, 629
 Marquette, etc. R. Co. v. Spear, 679
 Marr v. Western U. Tel. Co., 553, 741
 Marri v. Stamford St. Ry. Co., 115
 Marrier v. St. Paul, etc. R. Co., 147
 Marriott v. Baltimore, 262
 Mars v. Delaware, etc. Canal Co., 35, 154
 Marseilles v. Howland, 390
 Marsel v. Bowman, 637
 Marsh v. Bancroft, 624
 v. Benton, 87
 v. Branch Road, 388
 v. Chickering, 195, 215, 217
 v. Hand, 144, 635, 636
 v. Herman, 195
 v. Jones, 629, 635
 v. N. Y. & Erie R. Co., 440
 v. Whitmore, 559
 Marshall v. Boston, etc. Ry. Co., 497
 v. Chicago, etc. R. Co., 60*a*
 v. Cohen, 713
 v. Consol. Mining Co. (App. 2076)
 Marshall v. Heard, 709
 v. Hosmer, 618
 v. Ipswich, 351, 356
 v. McAllister, 367
 v. Mines Co., 773
 v. Nagel, 578
 v. Nashville, etc. Ry. Co., 491
 v. St. Louis, etc. Ry. Co., 207*h*, 207*i*, 208, 209*a*, 215
 v. Schricker, 52
 v. Wabash R. Co., 136
 v. Wabash, etc. Ry. Co. (App. 2075)
 v. Welwood, 17, 683, 701*a*
 v. Wellwood, 154*a*
 v. York, etc. R. Co., 22, 486
 Window Glass Co. v. Cameron Oil, etc. Co., 692
 Marsland v. Murray, 73*a*
 Martello v. Fusco (App. 2093)
 Marten v. Sunset Tel., etc. Co., 757
 Martin v. Algona, 68
 v. Atchison, etc. Ry. Co., 232
 v. Boston, etc. Ry. Co., 516
 v. Brooklyn, 291, 368
 v. Butte (App. 2077)
 v. California Cent. R. Co., 207*a*
 v. Columbia, etc. R. Co., 23, 506
 v. Cornell (App. 2171)
 v. Courteney, 609
 v. Detroit Lbr. Co., 218
 v. Dufalla, 702
 v. Georgia R. Co., 480
 v. Grand Trunk R. Co., 676
 v. Great Northern R. Co., 410
 v. Hibernia Bank, etc. Co., 582
 v. Kehoe, 476
 v. Little Rock, etc. Ry., 476
 v. Louisville, etc. R. Co., 207*a*, 225
 v. McCrary, 665, 668
 v. Mason-Hoge Co., 224
 v. Missouri, etc. Ry. Co., 518
 v. Missouri Pac. R. Co., 675
 v. N. Y. & New England R. Co., 30, 666, 676
 v. New Haven, etc. R. Co., 60*a*
 v. Niles, etc. Co., 203
 v. North Star Works, 31
 v. N. Y., Ontario, etc. R. Co., 666
 v. Pettit, 56, 710
 v. Platte Valley Sheep Co., 656
 v. Riddle, 735
 v. St. Louis, etc. R. Co., 40
 v. Seaboard, etc. Ry. Co., 122

[References are to sections.]

- Martin v. Second Ave. R. Co., 508,
 521
 v. Simpson, 721
 v. Stewart, 439, 451a
 v. Texas, etc. R. Co., 672
 v. Towle, 60c
 v. Temperely, 172
 v. Tribune Asso., 169
 v. Western U. R. Co., 676, 680
 v. Western U. Tel. Co., 544,
 754
 v. Texas, etc. Ry. Co., 61, 672
 Martinez v. Gerber, 115
 Martini v. Chicago, etc. Ry. Co., 460
 Martinovich v. Wooley, 333
 Marty v. Chicago, etc. R. Co., 476
 Marvin v. Chicago, etc. R. Co., 666,
 667
 v. Manhattan Ry. Co., 258
 v. Maysville, etc. R. Co., 133
 v. Miller, 205
 v. New Bedford, 369
 v. Western U. Tel. Co., 545,
 547
 Safe Co. v. Ward, 8, 118, 258
 Marwedel v. Cook, 704, 710
 Marx v. Louisiana, etc. Ry. Co., 493
 Maryland Central R. Co. v. Neubeur,
 90, 476, 477
 Steel Co. v. Engleman, 232
 etc. Ry. Co. v. Brown, 760
 Mary Lee, etc. Co. v. Chambliss (App.
 2120)
 Marzetti v. Williams, 753
 Mascot Coal Co. v. Garrett, 207b
 Masner v. Atchison, etc. Ry. Co., 191
 Mason v. Cotton, 729
 v. Chicago, etc. R. Co., 481,
 484
 v. Ellsworth, 368, 749a
 v. Erie Ry. Co., 744
 v. Highland, 164
 v. Hill, 729, 733
 v. Hutchings, 624
 v. Keeling, 631
 v. Minneapolis R. Co., 483
 v. Missouri Pac. R. Co., 64,
 480
 v. Moore, 1
 v. Morgan, 627
 v. Richmond, etc. R. Co., 196,
 207b, 207h, 230
 v. Southern Ry. Co., 457
 v. Tower Hill Co., 58
 City, etc. Co. v. Board of
 Supervisors, 735
 Hoge & Co. v. Highland, 168
 etc. Ry. Co. v. Anderson, 520
 v. Moore, 493
 v. Yockey, 211
- Massengale v. Western U. Tel. Co.,
 554
 Massie v. Peel Coal Co., 207
 Massoth v. Delaware, etc. Canal Co.,
 13, 114, 467, 476, 477
 Massey v. Seller, 704
 Massy v. Milwaukee, etc. Ry. Co., 231
 Mastad v. Swedish Brethren, 706
 Masters v. Troy, 363, 373
 v. Warren, 758
 Masterson v. Eldridge, 207e, 208
 v. Macon R. Co., 520
 v. N. Y. Central, etc. R. Co.,
 66, 359, 415
 Masterton v. Mount Vernon, 263, 760
 Mateer v. Missouri Pac. R. Co., 196
 Math v. Chicago City Ry. Co., 495,
 523
 Mather v. Rillston, 187, 192, 203,
 207a, 219a
 Mathews v. Case, 233
 v. St. Louis, etc. R. Co., 676,
 680, 765
 v. Winooski Turnp. Co., 385,
 389
 Mathias v. Kansas City Stockyards
 Co., 207e
 Mathis v. Carpenter, 619
 v. Western U. Tel. Co., 554
 Matla v. Rapid Motor Vehicle Co.,
 653b
 Matlock v. Strange, 303
 v. Williamsville, etc. Ry. Co.
 (App. 2075)
 Matson v. Chicago, etc. Ry. Co. (App.
 2141)
 v. Maupin, 634
 v. Port Townsend R. Co., 481a
 Matta v. Chicago, etc. R. Co., 476
 Matteson v. N. Y. Central R. Co.,
 115
 v. Strong, 639
 Matterson v. Southern Pac. Co., 99,
 100, 476, 482
 Matthew v. Wabash R. Co., 742
 Matthews v. Atlantic, etc. R. Co.,
 480, 483
 v. Bonsee, 684, 705
 v. Cedar Rapids, 375
 v. DeGroof, 708
 v. Kelsey, 362
 v. Louisville Ry. Co., 224
 v. Missouri Pac. Ry. Co., 750
 v. Phila., etc. R. Co., 480
 v. St. Louis, etc. R. Co., 62
 v. Seaboard Air Line Ry. Co.,
 480
 v. Warner's Exec. (App. 2102)
 v. Warner, 61, 95, 741
 Mattimore v. Erie, 93, 362, 369

[References are to sections.]

- Mattise v. Consumers' Ice Co., 185a,
193, 206, 233, 233a
- Mattloge v. Bd. of Freeholders, 256
- Mattoon v. Freemantle, etc. R. Co.,
676
City Ry. Co. v. Graham, 215
- Mattson v. Minnesota, etc. R. Co., 689
- Matulys v. Philadelphia, etc. Coal
Co., 1, 717
- Matz v. Missouri Pac. Ry. Co., 99
v. St. Paul R. Co., 523
- Matzer v. N. Y. Central R. Co., 97
- Mau v. Morse, 719a
- Mauch v. Hartford, 61
Chunk, The, 770
v. Kline, 363
- Maucher v. Hartsheim, 592
- Mauerman v. Siemerts, 114
- Mauill v. Wilson, 665
- Maultby v. Leavenworth, 377
- Maurus v. Champion, 64
- Maupin v. Texas, etc. Ry. Co., 186
- Maury v. Talmadge, 495, 514
- Maus v. Springfield, 376
- Maverick v. Eighth Avenue R. Co.,
51, 495
- Max Morris, The v. Curry, 61
- Maxey v. Metropolitan St. Ry. Co.,
505
v. Missouri Pac. R. Co., 482
- Maxfield v. Maine, etc. Ry. Co., 495,
501
- Maxim v. Champion, 272, 340, 356,
367
- Maximillian v. New York, 253, 255,
266, 281, 289, 295
- Maxon v. Case, etc. Mach. Co., 183
- Maxwell v. McIlvoy, 321
Ginning Co. v. Wallan, 209a
v. Wilmington City Ry. Co.,
61
- Maxey v. Missouri, etc. Ry. Co., 464
- May v. Berlin Bridge Co., 60
v. Burdett, 17, 626, 629
v. Ennis, 708a
v. Princeton, 113
v. Central R. Co., 480
v. Shreveport Tr. Co., 513
v. Smith, 219, 219a
v. Texas, etc. Ry. Co., 460
v. West Jersey Ry. Co., 772
v. Whittier Mach. Co., 241b
- Mayberry v. Concord R. Co., 449
v. Kelly, 303
- Mayer v. Brensinger, 727a
v. Detroit R. Co., 207g
v. Hutchinson Bldg. Co., 244
v. Laux, 702a
v. People, 625a
- Mayer v. Thompson, etc. Bldg. Co.,
122, 148
- Mayes v. Chicago, etc. R. Co., 217,
408
- Mayesville v. Guilfoyle, 376
- Mayfield v. Atlanta, etc. Ry. Co., 120a
Water, etc. Co. v. Webb, 73
- Mayhew v. Boyce, 649
v. Burns, 133, 700
- Maynard v. Boston, etc. R. Co., 57,
418, 428, 430
v. Buck, 53
v. Norfolk, etc. R. Co., 419, 449
v. Oregon, etc. Ry. Co., 761
- Mayne v. Chicago, etc. Ry. Co., 501
- Maynell v. Saltmarsh, 371
- Mayo v. Boston, etc. R. Co., 111, 112,
525
v. Spartenburg, etc. R. Co., 676
v. Wright, 614
Estate, In Re (App. 2093)
- Mayor v. Benedict, 162
v. Peabody, 310
etc. v. Mayberry, 343
v. O'Donnell, 298
v. Sheffield, 289, 333, 334, 367
- Maypole v. Forsyth, 701
- Maysville v. Guilfoyle, 352, 353
- Maywood v. Logan, 709
- Mazetti v. Harlem R. Co., 408
- Mead v. Burlington, etc. R. Co., 451a
v. Derby, 258, 334
v. New Haven, 255, 291
v. Zang Brewing Co., 122
- Meade v. Pittsburg Ry. Co., 214a, 215
v. Topeka, 334
- Meador v. Lake Shore, etc. R. Co.,
215
v. Missouri, etc. Ry. Co., 516,
518
- Meadowcroft v. New York, etc. Ry.
Co., 207g
- Meadows v. Truesdale, 668
- Meadville v. Erie Canal Co., 257
- Meagher v. Cooperstown, etc. R. Co.,
53, 485
- Means v. Southern, etc. Ry. Co., 457,
460
- Meara v. Holbrook, 163, 413
- Mears v. Boston, etc. R. Co., 207a
v. Chicago, etc. Ry. Co., 419,
428
- Meares v. Wilmington, 289, 291
- Mearns v. Central, etc. Ry. Co., 508,
520
- Mechanics' Bank v. Earp, 583
v. Merchants' Bank, 580, 598,
600
- Mechanicsburg v. Meredith, 336
- Mechesney v. Unity, 376

[References are to sections.]

- Meddaugh v. N. Y., Ontario, etc. R. Co., 478
 Medinger v. Brooklyn H. Ry. Co. (App. 2083)
 Medlin Milling Co. v. Boutwell, 151
 v. Schmidt, 214a, 215
 Meegan v. McKay, 628
 Meehan v. Cpiers, 193
 v. Holyoke St. Ry. Co., 208
 v. Morewood, 150
 Meek v. N. Y. Central R. Co., 197
 v. Pennsylvania R. Co., 92, 480, 482
 Meeker v. Metropolitan St. Ry. Co., 485b
 v. Northern Pac. R. Co., 448
 v. Ohio R. Ry. Co., 472
 Meekin v. Brooklyn, etc. Ry. Co., 135a (App. 2082)
 Meekins v. Norfolk, etc. R. Co. (App. 2085)
 Meeks v. Southern Pac. R. Co., 73, 74, 483
 Meenah v. Buckmaster, 66
 Meesel v. Lynn, etc. R. Co., 523
 Meeteer v. Manhattan R. Co., 743
 Megargee v. Philadelphia, 380
 Meggett v. W. U. Tel. Co., 753a, 755
 Megow v. Chicago, etc. R. Co., 675
 Mehan v. Syracuse, etc. R. Co., 87, 214
 Mehegan v. N. Y. Central R. Co., 475
 Mehler v. Fisch, 168
 Mehan v. St. Louis, 262
 Mehoning Valley, etc. Ry. Co. v. Houston, 485bd
 Meibus v. Dodge, 73, 639
 Meier v. Morgan, 184a, 185
 v. Pennsylvania R. Co., 12, 45, 495
 v. Shrunk, 630, 634, 639
 v. Way, etc. Co., 231
 Meily v. St. Louis, etc. Ry. Co., 191
 Meinzer v. Racine, 274
 Meisner v. City of Dillon, 16a
 Meister v. Lang, 721
 Meixell v. Morgan, 735
 Melchert v. Amer. U. Tel. Co., 538
 Melhado v. Poughkeepsie Trans. Co., 515
 Melhop v. Seaton, 619
 Melker v. City of New York, 262
 Mellen v. Morrill, 709
 v. Western R. Co., 395, 412
 Meller v. Bridgeport, 376
 Mellette v. Indianapolis, etc. Trac. Co., 215
 Mellody v. Missouri, etc. Ry. Co., 56
 Mellor v. Merchants' Mfg. Co., 207, 241b (App. 2150, 2151)
 Mellor v. Missouri Pac. R. Co., 488, 492
 Mellors v. Shaw, 56, 185, 197
 Melone v. Sierra Ry. Co., 758
 Meloy v. Chicago, etc. R. Co., 185a, 197, 467
 Melsheimer v. Sullivan, 639
 Melton v. Birmingham, etc. Ry. Co., 507
 Melver v. Georgia, etc. Ry., 481
 Melvin v. Pennsylvania Steel Co., 60
 Melzer v. Peninsular Car Co., 219a
 Memphis v. Kimbrough, 285
 v. Lasser, 291
 v. Overton, 333
 v. Waterworks Co., 358
 Consol. Gas Co. v. Creighton, 122
 Gas, etc. Co. v. Letson, 696, 769
 v. Simpson, 207b
 etc. Packet Co. v. McCool, 516
 v. Nagel, 749
 v. Pikey, 133, 513 (App. 2061)
 etc. R. Co. v. Askew, 184
 v. Blakeny, 419
 v. Copeland, 62, 102, 479
 v. Graham, 194, 207b, 207f
 v. Graves, 493
 v. Hembree, 95
 v. Jobe, 96
 v. Jones, 432
 v. Kerr, 419
 v. Lyon, 429
 v. Martin, 7, 61, 99
 v. Sanders, 458
 v. Shaw, 510
 v. Stringfellow, 520
 v. Thomas, 207
 v. Whitfield, 509, 510, 758
 v. Womack, 457, 464, 472
 Menard v. Boston, etc. R. Co., 60c, 485
 Mendell v. Wheeling, 265, 286
 Mendenhall v. Atchison, etc. Ry. Co., 513a
 Mendt v. Clockner (App. 2084)
 Meng v. Coffey, 729
 v. St. Louis, etc. Ry. Co., 54
 Mengel Box Co. v. Dulin, 218
 Menger v. Laur, 654
 Menier v. St. Louis, 334
 Menomonee River, etc. R. Co. v. Milwaukee, etc. R. Co., 56, 673, 675
 Mensing v. Michigan, etc. Ry. Co., 501, 518
 Mentone Irr. Co. v. Redlands, etc. Co., 729
 Mentzer v. Armour, 190

[References are to sections.]

- Mentzer v. Western U. Tel. Co., 543, 756
- Meo v. Chicago, etc. Ry. Co. (App. 2196)
- Mercer v. Corbin, 653
v. Southern, etc. Ry. Co., 467
v. White, 704
v. Woodgate, 343
- Merchants' Nat. Bank v. Dorchester, 579
etc. Bank v. Stafford National Bank, 579
v. Spicer, 580
etc. Oil Co. v. Burns, 138 (App. 2098)
Staple of England v. Bank of England, 61
- Mercier v. Mercier, 56
- Meredith v. Reed, 626
v. Richmond, etc. R. Co., 480, 481a, 483
- Mergenthaler v. Kirby, 705
- Meridian v. Hyde, 376
- Merkle v. N. Y., Lake Erie, etc. R. Co., 476
- Merrifield v. Lombard, 734
v. Worcester, 258, 274, 734
- Merrigan v. Boston, etc. R. Co., 13, 60c, 466
v. Evans, 187, 195
- Merrill, Matter of, 459
v. Cates, 146
v. Claremont, 346
v. Eastern R. Co., 490, 518
v. Grinnell, 526
v. Hampden, 350, 367, 375
v. Los Angeles Gas Co., 31, 693, 758
v. Oregon Short Line Ry. Co., 186 (App. 2188)
v. Western Union Tel. Co., 23, 753a
v. Wilbraham, 358
- Merrimann v. Phillipsburg, 376
- Merritt v. Brinkeroff, 730
v. Earl, 16, 104
v. Fitzgibbons, 362
v. Hill, 656
v. Lambert, 557
v. Matchett, 626, 628, 630
v. N. Y., New Haven, etc. R. Co., 520
v. Parker, 729
v. Read, 303
Tp. v. Harp, 721, 731
- Merriweather v. Sayre Min. Co., 207h, 215
- Merriwether v. Bell, 750
- Merryman v. Chicago, etc. R. Co., 72, 73a, 501, 509
- Merschel v. Louisville, etc. Ry. Co., 154a
- Mersey Docks v. Cameron, 327
v. Gibbs, 14, 176, 254, 281, 319, 326, 327, 725, 726
- Mertz v. Detweiler, 614
- Merwin v. Manhattan R. Co., 496; 523
v. Rogers, 303
- Merz v. Brooklyn, 254
- Meservey v. Lockett, 649
- Meshishnek v. Seattle Land, etc. Co., 209a
- Messenger v. Dennie, 73a, 90, 654
v. Pate, 685
v. Valley, etc. Ry. Co., 501
- Messersmith v. Buffalo, 291
- Messerole v. Brooklyn R. Co., 525
- Metallic Coasting Co. v. Fitchburg R. Co., 464
- Mestas v. Diamond Coal, etc. Co. (App. 2106)
- Metcalf v. Baker, 758
v. Central Vermont Ry. Co., 476
v. Central, etc. Ry. Co., 475
v. Cunard S. S. Co., 705
v. Hetherington, 326
v. Rochester Ry. Co., 77
- Metropolitan Asyl. Dist. v. Hill, 283
- Savings Bank v. Marion, 709a
- R. Co. v. Jackson, 54
- v. Johnson, 90, 485c, 760, 764
- v. Moore, 488
- St. Ry. Co. v. Dick, 176
- v. Hanson, 495, 497
- v. Powell, 66
- v. Ryan, 525
- etc. Ry. Co. v. Fortin, 189
- Metz v. Ashville, 253, 281
v. Buffalo, etc. R. Co., 120a, 163, 413
v. California Ry. Co., 526
v. Missouri, etc. Ry. Co., 99
v. Soule, 249
- Metzgar v. Chicago, etc. R. Co., 673
- Metzger v. Schultz, 709a
- Metzinger v. New Orleans Board of Trade, 164, 168
- Metzler v. McKensie, 195
- Mexican, etc. R. Co. v. Crum, 3
v. De Rosear, 526
v. Glover, 186
v. Lauricella, 500, 516
v. Louisville, 500
v. Mussette, 35
v. Shean, 196
v. Townsend, 184a
- Meyer v. Hart (App. 2083)
v. King, 690

[References are to sections.]

- Meyer v. Lewis, 644
 v. Midland, etc. R. Co., 100, 460, 483
 v. No. Missouri R. Co., 435
 v. Pacific R. Co., 53, 64, 493
 v. People's R. Co., 94
 v. St. Louis, etc. R. Co., 495, 496, 512
 v. Schunk, 634
 v. Second Ave. R. Co., 488
 v. Tacoma Water Co., 733
 v. Vicksburg, etc. R. Co., 676
 Meyers v. Menter, 656
 v. San Pedro, etc. Ry. Co. (App. 2189)
 Michael v. Alestree, 122
 v. Roanoke Mach. Works, 207a, 207g
 v. Stanton, 160
 Michaels v. N. Y. Central R. Co., 39, 40
 Michels v. Syracuse, 368
 Michigan Central R. Co. v. Austin, 216
 v. Dolan, 180
 v. Smithson, 196, 197
 City v. Ballance, 367
 v. Boeckling, 358, 367, 368, 369
 etc. R. Co. v. Coleman, 57, 107, 115
 v. Hammond, etc. Elec. Ry. Co., 485
 v. Lautz, 113
 v. Leahy, 61
 Mickee v. Wood Mach. Co., 216
 Mickie v. Wood Mowing, etc. Mach. Co., 193
 Mickles v. Hart, 618
 Middle Georgia, etc. Ry. Co. v. Barnett, 192
 Middleborough Ry. Co. v. Webster, 508
 Middlesex Co. v. Lowell, 734
 Middlestadt v. Morrison, 646
 Middleton v. Rentler, 705
 Co. v. Roycroft, 719a
 Midgett v. Branning Mfg. Co., 164, 168
 Midland R. Co. v. Daykin, 449
 v. Fisher, 443
 Valley Ry. Co. v. Fulgham, 184a
 Midway v. Lloyd, 353
 Mielke v. Chicago, etc. Ry. Co., 207e
 Mikula v. Delaware, etc. Ry. Co., 223
 Milarkey v. Foster, 365, 371
 Milburn v. Stickney, 591
 Miles v. Brondum, 73a
 v. Janvrin, 708a
 Miles v. N. Y., Lake Erie, etc. R. Co., 508
 v. Worcester, 267, 285
 Milford v. Holbrook, 350, 384
 Milhau v. Sharp, 359
 Millard v. Jenkins, 303
 Millen v. Fandrye, 640
 v. Fawtrey, 640
 v. Pacific Bridge Co., 209a
 Miller v. Amer. Sugar Refining Co., 180, 235
 v. Atlanta, etc. Ry. Co., 488
 v. Boone Co., 356, 393, 743
 v. Casco, 367
 v. Centralia Pulp, etc. Co., 232, 235, 236
 v. Chatterton, 737
 v. Chicago, etc. R. Co., 195, 419, 427, 485
 v. Church, 709a
 v. Cohen, 647
 v. Consol. Gas Co., 704
 v. Detroit, 253, 289, 337, 354
 v. East Tennessee, etc. R. Co., 509
 v. Fisher, 120, 709a
 v. Hancock, 710
 v. Harvey, 323
 v. Iron Co., 256, 262
 v. Kelly Coal Co., 31, 122
 v. Kimbray, 630
 v. Lapham, 729
 v. Laubach, 735
 v. Louisville, etc. R. Co., 66a
 v. McCardell, 709
 v. McWilliams, 256, 258
 v. Madera, etc. Co., 729
 v. Manhattan R. Co., 760
 v. Mariner's Church, 95, 741
 v. Martin, 666, 668
 v. Meade Tp. (App. 2070)
 v. Merritt, 164
 v. Miller, 669, 729
 v. Minnesota, etc. R. Co., 168
 v. Missouri Pac. R. Co., 203a, 204, 230, 232
 v. Missouri, etc. Ry. Co. (App. 2075)
 v. Moran, 184
 v. Morristown, 274
 v. Mullon, 289, 367
 v. N. Y. Central R. Co., 114, 460
 v. N. Y., Lackawanna, etc. R. Co., 144
 v. N. Y., Lake Erie, etc. R. Co., 413
 v. New York, etc. Ry. Co., 459
 v. Newport News, 262, 275
 v. Norfolk, etc. Ry. Co., 683

[References are to sections.]

- Miller v. Ocean Steamship Co., 60c,
 495, 496, 515, 516, 523
 v. Pendleton, 518
 v. Ry. Co., 154
 v. Raymond, 690
 v. Rochester Pav. Co., 68
 v. Rucker, 310
 v. St. Louis, etc. R. Co., 519,
 739
 v. St. Paul, 356, 358
 v. Southern Pac. R. Co., 195,
 232, 233a, 241
 v. Staple, 244
 v. State, 736
 v. Strivens, 645
 v. Sturgeon (App. 2057)
 v. Terre Haute, etc. R. Co.,
 482
 v. Truesdale, 476
 v. Twiname, 688a
 v. Union Pac. R. Co., 207,
 207h, 232, 233
 v. Village of Mullan, 339
 v. Webster, 359
 v. Western Union Tel. Co.,
 741, 753a
 v. White, etc. Monument Co.,
 206, 215
 v. Wilson, 574
 v. Wing, 218
 v. Woodhead, 705
 -Brendt Lbr. Co. v. Stewart,
 749
 & Meys v. City of Newport
 News, 275
 Millidgeville v. Cooley, 289
 Millagan v. Wedge, 173
 Milliken v. St. Clair, 367
 v. Somerset Co., 367
 v. Western U. Tel. Co., 543
 Milliman v. N. Y. Central, etc. R.
 Co., 93, 508
 v. Oswego, etc. R. Co., 440
 Mills v. Armstrong, 66
 v. Atlantic, etc. Ry. Co., 63,
 202 (App. 2085)
 v. Bartow Lbr. Co., 235
 v. Brooklyn, 262, 274, 275
 v. Chicago, etc. R. Co., 676,
 679
 v. Conley, 654
 v. Harlem R. Co., 633
 v. Louisville, etc. Ry. Co., 672
 v. Missouri, etc. Ry. Co., 467
 v. N. Y. Central R. Co., 521
 v. Orange, etc. R. Co., 457
 etc. Lbr. Co. v. Chicago, etc.
 Ry. Co., 427
 Millum v. Lehigh, etc. Coal Co., 683,
 706
- Millwood v. De Kalb Co., 256
 Milm v. Providence Tel. Co., 698a
 Milne v. Smith, 174
 Milton v. Frankfort, etc. Trac. Co.,
 231, 232, 233b
 v. Hudson River Steamboat
 Co., 95, 741
 v. Norfolk, etc. Ry. Co., 114
 Milwaukee v. Davis, 262, 334, 356,
 377
 etc. R. Co. v. Arms, 47, 747
 v. Finney, 150, 154, 518
 v. Hunter, 408, 474
 v. Kellogg, 26, 29a, 30, 55,
 119, 666
 Minahan v. Grand Trunk, etc. Ry.
 Co., 494, 516
 Minard v. Mead, 118
 Minat v. Suavely, 11
 Miner v. Connecticut River R. Co.,
 65, 208
 v. Hopkinton, 356
 v. McNamara, 26, 120, 709
 Minick v. Troy, 373, 375
 Minneapolis Mill Co. v. St. Paul, 729
 etc. R. Co. v. Beckwith, 422
 v. Cronon, 698
 v. Herrick (App. 2140)
 v. Odegaard, 494, 516, 578,
 653a
 Minnesota Butter, etc. Co. v. St.
 Paul Cold Storage Co., 727a
 Minnikuyson v. Dorsett, 562
 Minor v. Sharon, 1, 92, 709
 Minster v. Citizens Ry. Co., 65a
 Minter v. Crommelin, 317
 Minty v. Union Pac. R. Co., 180
 Missano v. New York, 253, 281, 291
 Mississinewa Min. Co. v. Patton,
 692, 693
 Mississippi v. Johnson, 313
 Cent. Ry. Co. v. Hardy, 108
 Cotton-Oil Mills Co. v. Ellis,
 203
 Cotton & Oil Co. v. Smith,
 769, 773
 Ins. Co. v. Louisville, etc. R.
 Co., 672, 680
 Logging Co. v. Schneider, 185,
 203
 Mills Co. v. Smith, 734
 etc. R. Co. v. Mason, 63, 99
 Missouri Furnace Co. v. Abend, 107,
 215
 Valley Bridge Co. v. Ballard,
 164, 168, 175
 etc. Ry. Co. v. Aycock, 741
 v. Baier, 54, 516 (App. 2078)
 v. Bailey, 207h
 v. Baker, 427 (App. 2187)

[References are to sections.]

- Missouri, etc. Ry. Co. v. Barber, 135, 196
 v. Bartlett, 156*b*, 673, 676, 679
 v. Blachley, 217
 v. Bradshaw, 424, 451*a*
 v. Brown, 53, 464, 484, 761*a*
 v. Buchanan, 510
 v. Burnett, 483
 v. Bussey, 476
 v. Butler, 455
 v. Byars, 566
 v. Byrd, 25, 497, 742
 v. Cady, 676
 v. Callahan, 518
 v. Carter, 673
 v. Castel (App. 2163)
 v. Chicago, etc. Ry. Co., 464*a*
 v. Clark, 747
 v. Clayton, 87
 v. Collier, 207*b*
 v. Cork, 492
 v. Couch, 750
 v. Cowser (App. 2098)
 v. Cox, 463
 v. Crenshaw, 217
 v. Cullers, 666, 667, 676
 v. Daniels, 742, 758
 v. Davidson, 671
 v. Day, 189
 v. Dement, 751
 v. Donaldson, 674, 675
 v. Dunbar, 497, 509
 v. Dunham, 428, 444
 v. Edwards, 73
 v. Eckel, 434
 v. Elliott, 769
 v. Evans, 140*a*
 v. Finley, 633
 v. Finch, 471
 v. Flood, 497, 505, 758
 v. Foreman, 184*a*, 508
 v. Foster, 503
 v. Fowler, 760
 v. Fox, 2077
 v. Freeman (App. 2098)
 v. Gedney, 428
 v. Gerren, 500, 513, 516
 v. Gilbert, 750
 v. Gill, 448
 v. Gist, 508
 v. Hammer, 457, 483
 v. Hannig, 215
 v. Hanning, 758
 v. Hansen, 481*a*
 v. Harris, 196
 v. Harrison, 29*a*, 31, 497, 503
 v. Hendricks, 224
 v. Henry, 133 (App. 2097, 2098)
- Missouri, etc. Ry. Co. v. Hibbitts, 485*d*
 v. Hogan, 222
 v. Holcomb, 513*a*
 v. Hollan, 463
 v. Housman, 483
 v. Humes, 422, 749
 v. Irvin, 501, 520
 v. Ivy, 505
 v. Jaffi, 457
 v. James, 476
 v. Johnson, 16, 470, 704, 748
 v. Jones, 160, 225
 v. Kaiser, 761*a*
 v. Keyes, 733
 v. Kincaid, 679
 v. Kirchoffer, 467
 v. Lassater, 31, 760
 v. Lee, 472, 478
 v. Leggett, 436
 v. Lehmberg, 214, 410
 v. Lightfoot, 761*a*
 v. Lewis, 133, 195, 197
 v. Long, 506
 v. Lyde, 187, 762
 v. McCally, 241*c* (App. 2063)
 v. McCanahan, 493
 v. McElyea, 193
 v. McFadden, 120*a*
 v. McLaughlin, 771
 v. Magar, 464
 v. Magee, 417, 426, 466, 468
 v. Malone, 457, 464, 480, 484, 749
 v. Martino, 493
 v. Medaris (App. 2142)
 v. Melugin, 464
 v. Miller, 492*a*
 v. Moffatt, 460, 467
 v. Morgan, 761*a*
 v. Morrow, 421
 v. Moseley, 114, 480
 v. Neiser, 672, 750
 v. Nesbit, 483, 743
 v. Olden, 659
 v. Palmer, 429
 v. Patton, 189
 v. Pfrang, 425
 v. Phillips, 750
 v. Platzer, 672
 v. Porter, 480
 v. Prewitt, 73*a*, 483
 v. Price, 490, 520
 v. Prickryl, 666
 v. Quinlan, 231
 v. Raney, 744
 v. Ray, 466, 473, 477
 v. Rogers, 102
 v. Rodgers, 419
 v. Russell, 512
 v. Renfro, 412

[References are to sections.]

- Missouri, etc. Ry. Co. v. Roads, 449
 v. Rogers, 66, 428, 472, 476
 v. Saunders, 470
 v. Scarborough, 73
 v. Sharp, 457, 481*b*
 v. Shuford, 49, 748
 v. Simmons, 490
 v. Smith, 218, 493
 v. Somers, 114*b*, 201, 208, 217
 v. Stafford, 518
 v. Steinberger, 750
 v. Stevens, 427
 v. Stone, 494
 v. Taff, 470
 v. Texas, etc. R. Co., 666, 667
 v. Thomas, 417
 v. Tietken, 505
 v. Tolbert, 428*a*
 v. Trahern, 475
 v. Wall, 90, 480
 v. Wallace, 769
 v. Walters, 103
 v. Watson, 113
 v. White, 67, 85, 219*a*
 v. Williams, 60*a*, 211, 233*b*,
 488, 769, 771
 v. Willis, 434
 v. Wilson, 430, 453
 v. Wise, 192, 197
 v. Wolf, 501, 508
 v. Wood, 194, 207*f*, 329
 v. Wortham, 508, 510
 Telep. v. Vanderwort, 375, 376
 Works v. Dillon, 232
 Mitchell v. Augusta Ry. Co., 490
 v. Boston, etc. R. Co., 464,
 484
 v. Brady, 708*a*, 712
 v. Charleston, etc. Power Co.,
 85*a*
 v. Chase, 635
 v. Chicago, etc. Co., 107, 494,
 516, 744
 v. Clapp, 628
 v. Clinton, 108
 v. Colorado Milling, etc. Co.,
 766
 v. Comanche Cotton Oil Co.,
 219*a*
 v. Electric Tr. Co., 520
 v. Grassweller, 147
 v. Harmony, 244
 v. Ill. Cent. R. Co., 73, 408,
 458, 463, 466
 v. Keene, 719
 v. Marker, 719*a*
 v. Mining Co., 203
 v. N. Y. Central R. Co., 476
 v. Northern Pac. Ry. Co.
 (App. 2154)
 Mitchell v. Phila., etc. R. Co., 481*a*
 v. Prange, 688*a*
 v. Raleigh Elec. Co. (App.
 2085)
 v. Rice, 591
 v. Robinson, 230
 v. Rochester, R. Co., 761
 v. Rockland, 256, 266, 299
 v. Southern Pac. R. Co., 516,
 523
 v. Tacoma Ry. Co., 99, 485*c*
 v. Tacoma R., etc. R. Co.,
 481*a*
 v. Third Ave. Ry. Co., 485*c*
 v. Turner, 57, 378
 v. Western R. Co., 508, 516
 v. Western U. Tel. Co., 741
 Lime Co. v. Nickless, 217
 Mitchelltree v. Stair, 712
 Mix v. Hamburg-American S. S.
 Co., 769 (App. 2082)
 Mixer v. Imperial Coal Co., 223
 Mize v. Rocky Mountain Tel. Co.,
 138, 698, 769
 Mizzell v. Southern Ry. Co., 480
 Moakler v. Williamette Val. R. Co.,
 519
 Mobile Life Ins. Co. v. Brame, 124
 Light Co. v. Baker, 485*ab*
 etc. Co. v. Walsh, 508, 520
 etc. R. Co. v. Ashcroft, 60*a*,
 518
 v. Bromberg (App. 2118)
 v. Caldwell, 427, 432
 v. Clanton, 242
 v. Coerver, 470, 476
 v. Crenshaw, 73
 v. Davis, 467
 v. George, 222 (App. 2120)
 v. Godfrey, 223
 v. Gray, 676, 678
 v. Hicks (App. 2157)
 v. Holborn, 58, 207*a*, 241*b*
 v. House, 428
 v. Hudson, 57, 419, 456
 v. Kimbrough, 431
 v. Malone, 457
 v. Massey, 233
 v. Reeves, 508
 v. Sanges, 758, 769
 v. Seaes, 151
 v. Smith, 232, 241
 v. Stroud, 480
 v. Thomas, 52, 57, 180
 v. Tiernan, 455
 v. Vallowe, 201
 v. Walsh, 518
 v. Watly, 99, 772 (App.
 2072)
 v. Williams, 419, 421

[References are to sections.]

- Mobley v. Clark, 580
 Mochler v. Shaftsbury, 652
 Mock v. Los Angeles Tr. Co., 485*ba*
 Moe v. Smiley, 128, 135*b* (App. 2090)
 Moebus v. Becker, 16, 686
 v. Herrmann, 73, 485*a*, 645, 654
 Moeller v. Brewster, 207
 Moellering v. Evans, 701, 750
 Moest v. Buffalo, 260*a*
 Moffatt v. Tenney, 767
 Moffet v. Koch, 143, 164
 Moffitt v. Asheville, 260
 Mohard v. Light, etc. Co., 775
 Mohawk Bank v. Broderick, 580
 Mohney v. Cook, 104
 Mohr v. Williams, 614*a*
 Moir v. Hopkins, 165
 Molair v. Port Royal R. Co., 428
 Molaske v. Ohio Coal Co., 218, 219
 Moller v. Am. Sugar Ref. Co., 232
 Mollhoff v. Chicago, etc. R. Co., 180, 232
 Mollie Gibson Mining Co. v. Sharp, 203, 772
 Molloy v. N. Y. Central R. Co., 151
 Moloy v. Mt. Morris Elec. Co., 189
 Molyneaux v. Southwest Elec. Ry. Co., 485*bd*
 Momence Stone Co. v. Turrell, 206
 Monagan v. Louisville, etc. Co., 698
 Monaghan v. N. Y. Central R. Co., 233*a*
 Monahan v. National Realty Co., 708*a*
 v. Worcester, 190
 Monarch Mfg. Co. v. Omaha, etc. Ry. Co., 287
 Tobacco Works v. Northern, 187, 193
 Mondou v. New York, etc. Ry. Co., 193
 Mongollon, etc. Co. v. Stout, 741
 Mongum v. N. C. Ry. Co., 501
 Monies v. Lynn, 338, 363, 368
 Monk v. New Utrecht, 271, 276, 337, 340
 Monmouth Min. Co. v. Erling, 193
 Monongahela v. Fischer, 93
 Bridge Co. v. Kirk, 283, 395, 737
 City v. Fischer, 352
 Monroe v. Atlantic, etc. Ry. Co., 25
 v. Collins, 310
 v. Fred J. Ley, etc. Co., 168
 v. Kilgore, etc. Co., 209*a*
 v. Lattin, 114
 Co. v. Flynt, 256
 Monsen v. Crane, 187, 195
 Monson, etc. Mfg. Co. v. Fuller, 728
 Montague v. Chicago, etc. Ry. Co., 207
 v. Hanson, 704, 705, 706
 Montfort v. Hughes, 244, 248
 v. Schmidt, 654
 Montgomery v. Alabama, G. S. R. Co., 484
 v. Bradley, 375
 v. East Tennessee, etc. R. Co., 94
 v. Koester, 632
 v. Lansing Electric R. Co., 484
 v. Locke, 729
 v. Missouri Pac. Ry. Co., 466
 v. Muskegon Co., 675
 v. Scott, 53
 v. Shirley, 759
 v. Townsend, 274
 v. Wabash, etc. R. Co., 421
 v. Western U. Tel. Co., 554
 v. Wilmington, etc. R. Co., 419, 429
 v. Wright, 289, 376
 Coal Co. v. Barringer, 193, 216, 221
 Co. Bank v. Albany City Bank, 243, 580, 581, 582, 584
 Gas Co. v. Montgomery, etc. R. Co., 93, 108, 413
 St. Ry. Co. v. Mason, 508, 757
 Tr. Co. v. Fitzpatrick, 486
 etc. R. Co. v. Boring, 509
 v. Mallette, 495, 516, 742
 v. Stewart, 520
 Monticello v. Fox, 274
 Montieith v. Finkbeiner, 710
 Montrion v. Jefferys, 558
 Monzi v. Washburn Wire Co., 219
 Moody v. Boston, etc. Ry. Co., 501, 508, 510
 v. Hamilton Mfg. Co., 233
 v. McClelland, 701
 v. McDonald, 748
 v. Minneapolis, etc. R. Co., 452
 v. New York, 285
 v. Osgood, 56, 57, 646, 652, 759, 762
 v. St. Louis, etc. Ry. Co., 480
 v. Ward, 686
 Mooers v. Northern Pac. Ry. Co., 455
 Moon v. Ionia, 368
 v. Northern Pac. R. Co., 206
 v. Richmond, etc. R. Co., 233, 233*a*, 233*b*

[References are to sections.]

- Moone v. Smith, 683
 Mooney v. Connecticut River Lbr. Co., 193, 223
 v. Lloyd, 557
 v. Trow Directory Co., 649
 v. Williams, 303
 Moor v. Ames, 303
 v. Veazie, 333
 Moore v. Abbot, 378
 v. Bible, 332
 v. Camden, etc. Ry. Co., 146
 v. Carter, 140
 v. Cass, 49
 v. Central R. Co., 61, 108, 463, 475
 v. Centralia Coal Co., 223*a*
 v. Chicago, etc. R. Co., 431, 676, 678, 729
 v. Columbia, etc. R. Co., 493
 v. Clear Lake Water Works, 729
 v. Des Moines, 495, 516
 v. Dublin, etc. Mills, 231
 v. Edison Electric Co., 519
 v. Floyd, 619
 v. Gadsden, 13, 14, 343, 467
 v. Godsden, 13*a*
 v. Goedel, 123, 723
 v. Gt. Northern R. Co., 471
 v. Gulf, etc. Ry. Co., 464
 v. Huntington, 289
 v. Kalamazoo, 367, 369, 741
 v. Kansas City, etc. R. Co., 355, 480, 485*a*
 v. Kenockee, 369
 v. Keokuk, etc. R. Co., 481*b*
 v. Kopplin, 65, 164, 175
 v. Levert, 664
 v. Lindsay (App. 2098)
 v. Linneman, 754
 v. Logan Iron, etc. Co., 709
 v. Louisiana Nat. Bank, 580
 v. McNeil, 232
 v. Metropolitan R. Co., 54, 145
 v. Minneapolis, 353
 v. Minneapolis, etc. R. Co., 185
 v. Nashville, etc. Ry. Co., 493
 v. N. Y. Central R. Co., 54, 476
 v. Norfolk, etc. R. Co., 207
 v. Ohio River R. Co., 493
 v. Parker, 709
 v. Pearson, 418, 655
 v. Pennsylvania R. Co., 64, 71, 207*e*
 v. Pierson, 626
 v. Platteville, 368
 v. Pywell (App. 2057)
- Moore v. Richmond, 289, 367, 308, 375
 v. St. Louis Tr. Co., 485*c*
 v. Sanborn, 150, 333
 v. Shreveport, 107
 v. Stanton, 162
 v. Townsend, 476
 v. Wabash, etc. Canal, 371
 v. Wabash, etc. R. Co., 230
 v. Webb, 734
 v. Western U. Tel. Co., 531
 v. Westervelt, 56, 621, 622
 v. White, 657
 Lime Co. v. Richardson's Admr., 232
 Moores v. Winter, 618
 Moorman v. Wood, 558, 566, 567
 Moorshead v. United Rys. Co., 485
 Morain v. Devlin, 121, 699
 Moran v. Brown, 195
 v. Dickinson, 85*a*, 719*a*
 v. Eastern R. Co., 203
 v. Harris, 185, 209*a*
 v. Hollings, 767*a*
 v. Merritt, etc. Co., 738
 v. Milford (App. 2069)
 v. Palmer, 351
 v. Pullman Car Co., 262, 705
 v. Racine Wagon Co., 60, 195
 Morange v. Mix, 592
 Morbach v. Home Min. Co., 207*g*, 215
 Mordecai v. Solomon, 568
 Morden Frog, etc. Works v. Fries, 214*a*, 215
 Moreland v. Boston, etc. R. Co., 51, 495, 502
 v. Leigh, 623
 v. Mitchell Co., 257, 393
 Morelli v. Noera Mfg. Co., 207
 Moren v. New Orleans, etc. Ry. Co., 11
 Morey v. Newfane, 254, 256, 338
 Morgan v. Bowes, 688*a*
 v. Bowman, 167
 v. Carbon Hill Co., 207
 v. Chesapeake, etc. Ry. Co., 495, 518
 v. Cox, 686
 v. Dudley, 303
 v. Fremont Co., 257, 368
 v. Gaisford, 644
 v. Giddings, 567, 570
 v. Hallowell, 356
 v. Hudson River Ore Co., 202
 v. King, 333
 v. Missouri, etc. Ry. Co., 99, 207
 v. Morley, 289
 v. Oregon, etc. Ry. Co., 151

[References are to sections.]

- Morgan v. Pennsylvania R. Co., 97,
 481b, 705
 v. Pleshek, 644
 v. Pritchett, 257
 v. Railroad Co., 334
 v. Rainer, etc. Co., 215
 v. Roberts, 569
 v. Saks, 487
 v. Shelbyville, 260a
 v. Sheppard, 709a
 v. Smith, 164, 225
 v. Southern Pac. Co. (App.
 2055)
 v. So. Pacific R. Co., 763, 764,
 767
 v. Tener, 582
 v. Vale of Neath R. Co., 178,
 180, 239
 v. Van Ingen, 598
 Cons. Co. v. Frank, 203
 Moriarty v. Boston, etc. Ry. Co., 516
 Morman v. Teel, 354
 Morning Light, The, 61
 Morrell v. Peck, 60c, 375, 393
 Morrill v. Deering, 367
 v. Graham, 558
 v. Minneapolis, etc. Ry. Co.,
 486
 Morrin v. Manning, 617
 Morris v. Bd. of Com'rs, 260a
 v. Bowers, 206
 v. Brown, 8
 v. Carbon Co., 584a
 v. Chicago, etc. R. Co., 99, 132
 v. Council Bluffs, 274
 v. Duluth, etc. Ry. Co., 207
 v. East Haven, 111
 v. Eighth Ave. R. Co., 522
 v. Eufaula Nat. Bank, 580,
 580a
 v. Fraker, 419
 v. Lake Shore, etc. R. Co., 56,
 85, 107
 v. Litchfield, 356
 v. N. Y. Cent. Co., 496, 500
 v. N. Y., Ontario, etc. R. Co.,
 488
 v. Platt, 16
 v. St. Louis, etc. R. Co., 434
 v. Salt Lake City, 298, 338,
 353, 354
 v. Strobel, etc. R. Co., 702
 v. Switzerland Co., 256, 257
 v. Trudo, 54, 160a, 162
 v. Western U. Tel. Co., 538
 v. Westminster Bank, 589
 Canal Co. v. Ryerson, 16, 402
 Co. v. Hough, 257
 etc. R. Co. v. Haslan, 88, 476,
 481
- Morrisett v. Canadian, etc. Ry. Co.,
 201
 Morrissey v. Eastern R. Co., 481a
 v. Hughes, 186, 192
 Morriss v. Duluth, etc. Ry. Co., 207
 Morrissey v. Providence, etc. R. Co.,
 27, 466a
 v. Smith, 92
 v. Wiggins Ferry Co., 91, 99
 Morrison v. Broadway R. Co., 508,
 520
 v. Coleman, 737
 v. Cornelius, 656, 662
 v. Davis, 28, 40
 v. Erie R. Co., 75
 v. General Steam Nav. Co.,
 93
 v. Kansas City, etc. Ry. Co.,
 455
 v. Lawrence, 262, 299
 v. Lee, 61, 87
 v. Long Island R. Co., 760
 v. Metropolitan Tel. Co., 719a
 v. N. Y. Central R. Co., 111,
 481b
 v. New Haven R. Co., 436
 v. Roberson, 702
 v. Shelby Co., 376
 v. Superior Water, etc. Co.,
 693
 v. Syracuse, 375
 Morrow v. Atlanta, etc. Ry. Co.,
 485d
 v. Hannibal, etc. R. Co., 433
 v. Missouri Pac. Ry. Co., 744,
 745
 v. Pullman Palace Car Co.,
 526b
 v. Sweeney, 705
 Morrish v. United Rys. Co., 459
 Morse v. Belfast, 352
 v. Boston, 363
 v. Boston, etc. R. Co., 449
 v. Crawford, 121
 v. Minneapolis R. Co., 60b,
 60c, 207e
 v. Richmond, 351, 355
 v. Rutland, etc. R. Co., 449
 v. Sweeney, 313
 v. Worcester, 274, 287
 Morseman v. Manhattan R. Co., 759
 v. Rockland, 346
 Morss v. Boston & Maine R. Co., 443
 Morten v. Western U. Tel. Co., 756
 Morton v. Crane, 303
 v. Detroit, etc. R. Co., 192,
 217, 233a
 v. Gloster, 104
 v. Smith, 343
 Mose v. Hastings, etc. Gas Co., 693

[References are to sections.]

- Moseley v. Black Diamond, etc. Co., 197
 Mosely v. Jamison, 686
 Moser v. St. Paul, etc. R. Co., 451a
 Moses v. Autuono, 739
 v. Louisville, etc. R. Co., 490
 v. So Pacific R. Co., 419, 434
 Mosher v. St. Louis, etc. R. Co., 493
 v. Smithfield, 107
 Moshier v. Utica, etc. R. Co., 413, 672
 Mosier v. Beale, 628
 Moskovitz v. Lighte, 645
 Moskowitz v. Brooklyn, etc. Ry. Co., 523
 Moss v. Augusta, 291
 v. Cummings, 313
 v. Johnson, 184, 489
 v. Pacific R. Co., 190
 v. Philadelphia, etc. Ry. Co., 485bc
 Motey v. Pickle Marble, etc. Co., 28
 v. Southern Finishing, etc. Co., 727a
 Mott v. Cherryvale Water, etc. Co., 265
 v. Consumers' Ice Co., 142, 154
 v. Havana Bank, 587a
 v. Hudson River R. Co., 122, 464
 v. Western U. Tel. Co., 540a
 Mouat Lumber Co. v. Wilmore, 675
 Moulter v. Grand Rapids, 373
 Moulton v. Aldrich, 90, 92, 645
 v. Gage, 217
 v. Jose, 617
 v. Lewiston, etc. Ry. Co., 485bd
 v. Moore, 630
 v. Norton, 618
 v. Sanford, 122, 346, 355
 v. Scarborough, 626
 Mounce v. Lodwick Lbr. Co. (App. 2187)
 Mound City Paint Co. v. Commercial Nat. Bank, 578, 581
 v. Conlon, 146
 Moundsville v. Ohio R. Ry. Co., 414
 Mt. Carmel v. Guthridge, 356
 Vernon v. Brooks, 353, 374, 375
 Mower v. Leicester, 256, 258, 337
 Mowers v. Municipal Gas Co., 693
 Mowrey v. Central R. Co., 91
 Mowry v. Chaney, 115
 v. Western U. Tel. Co., 553, 754
 Moye v. Wrightsville, etc. R. Co., 429
- Moylan v. Second Ave. R. Co., 500, 521
 Moynahan v. Wheeler, 626
 Moynihan v. Hills Co., 185a, 192, 204, 232
 Moyse v. Northern Pac. Ry. Co. (App. 2162)
 Mrozevich v. Western Steel Corp., 223
 Muckel v. Rochester Ry. Co., 749
 Muehlhausen v. St. Louis R. Co., 489
 Mueller v. Milwaukee R. Co., 13
 v. Ross, 379
 v. Washington, etc. Co., 495
 Muench v. Heinemann, 705
 Mugford v. Atlantic, etc. Co., 203
 Muhl v. Southern, etc. R. Co., 136
 Muir v. Thixton, etc. Co., 634
 Mulcairns v. Janesville, 286, 762
 Mulchahey v. Washburn Car Wheel Co., 139
 Mulchey v. Methodist, etc. So., 248
 Muldoon v. Seattle R. Co., 505
 Muldowney v. Illinois, etc. R. Co., 56, 89, 207, 217, 221
 Muldrow v. Missouri, etc. R. Co., 750
 Mulhado v. Brooklyn, etc. R. Co., 508, 521
 Mulhall v. Fallon, 134a
 Mulhern v. Lehigh V. Coal Co., 192
 Mulherrin v. Delaware, etc. R. Co., 64, 128
 Mulholland v. Ideal Mfg. Co., 207
 v. Samuels, 598
 Mullan v. Philadelphia S. S. Co., 226, 230, 234
 v. Wisconsin Cent. R. Co., 512
 Mullany v. Spence, 683, 705
 Mullen v. Glens Falls, 355
 v. Owosso, 376, 379
 v. Rainear, 707
 v. St. John, 58, 59, 60, 159, 343
 v. Wilkes-Barre, etc. Co., 698
 Muller v. Hale, 65, 518
 v. McKesson, 203, 628, 639
 v. Manhattan, etc. Ry. Co., 518
 v. Minken, 710
 v. Newburgh, 369
 v. Schufeldt, 144
 Mullett v. Mason, 633
 Mulligan v. Crimmins, 222
 v. Curtis, 72, 73a, 74
 v. Montana, etc. Ry. Co., 688
 v. N. Y. Central R. Co., 476
 v. Pennsylvania Ry. Co., 729
 v. Rockaway Beach R. Co., 154

[References are to sections.]

- Mullin v. California Horseshoe Co., 209a, 218
 Mullins v. Blaise, 688
 v. Siegel-Cooper Co., 175, 703
 Mulvehill v. Bates, 147
 Mulvey v. R. I. Locomotive Works, 204, 226
 Mulville v. Pacific Mut. Life Ins. Co., 108
 Mumby v. Bowden (App. 2058)
 Mumford v. Chicago, etc. Ry. Co., 208, 209a (App. 2141)
 v. Oxford, 119
 Munch v. N. Y. Central R. Co., 425
 Muncie v. Hey, 353, 368
 Pulp Co. v. Davis, 8 (App. 2137)
 v. Koontz, 734
 St. R. Co. v. Maynard, 474, 485o
 Mundhenke v. Oregon City Mfg. Co., 217
 Mundle v. Hill Mfg. Co., 208, 209a, 214
 Mundy v. N. Y., Lake Erie, etc. R. Co., 407, 731, 733
 Munger v. Tonawanda R. Co., 61, 86, 97, 418
 Munk v. Watertown, 275, 279
 Munn v. City of Hudson, 287
 v. Pittsburgh, 334
 v. Reed, 62, 73, 628, 639
 Munro v. Pac. Coast Dredging Co., 688a, 767 (App. 2055)
 v. Gates, 731
 Munroe v. Ley, 164
 Muntz v. Algiers, etc. Ry. Co., 120a, 413, 485
 Munzer v. Interurban St. Ry. Co., 516
 Murch v. Concord R. Co., 61, 413
 v. Western N. Y., etc. R. Co., 480
 Bros., etc. Co. v. Hayes, 197
 Murdock v. Boston, etc. R. Co., 493
 v. New York, etc. Ex. Co., 645
 v. Warwick, 378
 Muren Coal, etc. Co. v. Copeland, 223a
 Murfreesboro, etc. Co. v. Barrett, 386
 Murgatroyd v. Robinson, 734
 Murphy, Matter of, 310
 v. Atlanta, etc. R. Co., 519
 v. Atlantic Highlands, 287
 v. Booth, 748
 v. Boston Elev. Ry. Co. (App. 2068)
 v. Boston & Albany R. Co., 233
 v. Boston, etc. R. Co., 417a
 [LAW OF NEG. VOL. I—n.]
- Murphy v. Brooklyn, 334
 v. Buffalo, 373
 v. Caralli, 161
 v. Central Park R. Co., 150
 v. Chicago, 283
 v. Chicago, etc. R. Co., 49, 107, 111, 207a, 679
 v. Com'rs of Emigration, 295
 v. Crossan, 184, 193
 v. Dean, 61
 v. Galveston, etc. Ry. Co., 202
 v. Gloucester, 356
 v. Grand Rapids Veneer Wks., 223
 v. Greeley, 223
 v. Hays, 60, 719a
 v. Herold Co., 375
 v. Hughes, 189
 v. Indianapolis, 287
 v. Kelly, 735
 v. Leggett, 362, 365, 703
 v. Nassau El. Light Co., 645
 v. Needham, 258
 v. New Haven R. Co., 139, 767
 v. N. Y. Central, etc. R. Co., 92, 207a, 207e, 770
 v. New York, 174
 v. Orr, 645, 654
 v. Pollock, 190
 v. St. Louis, etc. R. Co., 190, 520, 769
 v. St. Louis Tr. Co., 513
 v. Smith, 227
 v. Southern Pac. Ry. Co., 494, 495, 516, 741, 742
 v. Union R. Co., 493
 v. Wabash R. Co., 61, 201
 v. Wait, 653b
 v. Weidman Co., 654
 v. Wilmington, etc. R. Co., 480
 Murray v. Archer, 699
 v. Boston, etc. Ry. Co., 60a
 v. Currie, 161, 162
 v. Denver, etc. R. Co., 223
 v. Fitchburg R. Co., 481
 v. Gulf, etc. R. Co., 108, 207a, 207b
 v. International S. S. Co., 727a
 v. Knight, 197
 v. Lardner, 20
 v. McShane, 343, 702
 v. Mo. Pacific R. Co., 467, 759
 v. N. Y. Central R. Co., 11, 425
 v. Omaha, 291
 v. Pannaci, 701
 v. St. Louis, etc. R. Co., 238

[References are to sections.]

- Murray v. So. Carolina, etc. R. Co., 57, 180, 241, 419, 432
 v. The Charming Betsy, 322
 v. Usher, 243, 380, 770
 v. Young, 628, 629
 Murrell v. Missouri Pac. Ry. Co., 457, 460
 Murry v. Omaha, 291
 v. Scranton, 70, 72
 Murtaugh v. N. Y. Central R. Co., 25, 185a, 211
 v. St. Louis, 266
 Murthia v. Lovewell, 359
 Murtorg v. Joline, 236
 Muscarelli v. Hodge Fence, etc. Co., 203
 Muse v. Stern, 160
 Musick v. Dold Packing Co., 222
 Musolf v. Duluth, etc. Elec. Co., 698
 Musselman v. Galligher, 115
 Musser v. Lancaster St. R. Co., 410
 Muster v. Chicago, etc. R. Co., 203
 Mutual Life Ins. Co. v. Dake, 592
 Myers v. Baltimore, etc. R. Co., 475, 476
 v. Boston, etc. Ry. Co., 484
 v. Burns, 744
 v. Chicago, etc. Ry. Co., 87 (App. 2071)
 v. Dodd, 655, 657
 v. Fritz, 730
 v. Hinds, 653
 v. Holborn, 605
 v. Hudson Iron Co., 185a, 193
 v. Kansas City, 112, 356
 v. Meinrath, 104
 v. N. Y. Cent. R. Co., 520
 v. Parker, 627
 Myhan v. Louisiana Electric, etc. Co., 698
 Myhra v. Chicago, etc. Ry., 215
 Mynard v. Syracuse, etc. R. Co., 555
 Mynning v. Detroit, etc. R. Co., 54, 107, 114, 481, 769
 Myrick v. Macon, etc. Ry. Co., 520
 Mystic Milling Co. v. Chicago, etc. Ry. Co., 741
 Mytton v. Midland R. Co., 243
 Nadau v. White River Lbr. Co., 192, 219
 Nadeau v. Sawyer, 653b
 Nagel v. Missouri, etc. R. Co., 73, 73a
 v. Missouri Pacific R. Co., 31
 Nagle v. Allegheny Valley R. Co., 73, 73a
 v. California So. R. Co., 521
 Naglee v. Alexandria, etc. R. Co., 163
 Nairn v. National Biscuit Co., 219a
 Nall v. Louisville, etc. R. Co., 185a, 207h, 233
 Nalley v. Hartford Carpet Co., 60c
 Naltner v. Dolan, 575
 Nance v. Newport News, etc. R. Co., 201
 Nanico v. Interborough, etc. Co., 191
 Nanticoke v. Warne, 67
 Nappa v. Erie Ry. Co., 188
 Nappanee v. Ruckman, 743
 Nappli v. Seattle, etc. Ry. Co., 485a
 Narragansett, The, 744
 Narramore v. Cleveland, etc. Ry. Co., 207c
 Nash v. Muldoon, 625a
 v. N. Y. Central, etc. R. Co., 90, 464, 476
 v. Sharpe, 760
 v. Swinburne, 569
 Nashua Iron Co. v. Worcester, etc. R. Co., 24a
 Nashville v. Brown, 289
 v. Sutherland, 287
 Lbr. Co. v. Busbee, 73
 etc. R. Co. v. Anthony, 429
 v. Carroll, 62, 235, 238, 429, 459
 v. Comans, 421, 457
 v. Eakin, 131
 v. Elliott, 178, 219
 v. Flake, 512
 v. Griffin, 493
 v. Handman, 216, 232, 241
 v. Hembree, 25, 428, 429
 v. Hughes, 434
 v. Jones, 184, 235
 v. Lillie, 526b
 v. McDaniel, 91, 233
 v. Messino, 51, 499
 v. Morrow, 421
 v. Nowlin, 62
 v. Prince, 139, 769
 v. Ragan, 415
 v. Spence, 451a
 v. Sadler, 448
 v. Smith, 65
 v. Sprayberry, 132
 v. Starnes, 154
 v. Thomas, 431
 v. Troxlee, 429
 v. Wheless, 233a, 241
 Nason v. Boston, 363
 v. West, 57
 Natchez Cotton Mills v. Mullins (App. 2072)
 etc. Ry. Co. v. Cook, 770
 v. McNeil, 428
 Nathan v. Charlotte St. R. Co., 99
 National Bank v. Graham, 588

[References are to sections.]

- National Bank of Commerce v. Amer. Exch. Bank, 580a
 v. Johnson, 580a
 Biscuit Co. v. Nolan, 762
 v. Wilson, 60, 487, 497, 719a
 Butchers' Bank v. Hubbell, 584a
 Casket Co. v. Powar, 653b, 653e, 748
 Enameling Co. v. Cornell, 223
 Fibre Board Co. v. Lewiston, etc. Elec. Co., 744
 Park Bank v. Seabrook Bank, 580a
 Revere Bank v. Nat. Bank of the Republic, 579, 585
 Steam Navigation Co. v. British Navigation Co., 172
 Subway Co. v. St. Louis, 534
 Syrup Co. v. Carlson, 212
 Nations v. Johnson, 249
 Naughton v. Laclede Gaslight Co., 218
 Nauss v. Boston, etc. R. Co. (App. 2069)
 Navailles v. Dielmann, 653c
 Navastota v. Pearce, 258
 Nave v. Alabama, etc. R. Co., 484
 v. Flack, 704
 Naylor v. Chicago, etc. R. Co., 207e
 v. Salt Lake City, 369
 Neagle v. Syracuse, etc. Ry. Co., 195 (App. 2172)
 Neal v. Gillett, 64, 121
 v. Marion, 375
 v. Northern Pac. R. Co., 239
 v. Price, 619
 v. Randall, 31
 v. Rendell, 644
 v. Southern Ry. Co., 56
 v. Wilmington, etc. Elec. Co., 52, 375
 Neanow v. Uttech, 104, 645, 654
 Neary v. Northern Pac. Ry. Co., 99
 Neas v. Chicago, etc. Ry. Co., 207b
 Neavy v. Citizens, etc. Ry. Co., 480
 Nebraska City v. Campbell, 285, 289, 760
 Tel. Co. v. Jones, 92, 379
 v. State, 556c
 Necker v. Harvey, 225, 244
 Neddo v. Ticonderoga, 376
 Needham v. Grand Trunk R. Co., 131, 133, 138 (App. 2100)
 v. King, 666, 669
 v. Louisville, etc. R. Co., 49, 184, 209a
 v. San Francisco, etc. R. Co., 11, 63, 99, 483
 Needles v. Howard, 22
 Needy v. Littlejohn, 649
 Neeley v. Mapleton, 376
 Neely v. Southwestern, etc. Co., 208
 Neff v. City of Cameron, 70
 v. N. Y. Central R. Co., 199
 v. Wellesley, 260, 375, 481
 Nehr v. State, 634
 Nehrbas v. Central, etc. R. Co., 108, 476 (App. 2055)
 Neier v. Mo. Pacific R. Co., 461
 Neighbour v. Trimmer, 303
 Neilon v. Marinette, etc. Paper Co., 218
 Neilson v. Hillside Coal Co., 207a
 Neiman v. Delaware, etc. Canal Co., 478
 Neimeyer v. Weyerhaeuser, 181
 Neininger v. Cowan, 476
 Neitge v. Chicago, etc. Ry. Co. (App. 2155)
 Nelling v. Chicago, etc. R. Co., 207
 v. Industrial Mfg. Co., 217
 Nelson v. Atlantic, etc. R. Co., 61, 99
 v. Brandford, etc. Co., 698
 v. Burrows, 589
 v. Breman, 370
 v. Canisteo, 281, 289, 334, 335
 v. Central R. Co., 209a
 v. Chesapeake, etc. R. Co., 132
 v. Chicago, etc. R. Co., 111, 216, 472 (App. 2141)
 v. Chicago, M., etc. R. Co., 241c
 v. Crescent City R. Co., 485bc
 v. DuBois, 222
 v. Duluth, etc. R. Co., 476
 v. Galveston, etc. R. Co., 133, 140 (App. 2097)
 v. Godfrey, 703
 v. Great Northern R. Co., 431a
 v. Harrington, 608
 v. Harrington, 609
 v. Helena, 108
 v. Lake Shore, etc. R. Co., 773, 775
 v. Metropolitan St. Ry. Co., 508
 v. Nelson, 573
 v. Ry. Co., 224
 v. St. Paul Plow Works, 207h, 223
 v. Totterall, 597
 v. Vermont, etc. R. Co., 413, 459
 v. Young, 164, 223, 518
 Nesbit v. Garner, 66
 Nesbitt v. Greenville, 358, 367

[References are to sections.]

- Nessley v. Southern Pac. Ry. Co. (App. 2188)
 Netherland-Am. Steam. Co. v. Hollander, 115, 763
 Netter v. Louisville, etc. Ry. Co., 485*bc*
 Netterfield v. New York City Ry. Co., 485*c*
 Nettersheim v. Chicago, etc. R. Co., 481*b*
 Netzer v. Crookston, 287, 374
 Neudærffer v. Brooklyn R. Co., 476
 Neuer v. Metropolitan St. Ry. Co., 513
 Neuman v. Greenleaf Real Est. Co., 699
 Nevera v. Sears, 203
 Neversorry v. Duluth, etc. Ry. Co., 437, 447, 466*a*
 Neville v. Chicago, etc. R. Co., 241*c*
 Nevins v. Bay State Steamb. Co., 550
 v. Peoria, 28, 273, 274, 367
 New Albany, etc. R. Co. v. Aston, 449
 v. McCulloch, 113, 374
 v. McNamara, 428, 430
 v. Maiden, 437
 v. Tilton, 421, 422
 Bedford v. Taunton, 291
 Castle v. Grubbs, 289, 353
 v. Mullen, 376
 Castel Bridge Co. v. Doty, 113
 Ellerslie Fishing Club v. Stewart, 151, 248
 England R. Co. v. Conroy, 232
 Telep., etc. Co. v. Butler (App. 2152)
 etc. Co. v. Laurel Lake Mills, 729, 734
 etc. Ry. Co. v. Hyde, 501
 Galt House v. Chapman, 195
 Hampshire Sav. Bank v. Var-num, 618
 Haven, etc. R. Co. v. Blessing, 481
 Steamboat Co. v. Vanderbilt, 61, 93, 744
 Jersey Express Co. v. Nichols, 56, 63, 64, 86, 108, 112, 114, 760
 R. Co. v. Pollard, 516
 v. Kennard, 519
 v. Morgan, 493
 v. Young, 188, 207*a*, 209*a*, 215
 Steamboat Co. v. Brockett, 493, 513
 Nav. Co. v. Merchants' Bank, 22, 210
 Trans. Co. v. West, 88
- New Jersey Traction Co. v. Danbech, 488
 v. Gardner, 494
 Kioa v. Craven, 260
 Omaha, etc. Co. v. Anderson, 705*a*
 v. Baldwin, 232
 v. Dent (App. 2077)
 Orleans v. Abbagnato, 261
 v. Kerr, 253
 Ins. Asso. v. Harper, 123
 etc. R. Co. v. Bourgeois, 429
 v. Burke, 512, 749
 v. Burkett, 429
 v. Field, 419
 v. Hanning, 143
 v. Harrod's Admr., 25
 v. Hughes, 191, 205, 226
 v. Hurst, 486, 749
 v. Jopes, 154
 v. McEwen, 1
 v. Mitchell, 90
 v. Norwood, 161, 162
 v. Statham, 508, 510, 749
 v. Thomas, 91, 523
 v. Thornton, 426
 Pittsburgh Coal Co. v. Peterson, 232
 Newport News, etc. Ry. Co. v. Deuser, 457
 v. Nicolo Poolos, 485*ab*
 World v. King, 495
 York v. Bailey, 173, 271, 285, 699
 v. Brady, 298, 301, 384
 v. Corliss, 708
 v. Dimick, 301, 384
 v. Furze, 281, 287, 368
 v. Workman, 265
 Biscuit Co. v. Rouss, 203, 219
 etc. Lumber Co. v. Brooklyn, 295
 Min. Co. v. Rogers, 193
 Steam Co. v. Foundation Co., 285
 Tr. Co. v. O'Donnell, 85*a*
 etc. Co. v. Ansonia, etc. Co., 747
 v. Atlantic Refg. Co., 92
 v. Ball, 523
 Mining Co. v. Rogers, 193
 etc. Ry. Co. v. Bennett, 493
 v. Blumenthal, 513*a*
 v. Cooper, 66
 v. Dailey, 201
 v. Doane, 509
 v. Grand Rapids, etc. R. Co., 464*a*
 v. Hamlin, 195*a*
 v. Hyde, 241
 v. Kellam, 476

[References are to sections.]

- Newport, etc. Ry. Co. v. Kistler, 65*a*, 483
 v. Leaman, 468
 v. Lock, 46
 v. Lockwood, 492, 505
 v. Lyons, 209*a*, 221, 520
 v. Maidment, 472
 v. Marion, 199
 v. Middlecoff, 674
 v. Moore, 466
 v. Mushbrush, 492*a* (App. 2061)
 v. O'Leary, 207*g*
 v. Ostman, 201
 v. Rhodes, 415
 v. Robbins, 482
 v. Skinner, 97, 418, 456
 v. Steinbrenner, 66, 142
 v. Thomas, 678
 v. Wilson, 207
 v. Wilson's Admr. (App. 2102)
 v. Winter, 493
 v. Woods, 508
 v. Zumbaugh, 424
 & Brooklyn Sawmill, etc. Co. v. Brooklyn, 255, 285, 291
 Rubber Co. v. Rothery, 729
 & Washington Tel. Co. v. Dryburg, 532, 537, 541, 543, 546, 755
- Newall v. Bartlett, 725
- Newark Elec. Light, etc. Co. v. Garden, 668
 v. Gordin, 698
 etc. R. Co. v. Block, 54, 475, 485*a*, 485*c*
- Newberg v. Long Island, etc. Ry. Co., 481*b*
- Newberry v. Getchell Co., 760
- Newbert v. Cunningham, 624
- Newbold v. Mead, 86
- Newbury v. Getchell, etc. Lbr. Co., 207*h*, 761
- Newby v. Swift & Co., 197
- Newcomb v. Boston Protective Dept., 104, 265, 331
 v. Montgomery Co., 392
 v. New York, etc. Ry. Co., 62, 518
 v. Van Lile, 647
- Newdall v. Young, 705
- Newell v. Smith, 503
 v. Woolfolk, 688*a*
- Newhall v. Ireson, 729
- Newhard v. Pennsylvania R. Co., 463
- Newhart v. St. Paul City R. Co., 214
- Newhouse v. Miller, 654
- Newkirk v. Milk, 633
- Newlin v. Davis, 257
 v. St. Louis, etc. Ry. Co., 132
- Newman v. New York, etc. Ry. Co., 485*a*
 v. Phillipsburg R. Co., 78
 v. Vicksburg, etc. R. Co., 431
- Newnan v. Washington, 557
- Newport v. Miller, 367, 369
 etc. R. Co. v. Dentzel, 233*a*, 233*b*
 etc. Tp. Co. v. Pirmann, 113
 News v. Scott, 353
 etc. R. Co. v. Bradford, 87
 v. Campbell, 207*b*
 v. Carroll, 182
 v. Deuser, 483
 v. Howe, 233*a*
 v. Stewart, 463
- Newsom v. Norfolk, etc. Ry. Co., 467
- Newsome v. Western U. Tel. Co., 541, 753*a*, 755
- Newson v. N. Y. Central R. Co., 92, 471
- Newstrom v. St. Paul, etc. R. Co., 485
- Newton v. Bronson, 597
 v. Central Vt. R. Co., 498, 519, 521
 v. Vulcan Iron Works, 206
 v. Wabash Ry. Co., 65
 v. Worcester, 363
- New York, etc. Ry. Co. v. Kistler, 460, 663
 v. Robbins, 476
- Ney v. Troy, 363
- Niagara Oil Co. v. Jackson, 717, 731
- Niantic Min. Co. v. Leonard, 238
- Niblett v. Nashville, 289
- Nichol v. Canada Southern R. Co., 735
- Nicholas v. Peck, 375
- Nicholds v. Crystal Plate Glass Co., 185*a*, 217
- Nicholls v. Great Southern R. Co., 509
- Nichols v. Baltimore, etc. Ry. Co., 426
 v. Boston, 709*a*
 v. Brabazon, 760
 v. Brush, etc. Mfg. Co., 223
 v. Chicago, etc. R. Co., 202, 241*c*
 v. Laurens, 376
 v. Louisville, etc. R. Co., 483
 v. Marsland, 16, 705, 732
 v. Middlesex R. Co., 508
 v. Minneapolis, 376
 v. St. Paul, 289
 v. Sixth Ave. R. Co., 508, 520
 v. Smith, 58, 111, 690
 v. Thomas, 303
 v. Union Pac. R. Co., 493

[References are to sections.]

- Nichols v. United States, 249
 v. Washington, etc. R. Co., 417a
 v. Winfrey (App. 2075)
- Nicholson v. Atchison, etc. R. Co., 455
 v. Detroit, 291
 v. Erie R. Co., 97, 464, 465, 705
 v. Lancashire, etc. R. Co., 406, 473
 v. Mounsey, 246, 322
 v. Transylvania R. Co. (App. 2173)
- Nickerson v. Bridgeport Hydr. Co., 8, 118, 265
 v. Harriman, 65
- Nickles v. Seaboard, etc. Ry. Co., 497
- Nickey v. Steuder, 27a, 62
- Nicolai v. Baltimore, 392
- Niehaus v. Cooke, 283
- Nield v. London, etc. R. Co., 729
- Nielson v. Cedar Co., 758
- Niemann v. Michigan Cent. R. Co., 436
- Niendorff v. Manhattan R. Co., 760
- Nierenberg v. Wood, 638
- Nigro v. Wilson, 60a
- Nihill v. New York, etc. Ry. Co., 207
- Nilan v. Richmond Gas Co., 355
- Niles v. Martin, 256, 258
- Nilson v. Oakland Tr. Co., 508, 520
- Nims v. Mt. Hermon School, 148
 v. Troy, 287
- Nininger v. Norwood, 735
- Nippert v. Warneke, 701
- Nisbet v. Lawson, 753
- Niskern v. Chicago, etc. R. Co., 679
- Nitrophosphate Co. v. London, etc. Dock Co., 16, 31, 33, 61, 728
- Niver v. Rochester, 376
- Nix v. Texas, etc. Co., 217, 233b
- Nixon v. Bogin, 579
 v. Chicago, etc. R. Co., 90, 476
 v. Selby Lead Co., 232
- Njus v. Chicago, etc. R. Co., 131
- Noakes v. New York, etc. Ry. Co., 66, 472, 476
- Noble v. Cunningham, 471
 v. Desmond, 624, 625a
 v. Doughten, 579
 v. Richmond, 289, 337, 368
 v. St. Joseph, etc. R. Co., 495
 v. Seattle, 2103
- Noblesville Gas Co. v. Loehr, 377
 etc. R. Co. v. Gause, 147
- Noe v. Chicago, etc. R. Co., 731, 750
- Nofsinger v. Goldman, 189
- Nohrden v. Northeastern Ry. Co. (App. 2093)
- Nolan v. Brooklyn, etc. R. Co., 522, 523
 v. King, 361, 375
 v. Labatut et al., 594
 v. Milwaukee, etc. R. Co., 476
 v. New Haven, etc. R. Co., 52
 v. N. Y. & N. H. & H. R. Co. (App. 2127)
 v. New York, etc. Ry. Co., 202, 457
- Noll v. Phil. & Reading R. Co., 207, 225
- Nolton v. Western R. Co., 486, 491, 492, 706
- Nonn v. Chicago City Ry. Co., 65a, 66
- Noonan v. Albany, 262, 274, 735
 v. Consol. Tr. Co., 66
 v. N. Y. Central R. Co., 225, 458
 v. Pardee, 716, 717
 v. Stillwater, 343
- Norbeck v. Philadelphia, 338, 341, 353
- Nordheimer v. Alexander, 18
- Nordstrom v. Spokane Ry. Co., 208
- Nordyke, etc. M. Co. v. Van Sant, 189, 192
- Norfolk, etc. Ry. Co. v. Ampey, 193
 v. Belcher's Admr., 207
 v. Bell, 187
 v. Board of Carroll Co., 332
 v. Bohannon, 675, 750
 v. Brame, 151, 493, 512
 v. Briggs, 207b
 v. Brown, 195, 241
 v. Burge, 457, 477
 v. Carper, 464, 480
 v. Cheatwood, 211a
 v. Crowe, 476
 v. De Board, 481
 v. Donnelly, 241
 v. Dunnaway, 99
 v. Emmert, 217
 v. Ferguson, 57
 v. Fritts, 672
 v. Graham, 207
 v. Groseclose, 78, 488
 v. Harmon, 483
 v. Hoover, 190, 204, 233a
 v. Jackson, 194, 195
 v. Jackson's Admr., 192, 195
 v. Johnson, 421
 v. Lipscomb, 748
 v. McDonald, 209
 v. McGavock, 434
 v. Marshall, 496
 v. Munsell, 775

[References are to sections.]

- Norfolk, etc. Ry. Co. v. Nuckols, 180,
186, 189, 235, 238
v. Nunnally, 193, 207*g*
v. Ormsby, 49, 78
v. Perrow, 672
v. Phelps, 186
v. Phillips' Admr., 186, 223
v. Prinnell, 508
v. Rhodes, 494
v. Shott, 488
v. Spears, 739
v. Spencer's Admr., 775
v. Spratley, 743
v. Stegall's Admx., 480
v. Stone, 478
v. Tanner, 494, 505
v. Thomas, 185, 233, 672
v. Ward, 222
v. Wilson, 476
v. Wood, 484
v. Wysor, 493
etc. Tr. Co. v. Ellington, 184
v. Miller, 749
v. Morris, 508
- Normal v. Gresham, 377
- Norman v. Ince, 283
v. Southern Ry. Co., 208, 209
v. Western U. Tel. Co., 540*a*
- Normania, The, 515
- Normile v. Ballard, 253
v. Wheeling Trac. Co., 508
etc. Ter. Co. v. Morris' Admr.,
61, 87
- Norris v. Androscoggin R. Co., 421,
438, 451*a*
v. Atlantic, etc. Ry. Co., 476
v. Hugh Nawn, etc. Co., 705
v. Illinois, etc. Ry. Co., 207*b*
v. Kohler, 158
v. Litchfield, 61, 93, 94, 104,
379, 393, 698
v. Saxton, 652
v. Southern Ry. Co., 512, 516
v. Vermont Cent. R. Co., 415
v. Warner, 628, 630
- Norristown v. Fitzpatrick, 262
v. Moyer, 354
- North v. Smith, 150, 645
Alabama Tr. Co. v. Thomas,
485*bd*
American, etc. House v. Mc-
Elligott, 85*a*
Baltimore R. Co. v. Arnreich,
485*c*
Birmingham R. Co. v. Colder-
wood, 96, 110
Chicago, etc. Ry. Co. v. Auf-
mann, 207*g*
R. Co. v. Brodie, 773
St. Ry. Co. v. Confield, 525
- North St. Ry. Co. v. Cook, 508
v. Cossar, 370, 653
v. Cotton, 516
v. Denebner, 756
v. Duebner, 761
v. Duageon, 175
v. Eldridge, 114, 519
v. Gastka, 151
v. Smadraff, 485*a*
v. Williams, 499, 520
v. Wrixon, 495
Rolling Mill Co. v. Johnson,
238, 471
Eastern Co. v. Sineath, 432
Fork Lumber Co. v. Southern
Ry. Co., 30
Hudson R. Co. v. Flannigan,
481*a*
Lebanon v. Arnold, 256
Manheim v. Arnold, 355
Pkg., etc. Co. v. Western U.
Tel. Co., 543*a*, 553
Penn. R. Co. v. Heileman, 463,
476
v. Kirk, 85, 85*c*, 114, 766
(App. 2091)
v. Mahoney, 73, 77, 78
v. Rehman, 418, 659
v. Robinson, 472
Point, etc. Co. v. Utah, etc.
Canal Co., 734
Side R. Co. v. Tippins, 485*a*
Staffordshire R. Co. v. Dale,
416
Vernon v. Voegler, 272, 274
- Northcott v. Smith, 641
- Northeastern R. Co. v. Barnett, 144
v. Martin, 428
- Northern Alabama Ry. Co. v. Key,
207*b* (App. 2121)
v. Mansell, 223 (App. 2121)
Central Ry. Co. v. Green, 429,
432
v. State, 58, 61, 93, 108, 111
Coal, etc. Co. v. Allera, 195
Indiana R. Co. v. Martin, 455
Pac. Coal Co. v. Richmond,
218
Pac. Ry. Co. v. Adams, 46
(App. 2058)
v. Altimus, 207*g*
v. Amato, 207*g*
v. Babcock, 132
v. Charless, 232
v. Dixon, 184*a*, 207*b*, 232
v. Egeland, 207*h*, 232
v. Everett, 207*g*
v. Freeman, 476
v. Hambly, 232
v. Herbert, 191, 192

[References are to sections.]

- Northern Pac. Ry. Co. v. Jones, 61, 94
 v. Key, 202
 v. Mansell, 201
 v. Mares, 189, 211
 v. Peterson, 232
 v. Spike, 478
 v. Wendel, 207, 217
 etc. R. Co. v. Price, 61, 95, 99
 R. Co. v. Amato, 114, 185b
 v. Austin, 478
 v. Babcock, 132, 133, 215
 v. Beaton, 239
 v. Blake, 197
 v. Cavanaugh, 233a
 v. Charless, 203, 205, 239
 v. Craft, 225
 v. Egeland, 186, 207a
 v. Ellison, 129
 v. Everett, 185b, 213, 217
 v. Hambly, 232, 235, 239, 241
 v. Herbert, 193, 194, 204, 205, 233a, 241a
 v. Hogan, 241a
 v. Lewis, 666, 675, 678, 679
 v. Mares, 108, 191, 211, 216
 v. Mase, 233a, 241c
 v. Mortenson, 199
 v. Nickels, 207b
 v. O'Brien, 108, 238
 v. Pauson, 493
 v. Peterson, 230, 235
 v. Poirier, 204
 v. Smith, 233a
 v. Urlin, 60a
 Texas Tr. Co. v. Roye, 497
 Transp. Co. v. Chicago, 701
 v. Hunt, 485c
- Northrup v. Pontiac, 339, 354
- Northwestern Fuel Co. v. Danielson, 186, 203
 R. Co. v. Hack, 492
 etc. Ry. Co. v. O'Malley, 705
- Norton v. Columbia Elec. St. Ry. Co., 61
 v. Consolidated Ry. Co., 493
 v. Cooper, 569
 v. Eastern R. Co., 417, 426, 470
 v. Ittner, 87
 v. Louisville, etc. R. Co., 209a
 v. Mansfield, 299
 v. St. Louis, 343
 v. Scholefield, 734
 v. Sewall, 38, 117, 690
 v. Volentine, 729
 v. Volzke, 73a, 218
 v. Webber, 644
 v. Wiswall, 708
 Coal Co. v. Hank's Admr., 203
 v. Murphy, 197
- Norton Coal Co. v. Wheeler, 209a
 Norvell v. Kanawha, etc. Co., 523
 Norwalk Gas Co. v. Norwalk, 166, 168, 175
 Norway v. Jensen, 238
 Norwich v. Breed, 703
 Gas Co. v. Norwich City Gas Co., 358
 Norwood v. Raleigh, etc. R. Co., 26, 475, 483
 v. Somerville, 356, 376
 Nosler v. Chicago, etc. R. Co., 477, 482
 Novelty Theatre Co. v. Whitecomb, 151
 Novock v. Michigan Cent. R. Co., 207
 Nowell v. Wright, 313, 340
 Noxon v. Hill, 303
 Noyes v. Boscawen, 66
 v. Colby, 627, 633
 v. Gardner, 368
 v. Shepherd, 87
 v. Smith, 180, 187, 192
 v. Wood, 195
 Nuckolls v. Gaut, 656
 Nugent v. Boston, etc. R. Co., 114, 120a, 413, 459
 v. Kauffman Milling Co., 203
 v. Metropolitan St. Ry. Co., 485bc
 v. Mississippi Levee Com'rs, 328
 v. Smith, 16
- Nulsen v. Priesmeyer, 632
 Nunco v. Central Ry. Co., 480
 Nunn v. Georgia R. Co., 510
 Nurse v. St. Louis, etc. R. Co., 492
 Nutt v. Southern Pac. R. Co., 187, 192, 195
 Nutter v. Gallagher, 737
 Nutting v. Conn. River R. Co., 503, 544
 Nutzmann v. Germania Life Ins. Co., 719a
 Nuzum v. Pittsburgh, etc. R. Co., 468, 481
 Nye v. Dibley, 367
 Nyback v. Champagne Lbr. Co., 165
- Oakes v. Hill, 310
 v. Maine Cent. Ry. Co., 769 (App. 2065)
 v. Spalding, 635
 Mfg. Co. v. New York, 286
 Oakham v. Holbrook, 16, 353
 Oakland Agric. Soc. v. Bingham, 154
 R. Co. v. Fielding, 115, 408, 763

[References are to sections.]

- Oakland Woolen Co. v. Union Gas Co., 729, 730
 etc. Soc. v. Bingham, 151
 Oates v. Metropolitan St. Ry. Co., 93, 485*bd*
 v. Union Pac. R. Co., 133
 Oatts v. Cincinnati, etc. R. Co., 484
 O'Bannon v. Louisville, etc. R. Co., 422
 O'Barr v. Alexander, 559
 O'Beirne v. New York, etc. Ry. Co., 470
 Ober v. Crescent City R. Co., 520
 Oberdorfer v. Phila, etc. R. Co., 475
 Oberfelder v. Doran, 719*a*
 Obert v. Dunn, 701
 Obertoni v. Boston, etc. R. Co., 60, 154*a*
 O'Brien v. Blue Hill St. Ry., 485*bd*
 v. Capwell, 708
 v. Corra Rock, etc. Co., 689
 v. Derby, 291
 v. Dredging Co., 232
 v. Greenbaum, 708
 v. Loomis, 760
 v. McGlinchy, 74, 79, 114
 v. Miller, 647
 v. N. Y. Cent. R. Co., 493
 v. New York, etc. Ry. Co., 463
 v. Omaha Water W. Co., 113
 v. Rideout, 232, 241*b*
 v. St. Louis Tr. Co., 501, 508
 v. St. Paul, 274, 287
 v. Tatum, 108, 719
 v. Western Steel Co., 719*a*
 v. J. G. White & Co., 122
 v. Wisconsin Cent. Ry. Co., 13, 73*a*
 O'Bryan v. Amsterdam, 375
 v. Webb, 622
 O'Callaghan v. Bode, 704, 706
 v. Dellwood Park Co., 487, 494, 516
 Occidental, etc. Ry. Co. v. Comstock Tunnel Co., 740
 Ocean S. S. Co. v. Cheeney, 191, 238
 v. Matthews, 206
 Oceanic Steam Nav. Co. v. Campania Tr. Espanola, 24*a*, 285, 725
 Och v. Missouri, etc. R. Co., 516
 Ocheltree v. Chicago, etc. R. Co., 426
 Ochsenbein v. Shapley, 96, 101, 150
 O'Clair v. Rhode Island Co., 494, 516
 O'Connell v. Baltimore, etc. R. Co., 180, 233
 v. Jarvis, 626
 v. Lewiston, 104
 O'Connell v. St. Louis Cable, etc. R. Co., 495
 v. St. Paul R. Co., 485*c*
 v. Samuel, 150
 O'Connor v. Adams, 46, 114, 203
 v. Andrews, 12*a*, 702, 709, 710
 v. Armour Pkg. Co., 114
 v. Boston, etc. R. Co., 73, 73*a*
 v. Detroit, 376
 v. Fond du Lac, etc. R. Co., 735
 v. Gillaspay, 193, 206
 v. Illinois Cent. R. Co., 16, 73
 v. Missouri Pac. R. Co., 92, 113, 463
 v. New York, 363
 v. New York, etc. Ry. Co. (App. 2068)
 v. North Truckee Co., 94
 v. Pittsburg, 283, 332, 334*a*
 v. Whittall, 218
 Odell v. Bretney, 362
 v. N. Y. Central R. Co., 207
 v. Schroeder, 291
 v. Solomon, 712
 Odin Coal Co. v. Tadlock, 221
 Odivrne v. Syford, 731
 Odlin v. Stetson, 563
 O'Doherty v. Cable Co., 771
 O'Donnell v. Allegheny Valley R. Co., 61, 184, 192, 239, 488, 523
 v. Chicago, etc. Ry. Co., 486
 v. Duluth, etc. R. Co., 223, 406
 v. East River Gas Co., 197
 v. Hannibal, 367, 375
 v. John H. Parker Co., 197
 v. Kansas City St. Ry. Co., 489, 513*a*
 v. Louisville, etc. Ry. Co., 523
 v. O'Neill, 653*b*
 v. Patton, 61, 706
 v. Providence, etc. R. Co., 469
 v. Riter-Conly, etc. Co., 13
 v. Syracuse, 253, 262, 287, 299
 v. White, 283
 O'Donohoe v. Whitty, 566
 O'Driscoll v. Faxon, 215
 O'Dwyer v. Northern Market Co., 353
 v. O'Brien, 708, 710
 Oerter v. Ziegler, 710
 Oesterreich v. Detroit, 375
 O'Fallon Coal Co. v. Laquet, 769
 Ofner v. Erie, etc. Ry. Co., 120*a*, 459
 O'Flaherty v. Union, etc. R. Co., 71, 72, 73*a*
 O'Gara v. Transit Co., 497
 Ogburn v. Connor, 735

[References are to sections.]

- Ogden v. Rummens, 192
 Ogg v. Lansing, 255, 266, 291
 Ogeir v. Albany R. Co., 481a
 Ogilvie v. Edinburgh, 291
 Oglesby v. Smith, 654
 Ogley v. Miles, 218, 219
 O'Hale v. Sacramento, 258
 O'Halloran v. Marshall, 568
 O'Hara v. Brophy, 562
 v. Laclede Gaslight Co., 174
 O'Harra v. Portland, 254
 Ohio, etc. R. Co. v. Allender, 489
 v. Applewhite, 540
 v. Brubaker, 421
 v. Burrow, 95
 v. Cole, 426, 448
 v. Collarn, 53, 180, 190, 206
 v. Cope, 493
 v. Craycraft, 451a
 v. Dickerson (App. 2061)
 v. Dunbar, 120a, 459
 v. Dunn, 190, 222
 v. Eaves, 482
 v. Edwards, 208
 v. Fitch, 445, 446
 v. Gullett, 61
 v. Hammersley, 60a, 71, 234
 v. Heaton, 193
 v. Hecht, 61, 760
 v. Hill, 475
 v. Hutchings, 215
 v. Jones, 451a
 v. Lackey, 16, 422
 v. McCartney, 672
 v. McDonald, 461, 468
 v. Meisenheimer, 423
 v. Muhling, 486
 v. Nickless, 113
 v. O'Donnell, 431
 v. Pearcy, 56b, 217, 233a
 v. People, 421
 v. Reed, 468, 485
 v. Robb, 238
 v. Schiebe, 521
 v. Selby, 485, 492, 505
 v. Shanefelt, 678, 680
 v. Simms, 506
 v. Stein, 233a
 v. Stransberry, 506
 v. Stratton, 99, 520
 v. Stribling, 428
 v. Tindall, 241, 766, 769 (App. 2061)
 v. Trowbridge, 355
 v. Voight, 516, 519
 v. Wachter, 735
 v. Walker, 113, 463, 483
 etc. R. Co. v. Wangelin, 54, 774
 So. R. Co. v. Morey, 175
- Ohio Valley R. Co. v. McKinley, 207e
 v. Watson, 513a
 Valley, etc. Ry. Co. v. Watson's Admr., 497
 Valley Trust Co. v. Wernke, 719a
 Ohliger v. Toledo, 759
 Ohnmacht v. Mt. Morris Elec. Co. (App. 2083)
 Oil City Fuel Co. v. Boundy, 93
 Gas Co. v. Robinson, 65, 94, 696
 Creek R. Co. v. Keighron, 26, 141, 161, 666
 O'Kane v. Treat, 336
 O'Keefe v. Chicago, etc. R. Co., 94, 102, 114, 480
 Olathe v. Mizze, 375
 O'Laughlin v. Boston & Maine R. Co., 512
 v. Dubuque, 351, 375
 Old Colony R. Co. v. Stevens, 24a
 Oldenburg v. N. Y. Central R. Co., 114, 477, 478
 Oldfield v. Harlem R. Co., 73a, 83, 135, 137, 410, 775
 Oldham v. Sparks, 568
 Oldstein v. Firemen's Bldg. Ass'n, 371
 O'Leary v. Chicago, etc. Ry. Co., 429
 Oleson v. Lake Shore, etc. R. Co., 478
 v. Tolford, 53
 Olfermann v. Union Depot R. Co., 516
 O'Linda v. Lothrop, 703
 O'Loughlin v. N. Y. Central R. Co., 190, 207a
 Olive v. Marble Co., 683
 v. State, 333
 v. Whitney Marble Co., 148
 Oliver v. Denver, 351
 v. Fort Smith Tr. Co., 523
 v. Hutchinson, 656
 v. Iowa, etc. Ry. Co., 480
 v. Kansas City, 334
 v. La Valle, 55, 742
 v. Louisville, etc. R. Co., 518, 523
 v. North East R. Co., 408
 v. No. Pac. Tr. Co., 758
 v. Ohio, etc. Ry. Co., 221
 v. Worcester, 258, 259
 Ollis v. Houston, etc. Ry. Co., 73, 73a
 Olmstead v. Brewer, 303
 v. Dennis, 314
 Olney v. Omaha St. Ry. Co., 485ab
 v. Riley, 367

[References are to sections.]

- Olsen v. Chicago, etc. Ry., 495
 v. Citizens, etc. Ry. Co., 494, 516
 v. Kelly Coal Co., 206
 v. Montana Ore Purchasing Co. (App. 2077)
 v. Nebraska Tel. Co., 114
 v. Northern Pac. Lbr. Co., 207g
- Olson v. Chicago, etc. R. Co., 451, 475
 v. Chippewa Falls, 378
 v. Erickson, 85a
 v. Gill, 73, 689
 v. Kelly Coal Co., 205
 v. McMurray Cedar Lumber Co., 216
 v. Northern Pac. Ry. Co., 207g, 475, 476
 v. St. Paul, etc. R. Co., 207e, 209a, 513a, 735
 v. St. Paul, etc. R. Co., 185
 v. Worcester, 338, 369
- Olund v. Worcester Consol. St. Ry. Co., 520, 522
- Olwell v. Milwaukee, 47
- Omaha v. Ayer, 108, 376
 v. Cunningham, 356
 v. Jensen, 298, 356
 v. Olmstead, 289
 v. Randolph, 356
 Bridge Co. v. Hargadine, 164
 Fair Ass'n v. Missouri Pac. R. Co., 679
 Gas Co. v. Omaha, 384
 St. Ry. Co. v. Boesen, 518
 v. Cameron, 480, 485a
 v. Duvall, 480
 v. Lochneisen, 54
 v. Martin, 54
 etc. R. Co. v. Brady, 54, 417, 426, 466
 v. Brown, 283, 731
 v. Chollette, 49, 522
 v. Clark, 426
 v. Cook, 483
 v. Crow, 492, 503
 v. Doolittle, 93
 v. Emminger, 759
 v. Kraysenbuhl, 207a, 213, 238, 460
 v. Martin, 99, 520
 v. Morgan, 225, 459b, 481a, 644a
 v. O'Donnell, 482
 v. Ryburn, 417
 v. Severin, 424a
 v. Standen, 406
 v. Talbot, 66, 469, 473, 476, 485
 v. Theiler, 208
- Omaha, etc. R. Co. v. Wright, 428
- O'Maley v. Dorn, 649
 v. So. Boston Gaslight Co., 114, 216, 241b
- O'Malley v. Gerth, 703
 v. N. Y., Lake Erie, etc. R. Co., 207b, 217
 v. St. Paul, etc. R. Co., 73
- O'Mara v. Delaware, etc. Canal Co., 479
 v. Hudson River R. Co., 137, 458, 481, 763, 769, 775
 v. St. Louis, etc. Ry. Co., 486, 520
- O'Meara v. New York, 265, 295
- O'Mellia v. Kansas City, etc. R. Co., 207a, 211, 775 (App. 2076)
- Ominger v. N. Y. Cent. R. Co., 477
- Omslaer v. Pittsburg, etc. Tr. Co., 485c
 v. Traction Co., 475, 476
- O'Neal v. Chicago, etc. R. Co., 209a
 v. Karr, 209a
- O'Neil v. Detroit, 353
 v. Dry Dock, etc. R. Co., 460, 480, 485a
 v. Lynn, etc. R. Co., 518
 v. N. Y., Ontario, etc. R. Co., 675, 678
 v. O'Leary, 241b
 v. New Orleans, 289
 v. N. Y., Ontario, etc. R. Co., 30
 v. St. Louis, etc. R. Co., 459
 v. So. Carolina R. Co., 751
 v. South, etc. R. Co. (App. 2173)
 v. West Branch, 369
- O'Neile v. Neilson, 61
- O'Neill v. Blase, 626, 628
 v. Keokuk, etc. R. Co., 207b
 v. New York, etc. Ry. Co., 30, 668
 v. St. Louis, etc. R. Co., 197
 v. Third Ave. R. Co., 485c
- Onderdonk v. N. Y. & Sea Beach R. Co., 509
 v. Smith, 725
- Onesti v. Central, etc. Ry. Co., (App. 2171)
- Ongaro v. Twohy, 235
- Onondaga Co. Bank v. Bates, 597
- Oolitic Stone Co. v. Ridge, 203, 231
- Opdycke v. Public Service Ry. Co., 378
- Opsahl v. Judd, 104 (App. 2071)
- Orange, etc. R. Co. v. Miles, 57
 v. Ward, 114
- Orcutt v. Century Bldg. Co., 518, 719a

[References are to sections.]

- Orcutt v. Kittery Bridge Co., 370,
 397
 v. Northern Pac. R. Co., 490
 v. Pacific Coast R. Co., 427
 Ordway v. Bacon, 618
 v. Canisteo, 285
 O'Regan v. Cunard S. S. Co., 513*a*
 Oregon Co. v. Roe, 487
 R. Co. v. Smalley, 422
 etc. Lbr. Co. v. Portland S. S.
 Co., 209*a*
 etc. R. Co. v. Tracey, 207*a*,
 216
 O'Reilly v. Brooklyn, etc. Ry. Co.,
 481*b*
 v. N. Y. & New England R.
 Co., 132, 133
 v. Utah, etc. Stage Co., 654
 Orendorff v. Terminal, etc. Ass'n
 (App. 2161)
 Orgall v. Burlington, etc. R. Co., 137
 Orgal v. Chicago, etc. Ry. Co. (App.
 2078)
 Orient Ins. Co. v. Northern Pac. Ry.
 Co., 113
 Oriental, The v. Barclay, 223
 Orlando v. Heard, 108
 v. Pragg, 299
 Orleans v. Perry, 94, 376
 Orman v. Maddix, 233
 Ormon v. Salvo (App. 2126)
 Ormond v. Holland, 184
 Ormsbee v. Boston, etc. R. Co., 88,
 476, 481, 482 (App. 2093)
 Orne v. Roberts, 628
 Ornes v. Wabash, etc. Ry. Co., 513
 O'Rorke v. Union Pac. R. Co., 208
 O'Rourke v. Finch, 627, 635
 v. Hart, 175
 v. Lindell Ry. Co., 66
 v. Monroe, 356
 v. Peck, 726
 v. Sioux Falls, 262
 v. Union, etc. Ry. Co., 211
 Orr v. Cedar Rapids, etc. R. Co.,
 114, 483
 v. Watterson, 187
 Ortolano v. Morgan Ry., etc. Co., 467
 (App. 2064)
 Orsdol v. Burlington, etc. R. Co., 729
 Ortmayer v. Johnson, 723
 Orttel v. Chicago, etc. R. Co., 197
 Orvif v. Elmira, etc. R. Co., 733
 Osage City v. Larkins, 365
 Osborn v. Adams, 635
 v. Gillett, 124
 v. Jenkinson, 646
 v. Lenox, 628
 v. Van Dyke, 26, 27*a*
 Osborne v. Detroit, 368, 375
 Osborne v. Hamilton, 367, 368
 v. Knox, etc. R. Co., 182
 v. London, etc. R. Co., 209*a*,
 214
 v. McMasters, 145
 v. Morgan, 243, 245
 Osgood v. Los Angeles Tr. Co., 494,
 516
 O'Shea v. Lehigh Valley Ry. Co., 73*a*
 (App. 2083)
 O'Shaughnessy v. Suffolk Brewing
 Co., 73*a*
 Oshkosh v. Milwaukee, etc. R. Co.,
 359
 Osincup v. Nichols, 628
 Osmond v. Widdicombe, 390
 Osteen v. Southern Ry. Co. (App.
 2093)
 Osterheldt v. Peoples, 644
 Osterholm v. Boston, etc. Ry. Co.,
 760
 Osterman v. Boston, etc. Co., 223*a*
 Ostertag v. Pacific R. Co., 479
 Osten v. Jerome, 735
 Ostrom v. San Antonio, 253
 O'Sullivan v. Victoria R. Co., 180
 Oszkoscil v. Eagle Pencil Co., 218
 Otey v. Bradley, 762
 Otis v. Janesville, 66
 v. Thorn, 66
 O'Toole v. New England Gas, etc. Co.,
 207, 209*a*, 217
 v. Pittsburgh, etc. R. Co., 477
 Ott v. Buffalo, 377
 v. Johnson (App. 2098)
 Ottawa v. Parks, 384
 v. Walker, 336
 v. Washabaugh, 289
 Gas Co. v. Graham, 750
 Otten v. Cohen, 36
 Ottendorff v. Willis, 645
 Ottersbach v. Philadelphia, 693
 Ottolengui v. Seattle, 334
 Ouderkirk v. Central Nat. Bank, 588
 Ouillette v. Overman Wheel Co.,
 184*a*, 222
 Ould v. Richmond, 254
 Oulighan v. Butler, 65, 122, 689
 (App. 2068)
 Ouimette v. Chicago, 373
 Outen v. North, etc. St. R. Co., 520
 Ouerson v. Grafton, 66, 355, 376
 Over v. Missouri, etc. Ry. Co., 464
 Overby v. Chesapeake, etc. R. Co.,
 106, 108, 110
 v. Mears Min. Co., 773
 Overholt v. Vieths, 704, 772
 Overman Wheel Co. v. Griffin, 111,
 212
 Overton v. Freeman, 169, 173, 699

[References are to sections.]

- Oviatt v. Dakota Central R. Co., 513a
 Ovington v. Lowell, etc. R. Co., 408
 Owen v. Brockschmidt, 767, 770
 v. Ft. Dodge, 368, 373, 377
 v. Gt. Western R. Co., 509
 v. Hudson Riv. R. Co., 94a, 410
 v. New York, 274
 v. State, 249
 Co. v. Washington, 390
 Owens v. Atlantic, etc. Ry. Co., 518, 520
 v. Gatewood, 621
 v. Kansas City, etc. R. Co., 508, 758
 v. Pennsylvania R. Co., 464, 478
 v. People's R. Co., 485c
 v. Richmond, etc. R. Co., 108
 Owensboro City Ry. v. Barber, etc. Co., 408
 v. Lyddane, 485bd
 Stove Co. v. Dougherty, 218
 Water Co. v. Duncan, 22, 118
 etc. Ry. Co. v. Barclay (App. 2063)
 etc. Telep. Co. v. Wisdom, 757
 Owings v. Jones, 86, 108, 120, 709a, 726
 Oxford v. Leathe, 120
 v. Peter, 146
 Lake Line v. Steadham, 426
 Oystherbank v. Gardner, 719
 Ozagar v. Pierce, etc. Mfg. Co. (App. 2171)
 Ozan Lbr. Co. v. Bryan, 193
 Ozanne v. Ill. Cent. R. Co., 51
- Pabst v. Hinesly, 701
 Pacetti v. Central of Ga. Ry. Co., 85a
 Pacific Coast Co. v. Jenkins, 485d
 Cable Co. v. Fleischner, 540
 Live Stock Co. v. Murray, 656
 Postal Tel. Co. v. Bank of Palo Alto, 539a
 R. Co. v. Brown, 451a
 v. Houts, 461
 Tel. Co. v. Underwood, 554
 Pack v. New York, 144, 165, 166, 168, 173, 298
 Packard v. Hannibal, etc. Ry. Co. (App. 2074, 2076)
 v. New Bedford, 376
 v. Voltz, 256
 Packet Co. v. McCue, 65
 Paddleford v. Eagle Grove, 353
 Paddock v. Atchison, etc. R. Co., 493, 761a
 v. Cameron, 618
- Paddock v. Northeastern R. Co., 406
 v. Somes, 735
 Paducah City Ry. Co. v. Alexander's Admr., 485c
 Lumber Co. v. Paducah Water Co., 22, 265
 Tr. Co. v. Sine, 65a, 122
 etc. R. Co. v. Hoehl, 61, 73a, 108, 468, 477
 Paff v. Slack, 628
 Pagan v. City of Highland, 187, 193
 v. Southern Ry. Co., 191 (App. 2183)
 Page v. Bucksport, 28, 85c, 346
 v. Defries, 146
 v. Hollingsworth, 627, 655
 v. Mille Lacs Lumber Co., 737
 v. Olcott, 663
 v. No. Carolina R. Co., 433
 v. Robinson, 119
 v. Weatherfield, 262, 334
 Co. v. Rose, 584a
 Pahlman v. Detroit, etc. Ry. Co., 192
 Paige v. Dempsey, 244, 688a
 v. Illinois Steel Co., 85a, 207a
 Paine v. Boston, 249
 v. Delhi, 287
 v. Eastern R. Co., 192, 193 (App. 2105)
 Painter v. Pittsburgh, 165, 173, 699
 Painton v. Northern Cent. R. Co., 54
 v. Pittsburgh, 298
 Pakalinsky v. N. Y. Central R. Co., 62, 458, 467, 472
 Paland v. Chicago, etc. Ry. Co., 207e
 Palfrey v. Portland, etc. R. Co., 124
 Palmer v. Andover, 346, 348, 356, 378, 393
 v. Ashley, 559
 v. Barker, 649
 v. Crane, 623
 v. Dearing, 87, 111, 114, 710
 v. Delaware, etc. Canal Co., 45, 46, 54, 497, 516
 v. Denver, etc. R. Co., 197
 v. Gallup, 619, 620
 v. Gordon, 54, 720
 v. Holland, 582
 v. Lincoln, 298
 v. Manhattan R. Co., 150, 154
 v. Michigan Cent. R. Co., 203, 230, 233
 v. Missouri Pac. R. Co., 58, 676, 680
 v. Mulligan, 730
 v. N. Y. Cent. R. Co., 466, 477, 481b
 v. Northern Pac. Ry. Co., 428
 v. Oregon, etc. Ry. Co., 65, 73
 v. Penn. Co., 519

[References are to sections.]

- Palmer v. Portland Ry., etc. Co., 485c
 v. Portsmouth, 346, 370
 v. St. Albans, 266
 v. St. Louis, etc. Ry. Co., 460, 480
 v. St. Paul, etc. R. Co., 427
 v. Schultz, 1
 v. Schulz, 49
 v. Silverthorn, 656
 v. Utah, etc. R. Co., 413
 v. Warren St. Ry. Co., 494, 516
 v. Wick, etc. S. S. Co., 24a, 242
 v. Winston-Salem, etc. Ry. Co., 513
 Trans. Co. v. Paducah Ry. Co., 485ab
 v. Smith, 489, 491
 Palmeri v. Manhattan Ry. Co., 513
 Palos Coa., etc. Co. v. Benson, 151
 Paltey v. Eagan, 175, 701
 Palys v. Erie R. Co., 475
 Pana Coal Co. v. Buker, 215
 Pannell v. Nashville, etc. R. Co., 476
 Pantages v. Seattle Elec. Co., 485a
 Pantam v. Isham, 665
 Panton v. Holland, 701
 Pantzar v. Tilly, etc. Mining Co., 197, 204, 207a, 230, 233
 Paolino v. McKendall, 73
 Pappa v. Rose, 310
 Paper Co. v. Mills, 734
 Parcels v. Auburn, 377
 Pardee v. Robertson, 619, 623
 Parfitt v. Sterling Veneer, etc. Co., 215
 v. Jenkins, 262
 etc. Ry. Co. v. Calvin, 426
 v. Robinson, 773
 Parish v. Baid, 750
 v. Eden, 368
 Park v. N. Y. Central R. Co., 190
 v. North Port Smelting Co., 750
 v. O'Brien, 107, 114, 634, 639, 654
 Hotel Co. v. Lockhart, 193, 195
 Parke Co. v. Sappenfield, 393
 Parker v. Adams, 107, 654
 v. Barnard, 704, 705
 v. Boston, etc. R. Co., 393, 759
 v. Boston, etc. Steamboat Co., 506, 518, 760
 v. Crowell, etc. Lbr. Co., 769 (App. 2064)
 v. Fenn, 619
 v. Georgia Pac. R. Co., 61, 87
- Parker v. Griswold, 733
 v. Hannibal, etc. R. Co., 238
 v. Lake Shore, etc. R. Co., 424, 427
 v. Laredo, 287
 v. Lowell, 287
 v. Macon, 262, 289, 354
 v. Mise, 748
 v. N. Y. & New England R. Co., 203a, 241
 v. New York, etc. Ry. Co., 191
 v. North Carolina, etc. Ry. Co., 120a, 413, 459
 v. Pennsylvania Co., 480
 v. Portland Pub. Co., 97
 v. Rensselaer, etc. R. Co., 435, 444
 v. Rolls, 574
 v. South Carolina, etc. Ry. Co., 758
 v. Springfield, 376
 v. Walrod, 303
 v. Washington Elec. St. Ry. Co., 73
 v. Wilmington, etc. R. Co., 469, 472
 v. Young, 618, 619, 624
 Parkerson v. Louisville, etc. Ry. Co., 463
 Parkhill v. Brighton, 376
 Parkhurst v. Johnson, 203
 Parkin v. Chicago, etc. Ry. Co., 769
 v. Grayson-Owen Co., 518
 Parkinson Sugar Co. v. Riley, 188
 Parks v. Alta Cal. Tel. Co., 532, 755
 v. Greenville, 291, 340
 v. Newburyport, 735
 v. Northwestern University, 331
 v. St. Louis, etc. Ry. Co., 493, 523
 Parmelee Co. v. Wheelock, 122
 Parnaby v. Lancaster Canal Co., 386
 Parody v. Chicago, etc. R. Co., 215
 Parr v. Bd. of Com'rs of Shawnee Co., 393
 Parris v. Green Island, 375
 Parrent v. Rhode Island Co., 494, 516
 Parrish v. Pensacola, etc. R. Co., 180
 Parrott v. Dearborn, 619, 621
 v. Housatonic R. Co., 747
 v. Knickerbocker Ice Co., 747
 v. Wells, 11, 16, 38, 47, 57, 689
 Parry v. Smith, 695
 Parshall v. Minneapolis, etc. R. Co., 760
 Parsons v. Goshen, 299
 v. Lindsay, 749a

[References are to sections.]

- Parsons v. Manchester, 369
 v. Missouri Pac. R. Co., 772
 (App. 2075, 2076)
 v. N. Y. Central R. Co., 91,
 114, 460, 478, 490, 525
 v. San Francisco, 254
 v. Winchell, 244, 248
 Partenheimer v. Van Order, 638
 Partlett v. Dunn, 192, 208
 Partlow v. Illinois Cent. R. Co., 460
 Partridge v. Boston, etc. Ry. Co., 469
 Parvis v. Philadelphia, etc. R. Co.,
 47, 87
 Paschal, In Re, 561
 Pasquini v. Lowry, 702
 Passamanek v. Louisville, etc. R.
 Co., 62
 Passenger R. Co. v. Young, 151
 Passman v. West Jersey, etc. Ry. Co.,
 461, 472
 Pastene v. Adams, 36, 704
 Pastoris v. Baltimore, etc. R. Co., 521
 Patch v. Covington, 265, 289
 Patchen v. Walton, 356, 378
 Pate v. Columbia, etc. Ry. Co., 516
 Paterson v. Colebrook, 53
 v. Society, etc., 281
 v. Wallace, 54, 87, 187, 192,
 215
 Bank v. Hamilton, 622
 Patneand v. Claire, 736
 Patnode v. Harter, 207b
 v. Warren Cotton Mills, 218,
 241b
 Patoka v. Hopkins, 274
 Patrick v. Pote, 86
 Patridge v. Scott, 701
 Patry v. Chicago, etc. R. Co., 493
 Patten v. Chicago, etc. R. Co., 55,
 455, 506
 v. Libbey, 739, 752
 v. Rea, 147
 v. Wiggin, 606, 607, 612
 Patterson v. Brooklyn, 254
 v. East Bridge Co., 396
 v. Frazer, 559, 565, 753
 v. Heminway, 719a
 v. New Orleans, etc. Co., 748
 v. Philadelphia R. Co., 114
 v. Pittsburgh, etc. R. Co., 91,
 206, 207h, 210, 211, 214,
 215, 221, 226, 230
 v. San Francisco, etc. Ry. Co.,
 494, 516, 518
 v. Wabash, etc. R. Co., 518
 v. Wenatchee Canning Co.,
 727a
 Pattison v. Syracuse Nat. Bank, 588
 Patton v. Board of Health, 302
- Patton v. Central Iowa Ry. Co., 203,
 207e
 v. East Tennessee, etc. R. Co.,
 480
 v. Illinois, etc. Ry. Co., 193
 v. Montgomery Co., 257
 v. Pittsburg, etc. Ry. Co.
 (App. 2091)
 v. Southern Ry. Co., 16a
 v. Texas, etc. Ry. Co., 184a
 v. West End, etc. R. Co., 453
 v. Western, etc. R. Co., 207h,
 232, 233
 v. Wharton Drug Store Co.,
 168
 Pauck v. St. Louis Dressed Beef, etc.
 Co., 223
 Pauckner v. Wakem, 704, 705
 Paul v. Fireworks Co., 187
 v. Salt Lake City Ry. Co., 495,
 516
 Pauley v. Steam Gauge, etc. Co., 13,
 702a
 Paulitsch v. N. Y. Cent. R. Co., 508,
 510
 Paulmier v. Erie R. Co., 65a, 186
 Paulson v. Pelican, 373
 Pavan v. Worthen & Co., 215
 Pawling v. Hoskins, 195
 Paxson v. Sweet, 343
 Paxton v. Boyer, 16
 Payne v. Baehr, 313
 Payne v. Chicago, etc. R. Co., 62, 66,
 73a, 94, 417, 473, 481a, 482
 v. Humeston, etc. R. Co., 483
 v. Illinois, etc. Ry. Co., 490
 v. Irvin, 120, 710
 v. Oakland Trac. Co., 87
 v. Providence Gas Co., 692
 v. Reese, 114, 187, 195
 v. Rogers, 120, 123, 708
 v. Smith, 646
 v. Springfield St. Ry. Co., 520
 v. Troy, etc. R. Co., 414
 v. Wayland, 359
 Peabody v. Boston, etc. Ry. Co., 406
 v. Haverhill, etc. St. Ry. Co.,
 73
 v. Oregon R., etc. Co., 493
 Peach v. Utica, 88, 374, 481
 Peachey v. Rowland, 173
 Peacock v. Dallas, 368
 Peake v. Buell, 718
 Pearce v. Hall, 625a
 Peard v. Mt. Vernon, 363
 Pearl v. Benton Tp., 393
 v. Macaulay, 645
 v. Omaha, etc. Ry. Co., 769
 Pearlstein v. New York, etc. Ry. Co.
 (App. 2069)

[References are to sections.]

- Pearsall v. New York Cent. Ry. Co., 236 (App. 2172)
 v. Western U. Tel. Co., 541, 542, 545, 547, 549, 552, 753*a*, 755
- Pearson v. Cox, 169
 v. Milwaukee, etc. R. Co., 419, 451*a*
 v. Lable, 298
 v. M. M. Potter Co., 168
 Lbr. Co. v. Hart, 206
- Peart v. Meeker, 328
- Pease v. Chicago, etc. R. Co., 233
 v. Delaware, etc. R. Co., 493
 v. Trac. Co., 1
- Peaslee v. Chatham, 114
 v. Fitchburg R. Co., 190, 202
- Peavey v. Robbins, 310
- Peavy v. Georgia R. Co., 493
- Peck v. Austin, 262
 v. Baraboo, 287
 v. Batavia, 8, 262, 281, 289, 328
 v. Ellsworth, 258, 370
 v. Goodberlett, 735
 v. Hurlburt, 623
 v. Michigan City, 359
 v. Missouri Pac. R. Co., 675
 v. N. Y. & N. Haven, etc. R. Co., 67, 89
 v. N. Y., etc. Ry. Co., 675, 676
 v. Roe, 702
 v. Williams, 626
- Peckham v. Burlington, 345
 v. Henderson, 365
 v. Lebanon, 333
- Pecos, etc. Ry. Co. v. Cazier, 422
- Peddle v. Gally, 151
- Pederson v. Rushford, 207*e*
 v. Seattle R. Co., 519
- Peers v. Elliott, 672
- Peery v. Quincy, etc. Ry. Co., 450
- Peet v. Chicago, etc. R. Co., 425
- Peetz v. St. Charles R. Co., 375
- Peginis v. Atlanta, 359
- Peil v. Rheinhart, 114, 120, 710
- Peirce v. Walters, 100
- Peisser v. Shanning, 723
- Pekin v. Brereton, 371
 v. McMahon, 71, 78, 140*a*, 285, 705
 v. Newell, 279
- Pelky v. Palmer, 608
 v. Saranac, 393
- Pelow v. Oil Well, etc. Co., 202, 209*a*, 219
- Peltier v. Bradley, 649
 v. Louisville, etc. R. Co., 463, 471
- Pelton v. Schmidt, 704, 705
- Pence v. California Min. Co., 54
 v. Carney, 729
 v. Chicago, etc. R. Co., 476
 v. Wabash Ry. Co., 518, 758, 760
- Pendergast v. Union R. Co., 192, 231, 505, 523
- Pendlebury v. Greenhalgh, 174
- Pendleton v. Kinsley, 512
 St. R. Co. v. Shires, 457
 v. Stallman, 457, 463
- Penico v. New York, etc. Ry. Co. (App. 2082)
- Peninsular, etc. Co. v. City of Grand Rapids, 705
- Penna. v. Interurban St. Ry. Co., 66
- Pennebacker v. San Joaquin, etc. Co., 705, 705*a*
- Pennington v. Detroit, etc. R. Co., 207
 v. Streight, 313
 v. W. U. Tel. Co., 755
 v. Yell, 559, 565, 570, 572
- Penniston v. Chicago, etc. R. Co., 506
- Pennsylvania Hall, Re, 261
 Lead Co., Re, 701*a*
 v. Wheeling, etc. Bridge, 250, 283
- Canal Co. v. Bentley, 53, 58, 108
- v. Burd, 399
- v. Graham, 9, 257, 371, 387, 758
- Coal Co. v. Kelly, 217
- Co. v. Backes, 114*b*, 185*a*, 468, 470
- v. Bray, 493
- v. Brush, 217
- v. Burgett, 207*g*
- v. City of Chicago, 261
- v. Chicago, etc. Ry. Co., 384
- v. Congdon, 218
- v. Conlan, 13, 53, 467
- v. Connell, 493, 761*a*
- v. Coyer, 513*a*
- v. Davis, 135*a*
- v. Ellett, 120
- v. Fishback, 191
- v. Gallaher, 182
- v. Greso, 505 (App. 127)
- v. Hensil, 467
- v. Horton, 13
- v. Keane, 477, 773
- v. Krick, 463
- v. Langendorf, 85
- v. Lynch, 221
- v. McCaffery, 191, 508
- v. McCaffrey, 190, 213, 217
- v. McCormack, 197, 217
- v. Marion, 87, 410, 506

[References are to sections.]

- Pennsylvania Co. v. Martin, 521
 v. Meyers, 476, 480, 482, 483
 v. Morel, 478
 v. Newmeyer, 513*a*
 v. Purris, 503
 v. Rathgeb, 476
 v. Roney, 85
 v. Roy, 51, 495, 526, 769
 v. Rudel, 477
 v. Scofield, 760
 v. Sears, 198
 v. Stegemier, 91
 v. Toomey, 513
 v. Whitcomb, 204, 207*b*
 v. Whitlock, 30, 665, 666
 Ry. Co., In Re, 417
 v. Ackerman, 468, 476
 v. Aiken, 476, 485
 v. Aspell, 61, 520
 v. Baltimore, etc. R. Co., 737
 v. Bantom, 486, 766, 769
 v. Barnett, 53, 426
 v. Beale, 476, 477
 v. Bock, 71
 v. Books, 766
 v. Butler, 771
 v. Canal Com'rs, 254
 v. Coon, 47
 v. Forstall, 192, 214*a*, 215, 222
 v. Gallentine, 113
 v. Goodenough, 67
 v. Goodman, 476, 485
 v. Hammill, 114, 464
 v. Hartel, 191
 v. Hartell, 189
 v. Henderson, 60*c*, 472, 492, 505
 v. Hensil, 13, 25, 27, 57
 v. Hope, 26, 55, 666
 v. Horst, 54, 479
 v. Hummel, 410, 459*c*
 v. Jones, 120*a*
 v. Keller, 766
 v. Kelly, 73*a*, 115, 209*a*, 763 (App. 2091)
 v. Kerr, 30, 666
 v. Kilgore, 508, 520
 v. Lacey, 55
 v. McCaffery, 60*a*
 v. McCann (App. 2178)
 v. McKinney, 516
 v. Marion, 501
 v. Meyers, 457
 v. Pfuelb, 476
 v. Scofield, 761*a*
 v. Smith, 7
 v. Stegmeier, 466
 v. Wachter, 207*c*
 v. Zebe (App. 2091)
 Steel Co. v. Wilkinson, 355
 [LAW OF NEG. VOL. I — o.]
- Pennsylvania, etc. Ry. Co. v. Hartel, 189
 v. Jones, 186
 v. Langdon, 61, 91, 523, 766
 v. Leary, 90, 476
 v. Lewis, 72
 v. Loftis, 503
 v. Lyons, 508, 520
 v. McCaffery, 501, 508, 525
 v. McCloskey, 519
 v. McKinney, 516
 v. McTighe, 87
 v. Marion, 501
 v. Matthews, 466
 v. Middleton, 223
 v. Miller, 729
 v. Mooney, 110
 v. Ogier, 91, 137, 766, 775
 v. Patterson, 399
 v. Price, 128, 225, 486, 488
 v. Riblet, 418, 422
 v. Righter, 56, 102, 112, 476
 v. Russ, 144
 v. St. Louis, etc. R. Co., 120*a*
 v. Smith, 7, 19
 v. Snyder, 85*d*
 v. Spaulding, 455
 v. Stranahan, 675
 v. Vandiver, 64, 151, 493
 v. Wachter, 185, 235, 241
 v. Watson, 675
 v. Weber, 108, 114, 463
 v. Werner, 89, 477
 v. Wilson, 758
 v. Zebe, 521, 766
 v. Zink, 207*a*, 217
 Tel. Co. v. Varnau, 60, 89
 Penny v. Atlantic Ry. Co., 500, 516
 v. Rochester R. Co., 73*a*, 485, 485*a*, 485*c*
 Penrhyn Slate Co. v. Granville Elec., etc. Co., 729
 Penruddock's Case, 709*a*
 Pensacola v. Jones, 289, 353
 Gas Co. v. Pebley, 692
 Penso v. McCormick, 73
 Penton v. Murdock, 633
 People v. Ames, 619
 v. Auditor, 317
 v. Beach, 618
 v. Breen, 538
 v. Bristol, etc. Turnp. Co., 310
 v. Brooklyn, 345
 v. Butler, 602
 v. Campbell, 319
 v. Canal Board, 398
 v. Central N. Y. Telep. Co., 556*c*
 v. Cobb, 591
 v. Colby, 602

[References are to sections.]

- People v. Cole**, 594, 602
 v. Colerick, 619
 v. Commissioners, etc., 337
 v. Cunningham, 332, 362
 v. Dennison, 249
 v. Detroit, etc. Ry. Co., 417*a*
 v. Dewey, 518
 v. Dikeman, 625*a*
 v. Dover, 394
 v. Eastwood, 110
 v. Eckerson, 332
 v. Economy, etc. Co., 730, 736
 v. Elk River Mill, etc. Co., 734
 v. Express, 338
 v. Faulkner, 303
 v. Goshen Turnp. Co., 387
 v. Hillsdale Turnp. Co., 348, 386, 388
 v. Hurlburt, 729
 v. Jackson, 334*a*
 v. Kendall, 625*a*
 v. Kerr, 332, 485*a*
 v. Kingman, 333
 v. Lambie, 333
 v. Lamborn, 569
 v. Little Valley, 338
 v. Loehfelm, 333, 334
 v. Medical Soc., 323
 v. Miles, 249
 v. Morrell, 254
 v. New York, 572
 v. N. Y. Central R. Co., 470
 v. Pease, 310
 v. Plymouth Plank Road Co., 386
 v. Rochester City Bank, 580*a*
 v. Saratoga, etc. R. Co., 390
 v. Scanlon, 653*b*, 653*e*
 v. Seaman, 310
 v. Smith, 729
 v. Stocking, 303, 310
 v. Supervisors, etc., 337
 v. Tallmadge, 249
 v. Telephone Co., 536, 556*c*
 v. Troy, etc. R. Co., 415
 v. Ulster Co., 340
 v. Vanderbilt, 334*a*
 v. Waterford, etc. Turnp. Co., 272
 v. Watertown, 249
 v. Wong Ark, 518
People's Bank v. Morgolofski, 719*a*
 Nat. Bank v. Freeman's Nat. Bank, 584*a*
Oil Co. v. Charleston, etc. Ry. Co., 672
Pass. R. Co. v. Green, 473
Ry. Co. v. Baldwin, 742
Rapid Transit Ry. Co. v. Dash, 485
People's Savings Bank v. Cupps, 588
Peoria v. Johnston, 336
 v. Simpson, 345, 709*a*, 713
 Bridge Ass'n v. Loomis, 389, 743, 758
 etc. R. Co. v. Champ, 453
 v. Herman, 87
 v. Lane, 457, 502, 524
 v. Miller, 461
 v. Puckett, 207
 v. Reynolds, 516
 v. Rice, 89, 238
 v. Siltman, 62
 v. Thompson, 497
Pepke v. Grace Hospital, 331
Pepin v. Dunham, 618
Pepper v. Union Ry. Co., 407*a*
 v. So. Pacific Co., 426, 474, 767
 v. Western U. Tel. Co., 553, 754
Peppercorn v. Black River Falls, 759, 760
Percival v. Jones, 303
Perdue v. Louisville, etc. R. Co., 241*b*
Pereira v. Star Land Co., 108
Perez v. New Orleans, etc. R. Co., 514
 v. Rayband, 709
 v. San Antonio, etc. Ry. Co. (App. 2187, 2188)
Perham v. Portland Elec. Co. (App. 2089)
Perigo v. Chicago, etc. R. Co., 217
Perigoy v. Sellick, 733
Perionowsky v. Freeman, 605
Perkins v. Chicago, etc. R. Co., 522
 v. Eastern, etc. R. Co., 57, 107, 418, 434, 435, 436
 v. Eighthme, 683
 v. Fayette, 346, 352, 355
 v. Fond du Lac, 86, 258, 353, 376
 v. Giles, 625
 v. Lawrence, 286
 v. Mossman, 629
 v. Missouri, etc. R. Co., 151
 v. New Orleans, etc. Ry. Co., 508
 v. N. Y. Cent. R. Co., 491, 505
 v. Oxford, 65, 139, 301
 v. Perkins, 640
 v. St. Louis, etc. R. Co., 448
 v. Sunset Telep., etc. Co., 376
Perley v. Chandler, 365
 v. Foster, 620
Perrault v. Minneapolis, etc. Ry. Co., 451*a*
Perrigo v. St. Louis, 758
Perrin v. Hill, 577

[References are to sections.]

- Perrine v. North, etc. Ry. Co., 486
 Perring v. Rebutter, 557
 Perry v. Buss, 310
 v. Cedar Falls, 377
 v. Central R. Co., 480
 v. Cobb, 627
 v. Dubuque Southwestern R. Co., 455
 v. Dubuque, etc. R. Co., 407, 425
 v. Howe Coop., etc. Co., 734
 v. Macon Consol. St. Ry. Co., 485*bc*
 v. New Orleans, etc. R. Co., 332
 v. Old Colony Ry. Co. (App. 2151)
 v. Philadelphia, etc. Ry. Co., 488
 v. Ricketts, 192, 196
 v. Rogers, 223
 v. Smith, 672
 v. Worcester, 105
 Mfg. Co. v. Eaton, 49
 Perryman v. Chicago City Ry. Co., 77, 485*bc*
 Perstein v. Amer. Exp. Co., 158
 Perse v. Atchison, etc. R. Co., 432
 Pershing v. Chicago, etc. R. Co., 407, 495
 Peru v. Brown, 274, 287
 etc. R. Co. v. Hasket, 448
 Peschel v. Chicago, etc. R. Co., 195, 233
 Petaja v. Aurora Iron Co., 195, 232, 233
 Peter v. Bowman, 705
 v. Chicago, etc. Ry. Co., 672, 680, 765
 Anderson & Co. v. Diaz, 151
 v. Denison, 688*a*
 v. Kendall, 333
 Peterman v. Northern Pac. Ry. Co. (App. 2060)
 Peters v. George, 231
 v. Harrison Wire Co., 192
 v. Johnson, 8
 v. Lindsborg, 291
 v. Rylands, 502
 v. St. Louis, etc. Ry. Co., 164, 176
 v. Southern Pac. Co., 769, 773
 Petersburg v. Applegarth, 285
 Petersen v. Sherry Lumber Co., 216
 v. Coal Co., 232
 v. New York, 299
 v. Western U. Tel. Co., 531
 v. Wisconsin Cent. R. Co., 451*a*
 Peterson v. Chicago, etc. Tr. Co., 505, 520
 v. Seattle Trac. Co., 505
 v. Standard Oil Co., 1
 v. Van Dusen, etc. Co., 231
 v. Western U. Tel. Co., 531
 Petrel, The, 237
 Petrie v. Columbia, etc. R. Co., 27*a*, 102, 468, 478, 769, 770, 775 (App. 2093)
 Pettengill v. Yonkers, 92, 286, 298, 346, 356, 369
 Petterson v. Composition Co., 187
 Pettingell v. Chelsea (App. 2150)
 Pettigrew v. Evansville, 274
 v. St. Louis, etc. Steel Co., 144
 Pettingill v. Chelsea, 258, 287
 v. Olean, 369
 Pettit v. Jamestown, etc. Co., 701
 v. May, 634
 Pettus v. Kerr, 207*g*
 Peverly v. Boston, 86, 523
 Peyton v. Texas, etc. R. Co., 85, 460, 467
 Pfau v. Reynolds, 359
 Pfeffer v. Cutter, 207
 Pfeiffer v. Aue, 665, 669
 v. Brown, 736
 v. Radke, 653*b*, 654
 Pfisterer v. Peter, etc. Co., 217
 Pfudl v. Romer Sons, 189
 Phalen v. Rochester, etc. Ry. Co. (App. 2083)
 Pharr v. Southern Ry. Co., 481*b* (App. 2084)
 Phelan v. Fitzpatrick, 708
 v. Granite, etc. Co., 653*b*
 Phelon v. Stiles, 141, 146
 Phelps v. Chicago, etc. Ry. Co., 201
 v. Cutter, 619
 v. Dolan, 310
 v. Erie Ry. Co., 56, 463
 v. Mankato, 334
 v. New Haven, etc. R. Co., 743
 v. Nowlen, 700
 v. Ry. Co., 464
 v. Wait, 122, 244, 248, 645
 Philadelphia v. Philadelphia Tr. Co., 485
 v. Weller, 358
 Fire Ins. Patrol v. Boyd, 331
 v. Gavagnin, 285
 Iron, etc. Co. v. Davis, 197
 etc. Co. v. Tucker, 188
 etc. Ry. Co. v. Allen, 494
 v. Anderson, 39, 407, 459, 497, 501, 516, 521
 v. Boyer, 25, 51, 57, 63, 66, 86, 495

[References are to sections.]

- Philadelphia, etc. Ry. Co. v. Bran-
 nen, 154
 v. Buchanan, 469
 v. Constable, 666
 v. Cooper, 122
 v. Crawford, 513
 v. Davis, 407, 735
 v. Derby, 142, 146, 154, 155,
 486, 491, 706
 v. Edelstein, 509
 v. Ervin, 13
 v. Fronk, 463
 v. Hagan, 92
 v. Hassard, 73
 v. Hendrickson, 680
 v. Henrice, 58
 v. Hogan, 476
 v. Hogeland, 66
 v. Hummell, 97, 480, 481a,
 484
 v. Keenan, 195
 v. Kellam, 460
 v. Killips, 426
 v. Larkin, 749
 v. Latshaw, 676
 v. Layer, 465
 v. Lehman, 104
 v. Long, 71, 72, 78, 87, 114,
 461
 v. McCormick, 509
 v. Mitchell, 175, 176
 v. Peebles, 476
 v. Philadelphia, etc. Towboat
 Co., 104, 395
 v. Rice, 493
 v. Schultz, 676, 680
 v. Spearen, 53, 73, 99, 464, 483
 v. State, 225
 v. Stebbing, 8, 27, 57, 111
 v. Stimpson, 317
 v. Stinger, 10, 426, 451, 474
 v. Trainor, 192
 v. Yeiser, 11, 672
 v. Yerger, 58, 676
 & Reading R. Co. v. Derby,
 706
 v. Smith, 709a
 Trac. Co. v. Lightcap, 485b
 v. Orbann, 492, 748
- Philbrick v. Inhabitants of West
 Gardiner, 376
- Philby v. Northern Ry. Co., 770
- Philes v. Missouri, etc. Ry. Co., 134a
- Philip v. Heraty, 68
- Phillips v. Bridge, 572
 v. Brigham, 40
 v. Chicago, etc. R. Co., 225
 v. Commonwealth, 118, 325,
 341
 v. County Court, 338
- Phillips v. Detroit, etc. R. Co., 476
 v. De Wald, 35, 645
 v. Dickerson, 28, 742
 v. East Tennessee, etc. R. Co.,
 480
 v. Edsall, 569, 572
 v. Eggert, 622
 v. Heraty, 775
 v. Huntington, 334, 376
 v. Kelly, 60a
 v. Library Co., 706
 v. Michaels, 215, 218
 v. Milwaukee, etc. R. Co., 458,
 477
 v. N. Y. Central, etc. R. Co.,
 31, 66, 426
 v. New York & New England
 R. Co., 479
 v. Northern R. Co., 144, 489
 v. Pruitt, 719a
 v. Railway Co., 207a
 v. Rensselaer, etc. R. Co., 520
 v. Ritchie County, 376
 v. Salem Iron Wks., 187
 v. Southern Ry. Co., 493
 v. Southwestern R. Co., 758,
 759, 760
 v. Veazie, 358
 v. Western U. Tel. Co., 554
- Philpot v. Ry. Co. (App. 2075)
- Philpott v. Penn. R. Co., 773
- Phinney v. Phinney, 243
- Phippin v. Missouri, etc. Ry. Co.
 (App. 2160)
- Phipps v. Millbury Bank, 581
- Phoenix Bridge Co. v. Castleberg, 195
- Ins. Co. v. N. Y. Cent. R. Co.,
 675
 etc. Co. v. Lemp, 203
- Phoenixville v. Phoenix Iron Co., 359,
 365
- Phyfe v. Manhattan R. Co., 745
- Pick v. Thurston, 370, 649, 653
- Pickard v. Smith, 14, 176, 314, 713
- Pickens v. Diecker, 634
 v. Richmond, etc. R. Co., 493
- Pickering v. Orange, 631
- Pickesville, etc. Ry. Co. v. State, 201
- Pickett v. Pearsons, 566
 v. Wilmington, etc. R. Co.,
 99, 457, 484, 775 (App.
 2085)
- Pidgeon v. Long Island R. Co., 192
 v. Williams, 573, 575
- Pieart v. Chicago, etc. R. Co., 221
- Piedmont, etc. Coal Co. v. Kearney,
 716
 etc. R. Co. v. McKenzie, 16
- Piehl v. Albany Ry. Co., 60, 518
- Pielke v. Chicago, etc. R. Co., 667

[References are to sections.]

- Pierce v. Atlanta Cotton Mills, 195
 v. Blake, 569
 v. Central Iowa R. Co., 241c
 v. Connors, 73a, 133, 645, 772
 v. Dart, 371
 v. New Bedford, 262
 v. North Carolina Ry. Co.,
 151, 413
 v. Oliver (App. 2138)
 v. Palmer, 562, 575
 v. Partridge, 619
 v. St. Louis, etc. Ry. Co., 761
 v. Strickland, 619
 v. Van Dusen (App. 2178)
 v. Whitcomb, 705
 Piercy v. Averill, 313, 363
 Pierrepont v. Loveless, 164
 Pierson v. Gale, 303
 v. Glean, 709a
 v. New York, etc. Ry. Co., 211
 v. Speyer, 729
 Lbr. Co. v. Hart, 207a
 Pietravoia v. New Jersey, etc. Ry.
 Co., 32
 Pietzner v. Shinnick, 421
 Pigeon v. Fuller, 203
 Piggot v. Eastern Counties R. Co.,
 675, 676
 Piggott v. Engle, 649
 v. Lilly, 518
 Pike v. Boston Elev. Ry. Co., 519
 v. Brittan, 710
 v. Chicago, etc. R. Co., 467
 v. Emerson, 572
 v. Grand Trunk R. Co., 85
 v. Honsinger, 606
 v. Megam, 249
 v. Megoun, 310
 Pikesville, etc. R. Co. v. Russell
 (App. 2066)
 Piles v. Missouri Pac. Ry. Co., 132
 Pilkington v. Gulf, etc. R. Co., 190,
 207b
 Pillsbury v. Moore, 709a
 Pilmer v. Boise Tr. Co., 61, 99
 Pilot Boy, The, 495
 Pim v. St. Louis Tr. Co., 61
 Pimm v. Roper, 612
 Pinckney v. Kanawha Valley Bank,
 583
 v. Western U. Tel. Co., 529,
 534, 542
 Pincus v. Atlantic Coast Line Ry.
 Co., 490, 501
 Pine v. New York, 729
 v. St. Paul R. Co., 748
 Pine Bluff Light Co. v. McCain, 695
 v. Schneider, 693, 696
 Pingree v. Leyland, 209a
- Pinkerton v. Pennsylvania Tr. Co.,
 485
 Pinkham v. Topsfield, 363
 Pine Mountain Ry. Co. v. Finley, 174
 Pinkstaff v. Steffy, 735
 Pinney v. Hall, 704
 v. King, 219
 Piollet v. Simmers, 104, 355, 381
 Pioneer Cooperage Co. v. Romono-
 wicz, 223
 Savings, etc. Co. v. Bartsch et
 al., 668
 Piper v. Boston, etc. Ry. Co. (App.
 2079)
 v. Cambria Iron Co., 207
 v. Chicago, etc. R. Co., 467,
 482, 485
 v. Manny, 22
 v. Menifee, 603
 v. N. Y. Cent. R. Co., 497
 v. New York, etc. Ry. Co., 518
 v. Spokane, 369
 Pippen v. Wilmington, etc. R. Co.,
 432
 Pippin v. Sheppard, 116
 Pistoner v. Amer. Can Co., 232
 Pitcher v. King, 620
 v. Lennon, 702a
 v. People's R. Co., 410, 521
 Pitman v. Francis, 574
 v. New York, 285
 Pitrowsky v. Reedy Mfg. Co., 209a
 Pitt v. Yalden, 558, 559, 572
 Pittinger v. Hamilton, 334, 353
 Pitts v. Gaince, 644
 v. Lancaster Mills, 730
 Pittsburgh v. Grier, 89, 262, 285, 704,
 725
 v. Vining, 74
 Reduction Co. v. Horton, 35
 Rys. Co. v. Thomas, 189, 190
 etc. R. Co. v. Adams, 180,
 207h, 207i, 218
 v. Aldridge, 497
 v. Allen, 437, 449
 v. Andrews, 519
 v. Banfil, 467
 v. Bennett, 111, 475, 480, 482
 v. Bingham, 97, 419, 705
 v. Bloomer, 497
 v. Blum, 472
 v. Bowyer, 434
 v. Brough, 672
 v. Bumstead, 72
 v. Burton, 478
 v. Caldwell, 78, 84
 v. Campbell, 58
 v. Carlson, 1
 v. Chicago, 60a, 261

[References are to sections.]

- Pittsburgh, etc. R. Co. v. Collins, 64, 87, 480 (App. 2137)
 v. Commonwealth, 333
 v. Cox (App. 2178)
 v. Cunningham, 434
 v. Devlinney, 224, 230, 233a, 233b
 v. Dodd, 392
 v. Donahue, 513
 v. Dunn, 408, 463
 v. Ensign, 513
 v. Evans, 54
 v. Gilleland, 407, 412
 v. Hall, 1
 v. Henderson, 186, 230
 v. Henley, 195
 v. Hewitt, 207g
 v. Higgs, 22, 494, 503, 505, 516
 v. Hinds, 512
 v. Hixon, 678, 680
 v. Indiana, etc. Co., 674, 678, 750
 v. Ives, 410
 v. Jones, 680
 v. Karnes, 27, 427
 v. Kinnare, 773
 v. Kirk, 146
 v. Kitley, 479
 v. Knutson, 467
 v. Krichbaum, 114
 v. Krouse, 490
 v. Lewis, 233a, 233b
 v. Lichteiser (App. 2136)
 v. Lynch, 472
 v. Lyons, 748
 v. McClurg, 56, 519
 v. McNeil, 473
 v. Mahoney, 505
 v. Martin, 490, 519
 v. Maurer, 463
 v. Moore, 73, 73a (App. 2136, 2138)
 v. Naylor, 134a
 v. Nelson, 85, 678
 v. Nuzzum, 540
 v. O'Conner, 110, 485
 v. Parish, 769 (App. 2061)
 v. Pearson, 72
 v. Pillow, 512
 v. Powers, 180, 238
 v. Ranney, 233a, 233b
 v. Redding, 481a
 v. Reed, 27a
 v. Richardson, 500, 512
 v. Rogers, 65, 769 (App. 2138)
 v. Ruby, 190
 v. Russ, 486, 761a
 v. Sentmeyer, 198, 207
- Pittsburgh, etc. R. Co. v. Seivers, 114
 v. Shepman, 497, 524
 v. Shields, 147, 154a
 v. Simons, 8, 463, 481a
 v. Smith, 64, 437, 450, 451a
 v. Spencer, 66
 v. Sponier, 479
 v. Street, 493
 v. Stuart, 418
 v. Sudhoff (App. 2138)
 v. Sullivan, 187
 v. Taylor, 28, 426, 451, 379, 748
 v. Thompson, 184, 496
 v. Vining's Admr., 508 (App. 2062)
 v. Warrum, 457, 480
 v. West, 469
 v. Williams, 516
 v. Wright, 114
 v. Yundt, 417
- Pittsfield, etc. Co. v. Pittsfield Shoe Co., 31
- Pittston v. Harts, 356
- Pixley v. Clark, 728, 731, 732
- Place v. Grand Trunk Ry. Co., 518
- Plank v. N. Y. Cent. R. Co., 192, 213
- Plankroad Co. v. Thomas, 385
- Plant v. Long Island R. Co., 332
 Ins. Co. v. Cook, 61, 725
 v. Normandy, 378
 Inv. Co. v. Cook, 61
 System Relief, etc., Dept. v. Dickerson, 331
- Planter's Oil Co. v. Mansell, 761
- Planters' Warehouse, etc. Co. v. Taylor, 665, 668
- Planz v. Boston, etc. R. Co., 64, 107, 151
- Platt v. Farney, 708
 v. Forty-second St., etc. R. Co., 521
 v. Johnson, 729, 730
 v. Sherry, 616
 v. Southern Photo Mat. Co., 27b
 v. Waterbury, 291
- Platte, etc. Canal Co. v. Dowell, 13, 27a
 Milling Co. v. Dowell, 72, 108
- Plattsmouth v. Mitchell, 353, 376
- Platz v. Cohoes, 67, 104, 381
- Plaunt v. Ry. Tr. Co., 477
- Playford v. United K. Tel. Co., 532, 543
- Pleasants v. Fant, 56
- Pleon v. Staff, 709
- Plonte v. Ry. Co., 464
- Ploof v. Burlington Tr. Co., 140a, (App. 2100)

[References are to sections.]

- Plouf v. Putnam, 146, 150, 151
 Plopper v. N. Y. Cent. R. Co., 521
 Pluckham v. Amer. Bridge Co., 192
 Pluckwell v. Wilson, 651
 Plumleigh v. Dawson, 733
 Plumley v. Birge, 62, 73, 639
 Plummer v. Dill, 705, 706
 v. Eastern R. Co., 477
 v. N. Y. Central R. Co., 476
 Plunkett v. Minneapolis, etc. R. Co., 434
 Plymouth v. Graver, 356
 v. Painter, 313
 Pocohontas, etc. Co. v. Rukas, 134a
 (App. 2102)
 Podvin v. Pepperell Mfg. Co., 187, 195, 209a
 Poe v. Raleigh, etc. R. Co. (App. 2085)
 Poeppers v. Missouri, etc. R. Co., 55, 666, 678
 Poff v. New England Tel. Co. (App. 2079)
 Pohlman v. Chicago, etc. Ry. Co., 735
 Poirier v. Carroll, 210, 215
 Poland v. Chicago, etc. R. Co., 185
 v. Earhart, 686
 Polaria, The, 146
 Polaski v. Pittsburgh, etc. Dock Co., 202
 Poler v. N. Y. Central R. Co., 425, 441, 450, 455
 Poli v. Numa Block Coal Co., 215, 221
 Poling v. Ohio River R. Co., 160, 705
 Polk v. Plummer, 249
 Pollard v. Maine Cent. R. Co., 146
 v. New Haven R. Co., 523
 Pollett v. Long, 30, 729, 732
 Pollich v. Sellers, 209a
 Pollock v. Eastern R. Co., 470
 v. Louisville, 291
 v. Stables, 179
 Polly v. McCall, 731
 Pomaski v. Grant, 523
 Pomeroy v. Boston, etc. Ry. Co., 516
 v. Donaldson, 333
 v. Granger, 700, 701
 v. Milwaukee, etc. R. Co., 359
 v. Precott, 573
 v. Westfield, 351
 Pomfrey v. Saratoga Springs, 60b, 333, 334, 363, 369, 373, 376
 Pomponio v. N. Y. & New Haven R. Co., 464, 481
 v. New York, etc. Co., 706
 Pond v. Vanderveer, 618
 Pontiac v. Carter, 262
 Ponton v. Wilmington, etc. R. Co., 180, 241
 Pool v. Chicago, etc. R. Co., 61, 473
 v. Southern Pac. Co., 114, 232
 (App. 2099)
 Poole v. Georgia Railroad & Banking Co., 508
 v. Jackson, 367, 368, 369
 v. North Carolina R. Co., 84
 v. Northern Pac. R. Co., 488
 Poor v. Sears, 66, 518, 709a
 Pope v. Commissioners, etc., 336
 v. Farmer's Union, 727a
 v. Kansas City R. Co., 457, 463
 v. Western U. Tel. Co., 540a
 Pordson v. Nassau, etc. Ry. Co., 519
 Popson v. Leathem, 743
 Port Jervis v. First Nat. Bank, 24a, 384
 Royal, etc. R. Co. v. Davis, 207b, 213
 Porter v. Amer. Bridge Co., 197
 v. Buckley, 653b
 v. Delaware, etc. Ry. Co., 758
 v. Hannibal, etc. R. Co., 217
 v. Missouri Pac. Ry. Co., 475, 476, 482, 483 (App. 2074)
 v. N. Y., Lake Erie, etc. R. Co., 492, 505
 v. Pierce, 619
 v. Sayward, 625
 v. Waters-Allen Co., 189
 Co. v. Dombka, 369
 Portland v. Richardson, 365, 385
 Gold Min. Co. v. O'Hara, 207e
 Portsmouth v. Houseman, 375
 etc. St. Ry. Co. v. Reed's Admr., 485c
 Portuehek v. Wabash Ry. Co., 513a
 Posch v. Southern, etc. Ry. Co., 520
 Posener v. Harvey, 518, 653a, 653e
 Posey v. North Birmingham, 286, 299
 v. Scofield, 60
 Tp. v. Semour, 340
 Poseyville v. Lewis, 376
 Post v. Boston, 338
 v. Hartford, etc. Ry. Co., 508
 v. Kerwin, 701
 v. Lincoln, 726
 v. Munn, 333
 v. Olmsted, 645
 v. Texas, etc. R. Co., 410
 v. U. S. Exp. Co., 646
 Postal Tel., etc. Co. v. Akron Cereal Co., 542
 v. Barwise, 753a
 v. Cumberland Tel. Co., 556c
 v. Hulsey, 742, 758
 v. Lathrop, 754
 v. Levy, 754

[References are to sections.]

- Postal Tel., etc. Co. v. Likes, 742
 v. Louisville Cotton Oil Co., 754, 755
 v. Moss, 554
 v. Nichols, 548, 554, 754
 v. Pratt, 556a
 v. Rhett, 542, 754
 v. Robertson, 553
 v. Schaefer, 553, 741, 753a, 755
 v. State, 531
 v. Sunset Constr. Co., 547, 754, 755
 v. Talerico, 755
 v. Wells, 547, 553
 v. Zoppi, 31, 359
 Potomac, etc. Ry. Co. v. Chichester, 187 (App. 2194)
 Potter v. Bunnell, 359, 414
 v. Castleton, 334, 351, 356
 v. Chicago, etc. R. Co., 54, 102
 v. Faulkner, 181, 182, 183
 v. Flint, etc. R. Co., 475
 v. Ft. Wayne, etc. Tr. Co., 66
 v. Moran, 646, 654
 v. N. Y. Cent. R. Co., 222, 241
 v. New York, etc. Ry. Co., 191
 v. St. Louis, etc. Ry. Co., 99
 v. Seymour, 171
 v. The Majestic, 504
 v. Warner, 102, 615, 741
 v. Western U. Tel. Co., 542
 Pottner v. Minneapolis, 367
 Pottstown Gas Co. v. Murphy, 692
 Poucher v. Blanchard, 559
 v. N. Y. Central, etc. R. Co., 178, 505
 Poulin v. Canadian Pac. R. Co., 486
 Poulin v. Broadway, etc. R. Co., 508
 Poulnot v. Western U. Tel. Co., 542
 Poulton v. Southwestern R. Co., 145
 Pound v. Port Huron, etc. R. Co., 423, 448
 Pounder v. North Eastern R. Co., 512
 Powell v. Augusta, etc. Co., 742
 v. Deveney, 31, 35, 73a, 122
 v. Great Northern Ry. Co. (App. 2071)
 v. N. Y. Central R. Co., 472, 476, 477
 v. Mo. Pacific R. Co., 460, 475, 484
 v. Salisbury, 662
 v. Sherwood (App. 2160)
 v. Tuttle, 291, 597
 v. Virginia Const. Co., 169
 Powell's Admr. v. Powell (App. 2101)
- Power v. First Nat. Bank, 582
 v. Kent, 566
 Powers v. Boston Gas Co., 693
 v. Boston, etc. R. Co., 513a
 v. Connecticut Co., 508
 v. Council Bluffs, 274
 v. Craig, 669
 v. Davenport, 40
 v. Harlow, 73, 688
 v. Kindt, 638
 v. Massachusetts, etc. Hospital, 331
 v. N. Y., Lake Erie, etc. R. Co., 209a, 217
 v. New York, etc. Ry. Co., 195a
 v. Pere Marquette Ry. Co., 58
 v. Quincey, 77
 v. Woodstock, 393, 394
 Prather v. Kean, 589
 v. Lexington, 291
 v. Richmond, etc. R. Co., 94, 108
 Pratt v. Amherst, 350
 v. Chicago, etc. R. Co., 426, 463, 464a
 v. Cohasset, 368
 v. Davis, 614a
 v. Gardner, 303
 v. Hill, 303
 v. Lake Shore, etc. R. Co., 217
 v. Lamson, 730, 733
 v. McGee (App. 2171)
 v. McKee, 189
 v. Missouri, etc. Ry. Co., 207c (App. 2075, 2161)
 v. Prouty, 219
 v. Waterbury, 296
 v. Weymouth, 291
 Iron Co. v. Brauley, 71, 73a, 78
 Pravie, etc. Co. v. Doig, 173, 699
 Pray v. Jersey City, 256, 258, 289
 v. Omaha R. Co., 523
 v. Western U. Tel. Co., 756
 Prayther v. Dean, 588
 Pre v. Standard, etc. Cement Co., 195, 203, 207, 207c, 215, 217
 Preble v. Wabash Ry. Co., 773
 Predmore v. Light, etc. Co., 766
 Prendegast v. New York Central Ry. Co., 481a
 Prendergast v. Union Ry. Co., 523
 Prendible v. Conn. River Mfg. Co., 214, 241b
 Prentice v. Geiger, 729, 734
 v. Wellsville, 185, 195
 Prentiss v. Boston, 356
 v. Boston, etc. R. Co., 107, 111, 112

[References are to sections.]

- Prentiss v. Kent Manufacturing Co., 207i, 219
 Presby v. Grand Trunk Ry., 426
 Prescott v. Ball Engine Co., 195
 v. Knowles, 628
 v. Robinson, 760
 Press v. Penny, 168, 175
 Pressman v. Mooney, 645, 772
 Preston v. Cameron, 283
 v. Central, etc. Ry. Co., 222
 v. Prather, 588
 Prestwich v. Poley, 573
 Pretty v. Bickmore, 709a
 Prevost v. Citizens Ice Co., 232
 Prewitt v. Eddy, 482
 v. Missouri, etc. R. Co., 474
 Pribbeno v. Chicago, etc. Ry. Co., 518
 Price v. Atchison Water Co., 705
 v. Bullen, 569
 v. Chesapeake, etc. Ry. Co., 493
 v. Ga Nun, 691
 v. High Shoals, etc. Co., 741
 v. Houston Nav. Co., 180
 v. Metropolitan St. Ry. Co., 494, 516
 v. New Jersey R., etc. Co., 57, 418, 429, 430
 v. Oregon R. Co., 407
 v. Richmond, etc. R. Co., 140 (App. 2093)
 v. Sacramento, 256
 v. St. Louis, etc. R. Co., 61, 99
 v. Simon, 54
 etc. Co. v. Haley, 214a
 Prickett v. Atchison, etc. R. Co., 419, 434, 453
 Priddy v. Black, etc. Min. Co., 207
 v. MacKenzie, 559
 Prideaux v. Mineral Point, 66, 108, 356, 377
 v. Morrice, 310
 Priebe v. Moorland Tp., 758
 Priest v. Nichols, 56, 57, 86
 Priestley v. Fowler, 184, 207e, 192
 Priester v. Augley, 155, 686
 Prignitz v. McTiernan, 751
 Prime v. Yonkers, 291
 Primely v. Elbe Lbr., etc. Co., 214a, 223
 Primrose v. Western U. Tel. Co., 545, 546, 547, 552, 553, 754
 Prince v. Lowell Elec., etc. Corp., 140a
 v. Lynn, 291
 v. N. Y. Central, etc. R. Co., 415, 417a
 v. St. Louis Comp. Co., 727a
 Prince George Co. v. Burgess, 108, 257, 376
 Princeton v. Gieske, 274
 Prindle v. Fletcher, 367
 Pringle v. Chicago, etc. R. Co., 93
 Pritchard v. La Crosse, etc. R. Co., 430
 v. Marvin, 562
 Probert v. Phipps, 218
 Probst v. Delamater, 187
 Proctor v. Andover, 387
 v. Hannibal, etc. R. Co., 129
 v. Jennings, 26, 35
 v. Wilmington, etc. R. Co., 428
 etc. Co. v. Williams, 235
 Producers' Oil Co. v. Barnes, 203, 207a, 219a
 Promer v. Milwaukee, etc. R. Co., 185a, 203, 241c
 Prondfoot v. Hare, 709
 Propeller Tow Boat Co. v. Western U. Tel. Co., 543, 753a
 Propsom v. Leathem, 110
 Prosser v. Montana Central R. Co., 60b, 108, 192, 197
 v. West Jersey, etc. Ry. Co., 8, 25
 Protector, The, 172
 Prot. Epis. Church v. Anamosa, 299
 Prothers v. Citizens' R. Co., 519
 Proud v. Philadelphia, etc. Ry. Co., 497
 Providence v. Clapp, 258, 333, 350, 352, 363
 -Washington Ins. Co. v. West. U. Tel. Co., 753a, 754
 etc. Ins. Co. v. Western U. Tel. Co., 534, 542, 754
 Provost v. Cook, 690
 v. New Chester Water Co., 283
 Prowell v. Waterloo, 298, 341
 Pruitt v. Hannibal, etc. R. Co., 39, 40
 v. Illinois, etc. Ry. Co., 424a
 Prudential Ins. Co. v. Guild, 749
 Prussak v. Hutton, 689
 Pryor v. Louisville, etc. R. Co., 207b
 Pueblo v. Griffen, 760
 v. Smith, 379
 Puff v. Lehigh Valley R. Co., 54
 Puffer v. Orange, 356
 Puget Sound Elec. Ry. Co. v. Felt, 520
 Pugh v. Texarkana, etc. Co., 408
 Pulaski Gaslight Co. v. McClintock, 692
 Pulley v. Standard Oil Co., 215

[References are to sections.]

- Pulliam v. Illinois Cent. Ry. Co. (App. 2072)
 Pullman Co. v. Hoyle, 24a
 v. Schaffner, 526b
 Palace Car Co. v. Adams, 526b
 v. Arents, 526b
 v. Bluhm, 31, 742
 v. Gardner, 526
 v. Gavin, 526
 v. Hall, 526b
 v. Harkins, 219a
 v. Laack, 90, 188, 194, 204
 v. Lawrence, 762
 v. Lowe, 526
 v. Martin, 526
 v. Matthews, 526
 v. Pollock, 526b
 v. Smith, 509, 526, 764
 v. Taylor, 526
 v. Trimble, 761
 v. Woods, 526b
 etc. Co. v. Laack, 51c, 186, 192
 v. Reed, 749
 Pumpelly v. Green Bay Co., 274
 Punkowski v. New Castle, etc. Co., 267h, 208
 Puppovich v. Galveston, etc. Ry. Co., 426
 Purcell v. St. Paul R. Co., 26, 742, 761
 Purdon Naval Stores Co. v. Western U. Tel. Co., 543, 754, 755
 Purdy v. New York, 373
 v. N. Y. Central R. Co., 478
 v. Rome, etc. R. Co., 241d
 Purinton v. Maine Cent. R. Co., 463, 483
 Purl v. St. Louis, etc. R. Co., 62, 88
 Puroto v. Chieppa, 702
 Purple v. Union Pac. Ry. Co., 489, 513a
 Pursley v. Edge Moor Bridge Wks., 218
 Purves v. Landell, 559
 Purvis v. Buffalo Ry. Co., 485d, 518
 Puterbaugh v. Reasor, 69
 Putnam v. Broadway, etc. R. Co., 512
 v. St. Louis, etc. Ry. Co., 750
 v. Southern Pac. R. Co., 140 (App. 2090)
 v. Wigg, 629, 639
 Putz v. St. Paul Gaslight Co., 203
 Pye v. Faxon, 175, 701a
 v. Mankato, 274
 Pyke v. City of Jamestown, 758
 Pyle v. Clark, 66
 v. Richards, 729
- Pym v. Great Northern R. Co., 137, 769
 Pyne v. Broadway, etc. R. Co., 485c
 v. Chicago, etc. R. Co., 241
 Pzolla v. Michigan Central R. Co., 62
 Quackenbush v. Chicago, etc. R. Co., 513a, 742
 v. Wisconsin, etc. R. Co., 62, 422, 451a
 Quaid v. Cornwall, 197
 Quaife v. Chicago, etc. R. Co., 57, 58
 Quarman v. Burnett, 171, 172, 173
 Quebec S. S. Co. v. Merchant, 241
 Queen, The, 172
 v. Dayton Coal, etc. Co., 13, 27a, 62, 73, 73a
 v. Schwann, 189, 190
 Anne's Ry. v. Reed, 476
 Quested v. Newburyport, etc. R. Co., 457, 459
 Quick v. Millfort Mill Co., 207
 v. Minnesota Iron Co., 216
 Quigley v. Central Pac. R. Co., 493
 Quill v. Empire State Tel. Co., 120a, 159
 v. Houston, etc. Ry. Co., 208, 466a
 v. Southern Pac. Co., 767, 769
 Quilty v. Battie, 635, 638
 v. Batty, 115
 Quimby v. Bee Bldg. Co., 719a
 v. Boston, etc. R. Co., 415, 505
 v. Vanderbilt, 503
 v. Vermont, etc. R. Co., 47, 57, 437
 Quin v. Complete Elec. Co., 162
 v. Lowell Elec. Light Co., 683
 v. Moore, 135, 137, 766, 769
 Quincy v. Jones, 274, 701
 v. Barber, 353
 Canal v. Newcomb, 371, 400
 Coal Co. v. Hood, 137, 193, 194a, 205
 Mining Co. v. Kitts, 184a, 203a, 235
 etc. Ry. Co. v. Schmidt, 122
 v. Wellhoener, 27
 Quinlan v. Lackawanna Steel Co. (App. 2171)
 v. Manistique, 338
 v. Sixth Ave. R. Co., 647
 v. Utica, 60b, 369
 Quinn v. Chicago, etc. Ry. Co., 62, 406, 473, 475, 476
 v. Crimmings, 664
 v. Glenn Lbr. Co., 207e, 231
 v. Illinois Cent. R. Co., 523

[References are to sections.]

- Quinn v. Johnson Forge Co., 207*e*,
 207*i*, 758, 767*a*
 v. Kansas City, etc. R. Co.,
 187
 v. Louisville, etc. R. Co., 512
 v. O'Keefe, 104, 743
 v. Perham, 710
 v. Pietro, 653
 v. Power, 146, 147
 v. South Carolina R. Co., 519,
 749
 Quirk v. Holt, 644, 654
 Quironet v. Alabama, etc. Ry. Co.
 (App. 2131)

 Raasch v. Dodge Co., 367
 Rabe v. Shoenberger Coal Co., 750
 v. Sommerbeck, 518, 690
 Raben v. Central Iowa R. Co., 510
 Raby v. Cell, 56
 Race v. Union Ferry Co., 502
 Rachmel v. Clark, 73*a*
 Racho v. Detroit (App. 2070)
 Racine v. Erie Ry. Co. (App. 2083)
 v. Morris, 705, 705*a*, 719
 Radcliff v. Brooklyn, 283, 700
 Rademacher v. Detroit Ry. Co., 426
 Raden v. Geo. R. Co., 480
 Rader's Admx. v. Louisville, etc. Ry.
 Co., 481*b*
 Radichel v. Kendall, 338
 Radley v. Columbia, etc. Ry. Co., 489,
 513*a*
 v. Northwestern R. Co., 94, 99
 Radway v. Briggs, 333, 725
 Rafferty v. Buckman, 766
 v. Erie, etc. Ry. Co., 463
 Rager v. Louisville, etc. Ry. Co., 464,
 484
 Ragland v. Norfolk, etc. S. B. Co.,
 515
 Ragon v. Toledo, etc. R. Co., 217, 406
 Ragsdale v. Illinois Cent. Ry. Co.,
 207*e*
 v. Memphis, etc. R. Co., 241
 v. Northern Pac. R. Co., 241*c*
 Rahles v. Thompson Mfg. Co., 219
 Rahm v. Chicago, etc. Ry. Co., 215
 Rahman v. Minnesota, etc. R. Co.,
 207*a*
 Rahnn v. Chicago, etc. Ry., 214*a*
 Rahway v. Carter, 338
 Raiford v. Mississippi, etc. R. Co.,
 419, 463
 Rail v. Potts, 310
 Railey v. Hopkins, 617
 Railroad Co. v. Alabama, 249
 v. Aiken, 103
 v. Barron, 413, 502, 758
 v. Brown, 120*a*, 413
 Railroad Co. v. Charles, 195
 v. Cunningham, 417*a*
 v. Fort, 46, 207*i*
 v. Gladmon, 73, 108
 v. Hambleton, 120*a*
 v. Harris, 503
 v. Hartley, 358
 v. Houston, 90
 v. Jones, 1, 61, 86, 207*b*, 523
 v. Keegan, 195
 v. Lacy, 132
 v. Leech, 207*e*
 v. Lockwood, 550, 551
 v. Mfg. Co., 210
 v. Miller, 180
 v. Norton, 63, 99
 v. Ogden, 87
 v. Peterson, 195
 v. Reeves, 40
 v. Richardson, 666
 v. Richmond, 358
 v. Rush, 241*a*
 v. Stanford, 30
 v. Stout, 53, 57, 72, 73
 v. Tennessee, 249
 v. Walker, 62, 103
 Railway Co. v. Carruthers, 421, 451*a*
 v. Dangourd, 219
 v. Diefenbach, 151
 v. Hartell, 219, 232
 v. Hawkins, 743
 v. Holmes, 463*a*
 v. Hurdman, 225
 v. Jullen, 406
 v. Whitcomb, 27*b*
 Raine v. Alderson, 119
 Raines v. Chesapeake, etc. R. Co., 99
 v. Great Northern, etc. Ry.
 Co., 207
 Rainey v. Lawrence, 377
 v. N. Y. Central, etc. R. Co.,
 27
 Rains v. St. Louis, etc. R. Co., 198,
 207
 v. Simpson, 303
 Rainy v. N. Y. Central R. Co., 466
 Raisler v. Oliver, 319, 321
 Rajowski v. Detroit, etc. R. Co., 672
 Ramm v. Minneapolis, etc. R. Co.,
 513*a*
 Ramp v. Metropolitan St. Ry. Co.,
 113
 Ramsbottom v. Atlantic, etc. Ry. Co.,
 49
 Ramsdell v. Grady, 606
 v. Morgan, 75
 v. New York, etc. Ry. Co.
 (App. 2151)
 Ramsden v. Boston & A. R. Co., 151,
 154

[References arc to sections.]

- Ramsey v. Louisville, etc. R. Co., 477
 v. Raritan Copper Wks., 203
 v. Rushville R. Co., 114, 351
 Ramson v. Metropolitan St. Ry. Co., 516
 Rand v. Butte, etc. Ry. Co., 154
 v. Syms, 644
 Randal v. Garouth, 591
 Randall v. Baltimore, etc. R. Co., 57,
 180, 224, 233a, 241, 241a
 v. Brigham, 303
 v. Cheshire Turnp. Co., 387,
 397
 v. Eastern R. Co., 262, 356
 v. Gross, 418, 655
 v. Holbrook, etc. Co. (App. 2171)
 v. Ikey, 559
 v. New Orleans, etc. R. Co., 125
 v. Northwestern T. Co., 108
 v. Richmond, etc. R. Co., 432 (App. 2085)
 v. Silverthorn, 729
 Randell v. Chicago, etc. Ry. Co., 493
 Randle v. Birmingham Ry., etc. Co., 767 (App. 2053)
 Randleson v. Murray, 168
 Randolph v. New York, etc. Ry. Co., 195
 v. O'Riordan, 66, 649
 Rankel v. Buckstaff-Edwards Co., 203, 209a, 224
 Rankin v. Buckman, 256
 v. Ingwersen, 708
 v. Schaeffer, 574
 Ranous v. Seattle Elec. Ry. Co., 520
 Ransier v. Minneapolis, etc. R. Co., 410
 Ransom v. Chicago, etc. R. Co., 62, 426, 470
 v. Cothran, 567
 v. Halcott, 620
 v. N. Y. & Erie R. Co., 758
 Raper v. Wilmington, etc. Ry. Co. (App. 2084)
 Rapho v. Moore, 254, 257, 369, 397
 Rappelyea v. Hulse, 644, 645
 Rapson v. Cubitts, 169, 173
 Raridan v. Central Iowa R. Co., 741
 Rascher v. East Detroit, etc. R. Co., 485c
 Rase v. Minneapolis, etc. Ry. Co., 217
 Rasmussen v. Chicago, etc. R. Co., 207e, 209a
 Rastetter v. Peoria Ry. Co., 73a
 Raterie v. Galveston, etc. Ry. Co., 490
 Rathbone v. Oregon Ry. Co., 513a
 Rathburn v. White, 689
 Rattan v. Central Elec. Ry. Co., 497
 Ratte v. Dawson, 705
 Rau v. Minn. Valley R. Co., 713
 Raub v. Los Angeles R. Co., 508
 Rauch v. Lloyd, 54, 72, 73, 92, 479, 644a
 v. Smedley, 614
 Rauenstein v. N. Y., Lackawanna, etc. R. Co., 416
 Rawitzer v. St. Paul Ry. Co., 485b
 Rawlston v. East Tennessee, etc. R. Co., 207
 Rawson v. Dole, 616, 625
 v. Penn. R. Co., 210, 504
 Rawstron v. Taylor, 734
 Ray v. Aberdeen, 520
 v. Birdseye, 572
 v. Chicago, etc. Ry. Co., 513a
 v. Diamond Steel Co., 206
 v. Dodd, 303
 v. Hodge, 214a
 v. Jeffries, 221
 v. Manchester, 350, 355
 v. Manhattan, etc. Co., 703
 v. Pecos, etc. Ry. Co., 31, 186
 v. Sellers, 709a
 County Savings Bank v. Hut-ton, 244
 Raymond v. Keseberg, 743
 v. Lowell, 352, 353, 375
 v. Lowell, etc. St. Ry. Co., 485a
 v. New York, etc. Ry. Co. (App. 2068)
 v. Portland R. Co., 1
 v. Sheboygan, 384
 Rea v. Sioux City, 350
 v. State, 249
 Raynor v. Mitchell, 147
 Raynsford v. Phelps, 313
 Read v. Barker, 731
 v. Boston, etc. R. Co., 104
 v. Brooklyn, etc. Ry. Co., 773
 v. Edwards, 418, 524, 627, 628
 v. Great Eastern R. Co., 140
 v. Morse, 672
 v. New York Central, etc. Ry. Co., 65a
 v. Nichols, 30, 667
 v. Spaulding, 39, 40
 Readdy v. Shamokin, 764
 Readhead v. Midland R. Co., 11, 494, 497
 Reading v. Reiner, 384
 v. United Trac. Co., 408
 Iron Works v. Devine, 225
 R. Co. v. Ritchie, 56, 108, 463, 477
 Readman v. Conway, 60c, 710

[References are to sections.]

- Reagan v. Casey, 160*a*, 225
 v. St. Louis, etc. R. Co., 202
 Ream v. Pittsburgh, etc. R. Co., 107
 Reamer v. Davis, 146
 Reardon v. N. Y. Card Co., 222
 v. Missouri Pac. R. Co., 483, 485
 v. St. Louis Co., 256
 v. Thompson, 705
 Reary v. Louisville, etc. R. Co., 89
 Reaves v. Anniston Knitting Mills, 61, 219
 v. Territory, 359
 Reber v. Bond, 513*a*
 v. Herring, 615
 v. Tower, 197
 Receivers v. Moore, 207*b*
 of Kirby Lumber Co. v. Poin-
 dexter, 217
 Record v. Chickasaw, etc. Co., 207*c*
 Rector v. Pierce, 377
 Red River Line v. Cheatham, 207*e*
 Mills v. Wright, 729
 Redington v. Pacific Cable Co., 541
 Reddington v. Harrisburg Tr. Co., 508
 v. Phila. Tr. Co., 520
 Reddon v. Union Pac. R. Co., 230
 Redfield v. Oakland Consol. R. Co., 133, 771
 v. Oakland, etc. Ry. Co. (App. 2055)
 Redigan v. Boston & Maine R. Co., 705
 Redington v. N. Y., Ontario R. Co., 202
 Redman v. Norfolk, etc. Ry. Co., 203
 Redmon v. Metropolitan St. Ry. Co., 495
 Redmond v. Missouri, etc. Ry. Co., 434
 v. Delta Lumber Co., 223
 v. Staton, 591
 Redner v. Lehigh, etc. R. Co., 506
 Redpath v. Western U. Tel. Co., 553
 Redus v. Milner Coal Co., 207*b*
 Redwood Cemetery v. Bondy, 334
 Reece v. Rigby, 569
 Reed v. Allegheny, 173, 298
 v. Belfast, 258, 337, 338
 v. Chicago, etc. R. Co., 478, 759
 v. Cornwall, 334, 336, 388
 v. Covington, etc. Bridge Co., 521
 v. Darling, 602
 v. Deerfield, 377, 379
 v. Howell Co., 256
 v. Madison, 73, 370
 v. Metropolitan Ry. Co., 66
 Reed v. Missouri Pac. R. Co., 676
 v. New York, 343
 v. Norfolk, etc. Ry. Co., 192
 v. Northeastern R. Co., 139 (App. 2093)
 v. Northfield, 110, 376
 v. Penn. R. Co., 665
 v. Queen Anne's Ry. Co., 463*a*
 v. Richmond, etc. Ry. Co., 501
 v. Rome, etc. R. Co., 751
 v. St. Louis, etc. Ry. Co., 467
 v. Southern Express Co., 626
 v. Southern Ry. Co., 459
 v. State, 728, 743
 v. Stockmeyer, 207*i*
 v. Western U. Tel. Co., 542, 543*a*, 755
 Reddie v. Northwestern R. Co., 167, 168, 173, 699
 Reems v. New Orleans, etc. Ry. Co., 516, 518
 Reese v. Biddle, 180
 v. Western U. Tel. Co., 531, 540*a*, 756
 Reeside v. Walker, 249
 Reeve v. Colusa Gas, etc. Co., 203
 Reeves v. Delaware, etc. R. Co., 61, 92, 93, 99, 418
 v. Dubuque, etc. R. Co., 62, 476
 v. Fourteenth St. Store, 485
 v. Galveston, etc. Ry., 207*b*
 v. Larkin, 359
 v. State Bank, 582
 Regan v. Boston, etc. Ry. Co., 207
 v. Keyes, 701
 v. N. Y. & New England R. Co., 765
 v. Reed, 154*a*
 Reget v. Bell, 93
 Regina v. Bamber, 348
 v. Birmingham, etc. R. Co., 337, 392
 v. Bucknall, 708
 v. Gloucestershire, 390
 v. Heathcote, 310
 v. Hornsea, 348
 v. Lincoln, 392
 v. London, etc. R. Co., 392
 v. McFarlane, 250
 v. McLeod, 250
 v. Paul, 348
 v. Ramsden, 343
 v. Stephens, 145
 v. Watts, 343
 Regner v. Glens Falls, etc. R. Co., 493
 Reho v. Hogan, 550
 Rehler v. Western N. Y., etc. R. Co., 702

[References are to sections.]

- Rehman v. Minneapolis, etc. R. Co., 207g
 Reibel v. Cincinnati, etc. R. Co., 520
 Reichla v. Gruensfelder, 209a
 Reickert v. Pkg. Co., 203
 Reid v. Atlantic, etc. Ry. Co. (App. 2085)
 v. Harmon, 73
 v. Long Island Ry. Co., 66a
 v. New Haven, etc. R. Co., 525
 v. N. Y. New Haven, etc. R. Co., 410, 466
 v. New Jersey, etc. Co., 698
 Reidel v. Philadelphia, etc. Ry. Co., 480
 Reifsnnyder v. Chicago, etc. R. Co., 457, 458
 Reilly v. Erie Ry. Co., 689
 v. Hannibal, etc. R. Co., 72, 158, 457, 461 (App. 2075)
 v. New York City Ry. Co., 513
 v. Racine, 336
 v. Third Ave. R. Co., 485c
 Reining v. Buffalo, 254, 373
 Reinke v. Bentley, 146, 761
 Reinsertsen v. Erie Ry. Co., 207c, 215
 Reipe v. Elting, 644
 Reiper v. Nichols, 666
 Reis v. Stratton, 640
 v. Struck, 207g
 Reiser v. Pennsylvania Co., 190
 Reisert v. City of New York, 750
 v. Williams, 219
 Reiss v. N. Y. Steam Co., 16, 28, 56a, 57, 60
 v. Wilmington City Ry. Co., 49
 Reiter v. Winona, etc. R. Co., 207e
 -Conley Mfg. Co. v. Hamlin, 769
 Reliance Mfg. Co. v. Langley, 222
 Textile, etc. Works v. Mitchell, 73a, 758, 760
 etc. Co. v. Williams, 180
 Relle v. Western U. Tel. Co., 543
 Relyea v. Kansas City, etc. R. Co., 238
 Rembe v. N. Y., Ontario, etc. R. Co., 91
 Rembert v. So. Carolina R. Co., 415
 Remer v. Long Island R. Co., 85a, 480, 483
 Renders v. Grand Trunk Ry. Co., 518
 Renick v. Orser, 625
 Reninger v. New York, etc. Ry. Co., 207
- Renlund v. Com. Mfg. 134a (App. 2070)
 Renneker v. South Carolina R. Co., 519
 Renner v. Canfield, 686
 Renwick v. Morris, 359, 371
 v. N. Y. Central R. Co., 375, 468
 Repp et al. v. Wiles, 573
 Requa v. Rochester, 262, 281, 390
 Respublica v. Sparhawk, 261
 Rettig v. Fifth Ave. Tr. Co., 207h, 233
 Revill v. Pettit, 303
 Rex v. Bucks, 390, 394
 v. Butchell, 608
 v. Carlisle, 362
 v. Cross, 362
 v. Cumberworth, 335
 v. Deron, 392
 v. Ecclesfield, 337, 394
 v. Edmonton, 334
 v. Flecknow, 343
 v. Hendon, 337, 394
 v. Jones, 332, 362
 v. Kerrison, 408
 v. Landulph, 348
 v. Leake, 334
 v. Long, 612
 v. Machynlleth, 394
 v. Montague, 348
 v. Pedley, 120, 708
 v. Russell, 362
 v. Severn, etc. R. Co., 333, 403
 v. Stoughton, 332
 v. Ward, 362
 v. Watts, 738
 v. West Riding of York, 392
 v. Whitney, 390
 v. Yorkshire, 337
 Rexford v. State, 251, 398
 Rexter v. Starin, 85
 Reynolds v. Banara, 203a
 v. Boston, etc. R. Co., 196, 207, 219a
 v. Clarke, 644
 v. Graves, 605, 606
 v. Great Northern R. Co., 470
 v. Hanrahan, 644
 v. Hindman, 62
 v. Hussey, 632
 v. Keokuk, 111
 v. Merchants Woolen Co., 195a
 v. N. Y. Cent. R. Co., 73a, 112, 114
 v. Niagara Falls, 759
 v. Orvis, 303
 v. Smith, 614a
 v. Van Beuren, 702

[References are to sections.]

- Reynolds v. Van Buren, 343, 708a
 v. Western U. Tel. Co., 556a, 753a
 v. Witte, 749
 Rhatigan v. Brooklyn Union Gas Co., 183, 190
 Rheola, The, 141
 Rheinhard v. New York, 296
 Rhinelander v. Lockport, 278
 Rhines v. Evans, 565
 v. Royalton, 743
 Rhing v. Broadway, etc. R. Co., 96
 Rhoades v. Chicago, etc. R. Co., 451, 475
 v. Seidel, 708
 Rhobodsky v. New Jersey Worsted, etc. Co., 203
 Rhode Island, The, 744
 Island Motor Co. v. Providence, 333
 Rhodes v. Cleveland, 274
 v. Otis, 333
 v. Roberts, 686
 Ricard v. North Penn. R. Co., 128
 Rice v. Chicago, etc. Ry. Co., 497, 512, 516, 518
 v. Crescent City Ry. Co., 73a
 v. Des Moines, 742
 v. Eureka Paper Co., 215
 v. Evansville, 272, 274
 v. Flint, 274
 v. Interurban St. Ry. Co. (App. 2083)
 v. Mienero, 729
 v. Montpelier, 350, 351, 356, 393
 v. Norfolk, etc. Ry. Co., 735
 v. Philadelphia Rapid Tr. Co., 523
 v. Van Why, 187, 219a, 223
 v. Wabash, etc. Ry. Co. (App. 2160)
 v. Wilkins, 621
 etc. Malting Co. v. Paulson, 195
 Ricehart v. Kansas, etc. Ry. Co., 437
 Rich v. Chicago, etc. Ry. Co., 485
 v. Keshena Imp. Co., 732
 v. Minneapolis, 359
 v. Pierpont, 606
 v. Rockland, 368
 Richard v. Sanford, 644
 Richards v. Chicago, etc. R. Co., 480
 v. Connell, 705
 v. Enfield, 122, 346, 356, 370, 379
 v. Michigan Steel Co., 203
 v. New York, 296, 334
 v. Phillips, 653b
 Richards v. Riverside Iron Wks. (App. 2104)
 v. Sanderson, 656
 v. Schlemener, 668
 Richardson v. Carbon Hill Coal Co., 188, 207, 331
 v. Cooper, 184
 v. Crandall, 299
 v. Dansers, 370
 v. Great Eastern R. Co., 459
 v. Kier, 16, 283, 729
 v. Kimball, 244
 v. Metropolitan R. Co., 89, 519
 v. Milburn, 655, 664
 v. Nelson, 73a, 518
 v. N. Y. Central R. Co., 132, 463, 476, 478
 v. Royalton Turnp. Co., 380
 v. Russ (App. 2058)
 v. Vermont Cent. R. Co., 412
 v. Wilmington, etc. R. Co., 480
 Richart v. Scott, 701
 Richberger v. Amer. Ex. Co., 150
 Richie v. Philadelphia, 302
 Richfield v. Michigan Cent. R. Co., 89
 Richland's Iron Co. v. Elkins, 192
 Richmond v. Chicago, etc. R. Co., 466
 v. Gray, 693
 v. Long, 255, 266, 291
 v. Mason, 289, 353
 v. Missouri Pac. Ry. Co., 25, 417a, 464a, 472
 v. Mulholland, 376
 v. Sacramento, etc. R. Co., 94, 419, 456
 v. Schonberger, 289, 375
 v. Second Ave. R. Co., 520
 Gas Co. v. Baker, 107, 693
 Granite Co. v. Bailey, 233
 Hosiery Mills v. Western U. Tel. Co., 753a, 755
 Trac. Co. v. Martin, 99
 etc. R. Co. v. Allison, 745, 758
 v. Brown, 99, 207b
 v. Bivins, 207
 v. Buice, 428
 v. Burnett, 193
 v. Burnsed, 492
 v. Chicago, etc. R. Co., 772
 v. De Butts, 207
 v. Didzoneit, 99
 v. Dudley, 194, 195, 196, 207b, 217
 v. Elliott, 204, 683
 v. Farmer, 20, 89
 v. Finley, 207b

[References are to sections.]

- Richmond, etc. R. Co. v. Free, 207b
 v. Freeman, 464a, 767
 v. Garthright, 410
 v. George, 186
 v. Gordon, 485c
 v. Hammond, 769
 v. Hissong, 207b
 v. Howard, 93
 v. Hudgins, 59
 v. Jefferson, 512
 v. Jones, 241b
 v. McNeill, 675
 v. Martin's Admr. (App. 2101)
 v. Medley, 678, 680
 v. Mitchell, 209a
 v. Moore, 410
 v. Morris, 8
 v. Noell, 419
 v. Norment, 211a, 235, 238, 758
 v. Pickleseimer, 520
 v. Powers, 525
 v. Risdon, 216
 v. Rush, 207b (App. 2157)
 v. Scott, 509, 519
 v. Smith, 509, 521
 v. Thomason, 207b
 v. Vance, 748
 v. Watts, 480
 v. Williams, 233, 233a, 233b
 v. Worley, 209a
 v. Wsems, 195
 v. Yeamens, 99, 463, 474
 Richner v. Plateau Live Stock Co., 739
 Richstain v. Washington Mills Co., 60a, 203
 Richter v. Harper, 82, 679
 v. Penn. R. Co., 128
 v. United Rys. Co., 481b, 485
 Rickels v. Log Owners, etc. Co., 729
 Ricker v. Freeman, 31
 Ricketts v. Birmingham St. R. Co., 502, 520
 v. Chesapeake, etc. R. Co., 120a, 502, 749
 v. East India Docks R. Co., 418, 449
 v. W. U. Tel. Co., 755, 756
 Rickhoff v. Heckman, 185
 Rickman v. Lee Lbr. Co., 206, 207
 Riddle v. Bedford Co., 313
 v. Delaware Co., 272
 v. Proprietors of Locks, etc., 256, 337, 400
 v. Westfield, 367
 Ridenhour v. Kansas City R. Co., 73, 508
 Rider v. Kinsey, 702
 Rider v. White, 628, 632, 639
 Rideout v. Knox, 702
 Ridley v. Tiplady, 569
 Riedel v. Moran, 168
 v. Wheeling Tr. Co., 485c
 Rietman v. Stolte, 216
 Ries v. St. Louis Tr. Co., 485c
 Rietveld v. Wabash R. Co. (App. 2062)
 Riest v. Goshen, 107
 Rigby v. Hewitt, 28
 Rigdon v. Allegheny Lumber Co., 217
 v. Temple Waterworks Co. (App. 2098)
 Riggs v. Metropolitan St. Ry. Co., 485bc
 v. New York Tunnel Co., 688a
 v. Standard Oil Co., 143, 683
 v. Thatcher, 619
 Righter v. Jersey City Eater Co., 728
 Rigler v. Charlotte, etc. R. Co., 463, 474
 Rigney v. Tacoma Water Co., 729
 Rigony v. Schuylkill Co., 256, 289
 Rigsby v. Oil Well Supply Co., 211a
 Riley v. Baxendale, 184, 203
 v. Buchanan, 334
 v. Chicago, etc. Ry. Co., 672
 v. Consolidated Ry. Co., 1
 v. Continuous, etc. Co., 701
 v. Farnum, 644
 v. Galveston R. Co., 241c
 v. Harris, 626
 v. Lissner, 708
 v. Missouri, etc. R. Co., 463, 472, 483
 v. Northern Pac. Ry. Co., 417
 v. O'Brien, 231
 v. St. Lake Tr. Co., 73a, 485a
 v. Salt Lake, etc. Tr. Co., 644a
 v. Simpson, 708
 v. Wrightsville, etc. Ry. Co., 503
 Rima v. Rossie Iron Works, 213
 Rinake v. Victor Mfg. Co., 188
 Rinard v. Omaha, etc. Ry. Co. (App. 2074)
 Rincicotti v. O'Brien, etc. Co., 769 (App. 2127)
 Rindge v. Coleraine, 115
 v. Sargent, 729
 Rine v. Chicago, etc. Ry. Co. (App. 2074)
 Ring v. Cohoes, 26, 246, 367, 740
 Ringelstein v. San Antonio, 351
 Ringland v. Toronto, 363
 Rinehart v. Kansas City, etc. Ry. Co., 449

[References are to sections.]

- Rio Grande Western R. Co. v. Rubenstein, 516, 760
 etc. Ry. Co. v. Vaughn, 424
 Riordan v. Ocean S. S. Co., 112
 Ripley v. Freeholders, etc., 256, 395
 Rippe v. Chicago, etc. R. Co., 435
 Rippy v. Southern Ry. Co. (App. 2183)
 Risque's Admr. v. Chesapeake, etc. Ry. Co., 459c
 Rissler v. Edwards, 709a
 Ritchey v. West, 604, 606, 607
 Ritchie v. Bowsfield, 172
 v. Waller, 147
 Ritger v. Milwaukee, 346
 Rittenhouse v. Independent Tel. Co., 542, 754, 755
 Ritter v. Thibodeaux, 144
 Ritscher v. Orange, etc. Ry. Co., 73a
 Ritz v. Austin, 127, 767 (App. 2097)
 River Wear Co. v. Adamson, 16
 Rivers v. Augusta, 262
 v. Kansas, etc. Ry. Co., 493
 Riverside Mills v. Jones, 192
 Riverton Coal Co. v. Shepperd, 206
 Roach v. Atlanta, etc. Ry. Co., 481
 v. Jones, 756
 v. Ogdensburg, 271, 369
 v. St. Joseph, etc. R. Co., 464
 v. Western, etc. R. Co., 60a, 473
 Roanoke v. Harrison, 375
 Nat. Bank v. Hambrick, 581
 Ry., etc. Co. v. Sterrett, 16, 51, 494, 518
 Robards v. Bannon Sewer Pipe Co., 146, 148, 151
 Robb v. Connellsville, 375
 Robbins v. Baltimore, etc. Ry. Co., 428
 v. Chicago, 175, 176, 289, 365, 703
 v. Fitchburg R. Co., 475, 477
 v. Jones, 343, 709
 v. Mount, 723, 724
 v. Scranton, 283
 v. Springfield R. Co., 90, 375, 385c, 485c
 Robel v. Chicago, etc. R. Co., 54
 Roberson v. Kirby, 671
 Robert v. Alexander, etc. R. Co., 463
 Robertson v. New York, 97
 Roberts v. Atlantic, etc. Ry. Co., 501
 v. Boston, 323
 v. Boston, etc. Ry. Co., 1
 v. Chicago, etc. R. Co., 241
 v. Detroit, 289
 v. Fielder Salt Works, 232
 v. Galveston, etc. Ry. Co., 742
 [LAW OF NEG. VOL. I — p.]
 Roberts v. Great Northern Ry. Co., 134a
 v. Great Western R. Co., 434
 v. Johnson, 122, 508, 514
 v. New York, etc. Ry. Co., 91
 v. Quincy, etc. R. Co., 436
 v. Richmond, etc. R. Co., 752
 v. Sanitas Food Co., 207
 v. Sierra Ry. Co., 518
 v. Smith, 187
 v. Spokane St. Ry. Co., 485ba
 v. Sterling, 574
 v. Virginia, etc. Co., 189, 203
 v. Western U. Tel. Co., 540a
 Bros. v. Dover, 287
 Robertson v. Boston, etc. R. Co., 114, 225, 488
 v. Chicago, etc. Ry. Co., 134a, 211a, 494 (App. 2105)
 v. Cornelson, 218
 v. Erie R. Co., 523
 v. Miller, 730
 v. N. Y. & Erie R. Co., 61
 v. Wabash, etc. R. Co., 467, 501
 v. Waukon, 375
 v. Wenger, 606
 v. Wooley, 702
 Robeson v. French, 104
 Robichaud v. Mendell, 180
 Robins v. Ft. Wayne Iron, etc. Co., 207b
 v. Lewiston, etc. Ry., 189
 Robinson v. Brennan, 622
 v. Canadian Pac. R. Co., 140
 v. Chamberlain, 118, 281, 313, 325, 341
 v. Charles Wright, etc. Co., 60
 v. Chicago, etc. R. Co., 455
 v. Cone, 73, 73a, 78, 84
 v. Evansville, 265
 v. Fetterman, 657
 v. Fitchburg, etc. R. Co., 57, 107, 190
 v. Flint, 634
 v. Fowler, 338
 v. Gell, 591
 v. Grand Trunk R. Co., 425, 451a
 v. Greenville, 262
 v. Helena, etc. Ry. Co., 7, 508
 v. Houston, etc. R. Co., 209a
 v. Louisville, etc. R. Co., 56, 180
 v. Marino, 628, 630
 v. Metropolitan St. Ry. Co., 66
 v. Morris, 653b
 v. N. Y. Central R. Co., 60, 66

[References are to sections.]

- Robinson v. N. Y. & Erie R. Co., 359, 365
 v. Northampton R. Co., 508
 v. Ocean St. Nav. Co. (App. 2083)
 v. Oregon, etc. R. Co., 73
 v. People, 624
 v. Pioche, 93
 v. Rockland, 476, 478
 v. Rohr, 340
 v. St. Louis, etc. Co., 516
 v. Shanks, 733, 750
 v. Simpson, 646, 758
 v. State, 363
 v. Superior Rapid Tr. Ry. Co., 748, 749
 v. Town of St. Matthews, 758
 v. Ward, 753
 v. Webb, 167, 173
 v. Western, etc. R. Co., 108
 v. Western Pac. R. Co., 92, 113, 353, 471
 v. West Virginia, etc. R. Co., 207b
 v. Wilmington, 369, 377
 v. Chas. Wright & Co., 60
- Roblee v. Indian Lake, 356
- Roblin v. Kansas City R. Co., 190, 207, 222
- Robostelli v. N. Y., New Haven, etc. R. Co., 460, 488
- Robson v. Northeastern R. Co., 509
- Roche v. Denver, etc. Ry. Co., 193
 v. Western U. Tel. Co., 545
- Rochereau v. Jones, 602
- Rochester v. Bull, 653b
 v. Campbell, 13, 13a, 343, 384, 703a
 v. Montgomery, 24a, 301, 343, 384
 White Lead Co. v. Rochester, 14, 47, 274, 278
- Rock v. American Construction Co., 341, 375
- Rockford v. Hildebrand, 53, 289, 353, 367
 v. Hollenbeck, 65
 etc. R. Co. v. Byam, 476
 v. Connell, 423, 436
 v. Delaney, 73
 v. Irish, 428
 v. Lynch, 440
 v. Rafferty, 419
 v. Rogers, 678
- Rockingham Ins. Co. v. Bosher, 115
- Rockwell v. Third Ave. R. Co., 417
- Roden v. Chicago, etc. R. Co., 470
- Roddy v. Missouri Pac. R. Co., 115, 217
- Roderick v. Whitson, 303
- Rodgers v. Central Pacific R. Co., 39, 187
 v. Lees, 73
 v. Missouri, etc. Ry. Co., 28, 29
- Rodger's Admr. v. Union, etc. Co., 698
- Rodman v. Mich. Cent. R. Co., 233, 233a
- Rodney v. St. Louis, etc. R. Co., 192, 197
- Rodrian v. N. Y., New Haven, etc. R. Co., 476
- Roe v. Birkenhead R. Co., 145
 v. Kansas City, 353
 v. New York, 353
- Roebing Constr. Co. v. Thompson, 231
- Roeck v. Newark, 262
- Roehrs v. Remhoff, 626
- Roesner v. Hermann, 178
- Rogahn v. Moore Mfg. Co., 151
- Rogers v. Atlantic City R. Co., 493
 v. Binghamton, 262
 v. Brewster, 617
 v. Covington, etc. Ry. Co., 207
 v. Florence R. Co., 166, 167
 v. Kennebec Steamboat Co., 490, 501, 505
 v. Leyden, 186, 208, 209a, 215
 v. Ludlow Mfg. Co., 203a, 226, 228
 v. Myerson Ptg. Co., 73, 73a
 v. Newburyport, 421
 v. N. Y. & Texas Land Co., 243
 v. Overton, 109, 113
 v. Parker, 175
 v. People, 256
 v. Phelps, 243
 v. Phillips, 653, 654
 v. Portland Lbr. Co., 206
 v. Rhymney R. Co., 464, 471
 v. Rio Grande, etc. Ry. Co., 469
 v. Roe, 207e
 v. Rogers, 631
 v. Shirley, 368, 373
 v. Smith, 115
 v. South, etc. Ry. Co., 215
 v. Taylor, 701
 v. The St. Charles, 61
 v. Mulliner, 303
 v. Western U. Tel. Co., 531, 538
 v. Williamsport, 367
 etc. Works v. Hand, 234
- Rohbach v. Pac. R. Co., 180
- Rohrbough v. Barbour County Court, 346

[References are to sections.]

- Rohloff v. Fair Haven, etc. Ry. Co., 73, 73a
 Rohrbach v. Pullman Palace Car Co., 513
 Roland v. Tift, 222
 Rolf v. Greenville, 363
 Rolipillon v. Abbott, 645
 Rolke v. Chicago, etc. R. Co., 674
 Roller v. Sutter St. Ry. Co., 485b
 Rollestone v. Cassirer, 704, 719
 Rollo v. Andes Ins. Co., 249
 Rolseth v. Smith, 114, 222
 Romano v. Capital City Co., 134a (App. 2062)
 Rome v. Dodd, 93, 289
 etc. Const. Co. v. Dempsey, 207b
 etc. R. Co. v. Barnett, 484
 v. Chasteen, 120a, 168
 v. Keel, 520
 Romeo v. Boston & M. R. Co., 477
 Romero v. Atchison, etc. Ry. Co. (App. 2081)
 Romick v. Chicago, etc. R. Co., 471
 Romney Marsh v. Trinity House, 18, 39, 738
 Romona Stone Co. v. Phillips, 193, 233a
 Rompillon v. Abbott, 35
 Rondeau v. Sayles, 223
 Roney v. Aldrich, 664, 702
 v. Des Moines, 272
 v. Ward, 628
 Ronn v. Des Moines, 369
 Rood v. N. Y. & Erie R. Co., 11, 119, 412, 672
 Roodhouse v. Christiani, 334a, 367
 Roof v. Railroad Co., 57, 108
 Rookard v. Atlanta, etc. Ry. Co., 120a, 413, 459
 Rooker v. Bruce, 559, 753
 Rooks v. Houston St. R. Co., 480, 485a, 485c, 653
 Rooney v. Carson, 207e
 v. New York, etc. Ry. Co., 760
 v. Randolph, 338
 v. Sewell, etc. Cordage Co., 195, 203
 Root v. Des Moines, etc. Ry. Co., 520
 v. Great Western R. Co., 503, 544
 v. Kansas City, etc. Ry. Co., 186, 207a, 209a
 v. N. Y. Cent. Car Co., 526
 v. Wagner, 618
 Roper v. Agriculture Soc., 176
 Rose v. Boston, etc. R. Co., 202
 v. Chicago, etc. R. Co., 676
 v. Des Moines Valley R. Co., 140, 505
 Rose v. Imperial Engine Co., 150
 v. King, 702a
 v. Louisville, etc. R. Co., 761a
 v. Miles, 371
 v. Minneapolis, etc. Ry., 207e
 v. Northeastern R. Co., 509
 v. St. Louis, 60b
 v. Stevens, etc. Transp. Co., 60
 v. U. S. Tel. Co., 543
 Roseback v. Aetna Mills, 241b
 Rosedale v. Golding, 334a
 Roseman v. Carolina Cent. R. Co., 493
 Rosemand v. Southern Ry. Co., 180
 Rosenbaum v. Newbern, 262, 291
 v. St. Paul & D. R. Co., 197
 Rosenberg v. Des Moines, 367
 v. Dufree, 73, 91
 v. Schoolherr, 120
 Rosenfield v. Arrol, 723
 v. Newman, 723
 Rosenhain v. Galligan, 361
 Rosenkranz v. Lindell R. Co., 760
 Rosenstock v. Lane, 701
 Rosenthal v. Davenport, 591
 Rosevear v. Osceola Mills, 369
 Rosewell v. Prior, 120
 Rosiere v. Sawkins, 246
 Rosin v. Danaher Lbr. Co., 191
 Ross v. Boston & Worcester R. Co., 680
 v. Campbell, 618
 v. Chicago, etc. R. Co., 189, 207e
 v. Double Shoals Cotton Mills, 59, 60
 v. Fedden, 723
 v. Iona, 346
 v. Madison, 299
 v. Metropolitan St. Ry. Co., 99
 v. Pearson Cordage Co., 223
 v. Reed, 317
 v. Troy, etc. R. Co., 99
 v. Walker, 195
 -Paris Co. v. Brown, 207h
 Rossey v. Lawrence, 219
 Rossire v. Boston, 291
 Rost v. Missouri Pac. R. Co., 673, 674, 678
 Rosted v. Great Northern Ry. Co., 513
 Roth v. Eccles, 221
 v. Metropolitan R. Co., 485a
 v. Northern Pac. Lumber Co., 219a
 v. Union Depot Co., 73, 481
 Rothe v. Milwaukee, etc. R. Co., 476
 Rothenberger v. Northwestern Milling Co., 215

[References are to sections.]

- Rothenberger v. Northwestern, etc. Co., 214a
 Rothstein v. Penna. R. Co., 520
 Rott v. Forty-second St. Ferry Co., 485d, 492a
 Roughan v. Boston, etc. Block Co., 195, 195a
 Roul v. East Tennessee, etc. R. Co., 207h
 Roulston v. Clark, 61, 97, 705, 718
 Rounds v. Delaware, etc. R. Co., 150, 154
 v. Mumford, 283
 Rourke v. White Moss Colliery Co., 162
 Rouse v. Harry, 241c
 v. Hornsby, 241c
 v. Somerville, 358
 Roushange v. Chicago, etc. Ry. Co., 406
 Rouston v. Detroit, etc. Ry. Co., 497
 Roux v. Blodgett Co., 204, 215
 Rowan v. New York, etc. Ry. Co., 463a
 Rowden v. Daniell, 193
 v. Schoenherr, etc. Min. Co., 195, 207g, 217
 Rowdin v. Pennsylvania Ry. Co., 488, 516
 Rowe v. Chicago, etc. Ry. Co., 476, 750
 v. Ehrmanstrauch, 628
 v. Lent, 614
 v. N. Y. Central R. Co., 114
 v. Portsmouth, 287, 367
 v. St. Paul, etc. R. Co., 735
 v. Southern Ry. Co., 13
 Rowell v. Boston, etc. Ry. Co., 150
 v. Lowell, 122, 346, 356, 378
 v. Railroad Co., 62
 v. Stamford R. Co., 355
 v. Williams, 358
 Rowen v. N. Y., New Haven, etc. R. Co., 64, 467
 Rowland v. Baird, 702
 v. Cannon, 65
 v. Murphy, 701
 Rowley v. Ellis (App. 2068)
 Rowling v. Clyde, etc. Co., 742
 Rowlings v. Wabash, etc. Ry. Co., 761
 Rowning v. Goodchild, 321, 419
 Rowson v. Earle, 568
 Royce v. Salt Lake City, 299
 Rozell v. Andrews, 334
 Rozelle v. Rose, 241
 Ruck v. Williams, 328
 Rucker v. Huntington 355
 v. Missouri Pac. R. Co., 523
 v. Smoke, 749
 Rudder v. Koopman, 689
 Ruddiman v. Smith, 147
 Ruddock v. Lowe, 607
 Rudel v. Los Angeles Co., 735
 Rudell v. Grand Rapids Storage Co., 606
 Ruddy v. Blake Mfg. Co., 203
 Rudiger v. Chicago, etc. Ry. Co. (App. 2105)
 Rudolphe v. New Orleans, 266
 Rudy v. Rio Grande W. R. Co., 493
 Ruffner v. Cincinnati, R. Co., 58, 676
 Ruggles v. Bucknor, 317
 v. Nevada, 57, 369
 Ruland v. South Newmarket, 114
 Rummell v. Dilworth, 219, 219a
 Rumpel v. Oregon, etc. R. Co., 479
 Rumsey v. Delaware, etc. R. Co., 221
 v. Nelson, 645
 Rundgren v. Boston, etc. St. Ry. Co., 485e
 Runians v. Keller, etc. Co., 164, 207b
 Runnels v. Bullen, 701
 Runyan v. Central, etc. Ry. Co., 526
 v. Patterson, 657
 Runyon v. Central R. Co., 61
 Rupard v. Chesapeake, etc. R. Co., 463
 Rupp v. Burgess, 703, 703a
 Ruppel v. United Railroads (App. 2077)
 Rural Home Tel. Co. v. Arnold, 698a
 v. Kentucky, etc. Telep. Co., 556e
 Rusch v. Davenport, 393, 394
 Rush v. Missouri Pac. R. Co., 207h
 v. Oregon Power Co., 207g
 Rusher v. Dallas, 291
 Rushing v. Seaboard, etc. Ry. Co., 760
 Rushville v. Adams, 355
 v. Poe, 107
 Russ v. Wabash, etc. R. Co., 233
 v. War Eagle, 488
 Russell v. Beebe, 317
 v. Carolina Cent. R. Co., 56, 482
 v. Central, etc. Ry. Co., 479
 v. Columbia, 358, 368
 v. Cone, 634
 v. Hanley, 455
 v. Hudson River R. Co., 180, 241
 v. Maine Central R. Co., 428
 v. Metropolitan St. Ry. Co., 757
 v. Men of Devon, 256
 v. Minneapolis, etc. R. Co., 214
 v. Monroe, 377

[References are to sections.]

- Russell v. New York, 295
 v. Oregon R., etc. Co., 457, 463*a*
 v. Palmer, 559, 572, 753
 v. Pittsburgh, etc. Ry. Co., 491, 505
 v. Reagan, 668, 669
 v. Richmond, etc. R. Co., 207*b*
 v. Roberts, 746, 751
 v. Scott, 731
 v. Seattle, etc. Ry. Co., 494, 516
 v. Stewart, 572
 v. Sunbury (App. 2088)
 v. Tillotson, 209*a*
 v. Tomlinson, 638
 v. Western U. Tel. Co., 543, 554, 756
 Rust v. Larue, 557
 v. Low, 655, 658
 Ruter v. Floy, 64
 Rutherford v. Chicago, etc. R. Co., 207*e*
 v. Iowa, etc. Ry. Co., 457, 460
 v. Irby, 747
 Rutledge v. Missouri Pac. R. Co., 202, 207*e*, 241
 v. New Orleans Ry. Co., 508, 520
 Ryall v. Central Pac. R. Co., 482
 v. Kennedy, 690
 v. Mechanics' Mills, 241*b*
 Ryalls v. Mechanics' Mills (App. 2150)
 Ryan v. Ardis, 54
 v. Bagaley, 230
 v. Bristol, 107
 v. Cumberland Iron Co., 61
 v. Cumberland V. R. Co., 180, 226, 235, 239
 v. Foster, 375
 v. Fowler, 187, 192, 197, 222
 v. Gross, 676
 v. Iron Works, 204
 v. Los Angeles, etc. Storage Co., 218, 219*a*, 223, 233
 v. Louisville, etc. R. Co., 107, 112
 v. McCully, 180
 v. Manhattan R. Co., 506
 v. Manufacturers', etc. Bank, 587
 v. N. Y. Cent. R. Co., 17, 30, 55, 195, 475, 666, 668, 739
 v. Northern Pac. Co., 219
 v. Oshkosh Gaslight Co., 769, 773
 v. Porter Mfg. Co., 217
 v. Rochester, etc. R. Co., 660
 v. Tarbox, 203
 Ryan v. Towar, 73, 705, 706
 v. Wilson, 708
 Rychlicki v. St. Louis, 274
 Ryder v. Kinsey, 343
 v. Wombwell, 56
 Ryer v. Prudential Ins. Co., 585
 Ryerson v. Abington, 53
 Ryland v. Atlantic, etc. Ry. Co. (App. 2128)
 Rylander v. Laursen, 11, 683
 Rylands v. Fletcher, 154*a*, 666, 701*a*
 Ryon v. Delaware, etc. Ry. Co., 186
 v. Northern Pac. Co., 219
 Sabere v. Atha Co., 203
 Sabin v. Vermont Cent. R. Co., 412
 Sabine, etc. R. Co. v. Ewing, 217
 v. Hanks, 457
 v. Smith, 750
 Sachra v. Manilla, 758
 Sack v. Dolese, 195
 Sackett Street, Matter of, 332
 Sacridier v. Brown, 597
 Sadler v. Henlock, 165
 Sadlier v. New York, 283
 Sadowski v. Michigan Car Co., 197, 204
 Safford v. Drew, 135, 137, 766
 v. Green Island, 363
 Sage v. Baltimore, etc. Ry. Co., 236
 v. Dickinson, 619
 Sagers v. Nuckolls, 188
 Saginaw R. Co. v. Bohn, 73
 Sahlgard v. St. Paul R. Co., 508, 520
 Sahlien v. Bank of Lonoke, 581, 587*a*
 St. Anthony's Falls v. Eastman, 113
 St. Benedict's Abbey v. Marion Co., 232
 St. Clair Nail Co. v. Smith, 215
 St. R. Co. v. Eadie, 66
 St. Germain v. Fall River, 291, 376
 St. Jean v. Lippitt Woolen Co., 197
 St. John v. New York, 744
 St. Johns, etc. R. Co. v. Ransom, 678
 v. Shalley, 165
 St. Johnsbury, etc. R. Co. v. Hunt, 446
 St. Joseph v. McCabe, 310
 v. Union R. Co., 384
 etc. R. Co. v. Chase, 673, 679
 v. Grover, 419
 v. Hedges, 33, 500, 516, 519
 v. Leland, 616
 St. Louis v. Conn. Mutual Life Ins. Co., 384
 v. Gurno, 283
 Brick Co. v. Kenyon, 207, 209*a*

[References are to sections.]

- St. Louis Bridge Co. v. Miller, 31, 376, 397
 Cordage Co. v. Miller, 208
 Nat. Stock Yards v. Brennan, 464
 v. Godfrey, 31
 Stove Co. v. Sawyers, 219
 Trust Co. v. Bambrick, 750
 v. Texas, etc. Ry. Co., 163
 etc. Metal Co. v. Dawson, 68
 etc. Packet Co. v. Keokuk Bridge Co., 395
 etc. Ry. Co. v. Adams, 455, 457
 v. Ames, 202
 v. Amos, 482
 v. Anderson, 508
 v. Atchison, 520
 v. Ayres, 750
 v. Baker, 91, 518
 v. Basham, 432
 v. Battle, 501
 v. Bell, 73, 410
 v. Biggs, 115, 752
 v. Bloyd, 207
 v. Bolen, 73a, 457
 v. Bolton, 481a
 v. Bowen (App. 2122)
 v. Box, 473
 v. Bricker, 120a
 v. Brisco, 2a, 208
 v. Britz, 238, 241
 v. Brown, 49
 v. Bryant, 484
 v. Burdg (App. 2122)
 v. Byas, 414
 v. Caldwell, 501
 v. Cannan, 508
 v. Cantrell, 523
 v. Carlisle, 429
 v. Carr, 87, 457, 469, 472, 476
 v. Chapman, 475
 v. Christian, 481a
 v. Cleeve, 773
 v. Cochran (App. 2054)
 v. Combs, 672
 v. Conger, 427
 v. Connolly, 672
 v. Conway, 206
 v. Coombs, 673, 675
 v. Corman, 132 (App. 2122)
 v. Cox, 513a
 v. Crabb, 672
 v. Crabtree, 475
 v. Crandell, 653e
 v. Crosnoe, 99
 v. Cundieff, 476
 v. Cunningham, 485d
 v. Curl, 120a, 413, 459
 v. Dallas, 493
 v. Dalvy, 749
- St. Louis, etc. Ry. Co. v. Davis, 206, 207, 209, 493, 772 (App. 2122)
 v. Dawson, 140a, 672 (App. 2054)
 v. Dillard, 476
 v. Dingman, 482, 484
 v. Dobbins, 761
 v. Dodd, 727a
 v. Doyle, 742
 v. Dooley, 410
 v. Douglas, 419
 v. Drodgy, 99
 v. Dunn, 463
 v. Dupree, 207b
 v. Dysart, 748
 v. Eggmann, 192
 v. Elledge, 467
 v. Farr, 520
 v. Ferguson, 426, 742
 v. Ferrell, 485
 v. Finley, 207, 510
 v. Fire Ass'n, 679
 v. Flinn, 70
 v. French, 207a (App. 2141)
 v. Garner, 472, 476
 v. Gentry, 672
 v. George, 517
 v. Gilbreath, 114
 v. Gilham, 672
 v. Goodnight, 672
 v. Goolsby, 633
 v. Gregory, 758, 763
 v. Griffith, 490
 v. Grimsley, 485d, 501
 v. Hagan, 432
 v. Haist (App. 2054)
 v. Hardy, 493
 v. Harkey, 494, 516, 518
 v. Harmon, 490 (App. 2122)
 v. Harper, 233
 v. Harris, 412
 v. Harrison, 154
 v. Hartung, 508, 520
 v. Hatch, 511, 516
 v. Hawks, 418
 v. Hawkins (App. 2122)
 v. Haynes, 505
 v. Hecht, 679
 v. Hendricks, 151, 427, 470
 v. Herrin, 483
 v. Hesterly, 769
 v. Higgins, 194a
 v. Highnote, 508, 522, 758
 v. Hitt, 769, 775
 v. Hoist, 771
 v. Holman, 207g, 214a, 215
 v. Holmes, 508
 v. Hook, 501
 v. Hopkins, 702
 v. Horne, 760

[References are to sections.]

- St. Louis, etc. Ry. Co. v. Huffman**, 493
 v. Humphreys, 490
 v. Hunt, 741
 v. Irwin, 193, 198, 217
 v. Jackson, 480, 760
 v. Jacobson, 99
 v. Jagerman, 184
 v. Jamison, 207*e*
 v. Johnson, 415, 470, 501, 742 (App. 2097)
 v. Johnston, 771
 v. Jones, 675
 v. Kelton, 215
 v. Kilpatrick, 493
 v. Knott, 169
 v. Langston, 773
 v. League, 30
 v. Leftwich, 523
 v. Lemon, 209*a*, 233*a*
 v. Lewis, 1, 426, 461, 493 (App. 2122)
 v. Linder, 436
 v. Loftis, 114, 419
 v. Ludlum, 673, 678
 v. Lyman, 751
 v. McClain, 188
 v. McCormick, 132
 v. McNamara, 132
 v. McNamare (App. 2123)
 v. Mackie, 493
 v. Madden, 174
 v. Maddry, 94, 519, 765, 771
 v. Mangan, 197, 207*g*, 214*a*
 v. Manly, 483
 v. Marker, 216
 v. Marshall, 203
 v. Mathias, 13, 468, 769, 771
 v. Matthews, 463, 475
 v. Mealman, 209*a*, 214*a*, 215, 223
 v. Miller, 22, 679
 v. Mitchell, 497, 516
 v. Mize, 203
 v. Monday, 483, 484
 v. Morgart, 61, 193, 209*a*, 241
 v. Morris, 207*b*, 207*g*, 207*h*, 215
 v. Morrison, 470
 v. Murray, 89
 v. Myzell, 758
 v. Needham, 195, 233*a*, 410, 773
 v. Neely, 480
 v. Newman, 656
 v. Niblack, 760
 v. Norton, 432
 v. Odum, 463
 v. Oliver, 495, 524
 v. Osborn, 493, 516
 v. Parks, 51, 94, 495, 516
- St. Louis, etc. Ry. Co. v. Payne**, 451
 v. Pell, 151
 v. Person, 508
 v. Phillips, 215 (App. 2120)
 v. Pitcock, 491
 v. Pollock, 524
 v. Ratley, 520
 v. Reagan, 489
 v. Reanes, 457
 v. Reed, 189, 193, 223
 v. Rhoden, 1, 25, 418
 v. Rice, 207*b*, 513*a*, 523
 v. Richardson, 678
 v. Rickman, 207*h*
 v. Robbins, 192, 197
 v. Rogers, 207*e*
 v. Rosenberry, 91, 520
 v. Ruff, 475
 v. Sanderson, 154
 v. Saunders, 728, 750
 v. Savage, 516, 760
 v. Schuler, 217
 v. Schumacher, 207
 v. Shackelford, 233, 235
 v. Sharp, 448
 v. Shaw, 500, 511, 516
 v. Shiflet, 457, 464, 480, 481*a*, 772
 v. Sizemore, 132
 v. Smuck, 505
 v. Snaveley, 676
 v. Sparks, 481*a*
 v. Spivey, 202
 v. Stamps, 85*a*, 769
 v. Standifer, 771
 v. Stapp, 436
 v. Stewart, 500
 v. Strotz, 676
 v. Summers, 483
 v. Sweet, 51, 495, 771, 775 (App. 2054)
 v. Taylor, 433, 761 (App. 2118)
 v. Thompson, 748
 v. Thompson-Hailey Co., 672
 v. Thornton (App. 2188)
 v. Tippet, 478
 v. Tittle, 508
 v. Todd, 20, 419, 437, 451*a*
 v. Torrey, 232
 v. Townsend, 485, 771
 v. Triplett, 185*a*, 202
 v. Tucka, 457, 463
 v. Turner, 508
 v. Valirius, 73
 v. Vincent, 432
 v. Wainwright, 488
 v. Walbrink, 409, 412
 v. Wallace, 490
 v. Warren, 457

[References are to sections.]

- St. Louis, etc. Ry. Co. v. Washburn, 437
 v. Weaver, 60c, 108, 187, 233, 238
 v. Welch, 239
 v. Wells (App. 2123)
 v. White, 223a (App. 2123)
 v. Whittle, 525
 v. Wilbanks, 30
 v. Willis, 168
 v. Wilson, 501, 511
 v. Woodruff, 493
 v. Woods, 501
 v. Wyatt, 145, 148
 v. York, 197
 v. Yarborough, 751
 v. Yocum, 133
 v. Yonley, 164, 668
 Press Brick Co. v. Kenyon, 222
 St. Nicholas Bank v. State National Bank, 580a
 St. Paul v. Kuby, 74, 375
 v. Sietz, 166, 176
 St. Paul, etc. R. Co. v. Duluth, 274
 St. Peter v. Denison, 325, 701a
 Sala v. Chicago, etc. R. Co., 482
 Saldana v. Galveston, etc. R. Co., 482, 483
 Salem v. Goller, 64
 v. Harvey, 769
 v. Spring Valley, 353
 v. Webster, 356
 Bank v. Gloucester Bank, 739
 Flouring Mills Co. v. Lord, 729
 Stone Co. v. Griffin, 203
 v. Hobbs, 217
 v. O'Brien, 207
 v. Teppes, 217
 Sales v. Western Stage Co., 51, 495, 514
 Salina v. Trosper, 761
 Salisbury v. Gourgass, 569
 v. Hirschenroder, 16a, 39, 343, 350
 v. Press Pub. Co., 207
 Sall v. Cleveland, etc. Ry. Co., 481a
 Salladay v. Dodgeville, 741
 v. Old Dominion, etc. Co., 705
 Saller v. Friedman Shore Co., 218
 Salmon v. Delaware, etc. R. Co., 680
 v. City Elec. Ry. Co., 516
 v. N. Y. Central R. Co., 472
 Salter v. Utica, etc. R. Co., 89, 114, 475, 476, 747
 Saltonstall v. Stockton, 519
 Saltus v. Pruyn, 179
 Salzman v. Brooklyn R. Co., 743
 Salzer v. Milwaukee, 376
 Sam Yun v. McMan, 625a
- Sambuck v. Southern Pacific Co., 516
 Sammon v. N. Y. Central, etc. R. Co., 207
 v. N. Y. & Harlem R. Co., 241
 Sample v. Consol. Light, etc. Co., 485bc (App. 2104)
 v. Vicksburg, 274
 Samples v. Atlanta, 376
 Sampson v. Goochland, 334
 v. Hoddinott, 729
 Samuel v. Commonwealth, 618
 Kupples & Co. v. Wallins, 214a, 215
 Samuels v. Ry. Co., 761a
 v. Richmond, etc. R. Co., 509, 748
 v. Willis, 614a
 Samuelson v. Cleveland, etc. Mining Co., 144, 166
 Samyn v. McCloskey, 171
 San Antonio v. Talerico, 346, 368, 384
 v. Wildenstein, 375, 376
 Tr. Co. v. Bryant, 522
 v. Court, 485bc
 v. Kelleher, 99, 463, 480
 v. Levyson, 485ab
 v. Mechler, 463
 v. Rodriguez, 191
 etc. Co. v. Home Ins. Co., 679
 etc. R. Co. v. Adams, 192, 437, 492
 v. Bennett, 108, 775
 v. Bowles, 13, 241c, 464a
 v. Bryant, 516
 v. Engelhorn, 216
 v. Gonzales, 458
 v. Graves, 22
 v. Gray, 85b, 680
 v. Green, 479
 v. Harris, 427, 433
 v. Jackson, 520
 v. Kiersey, 407, 750
 v. Kirlin, 742
 v. Lester, 87, 758
 v. Lynch, 513a
 v. McDonald, 213
 v. McMillan, 483
 v. Mechler, 463, 485c
 v. Morgan, 73
 v. Petersen, 434
 v. Renkin (App. 2097)
 v. Reynolds, 241c
 v. Robinson, 455
 v. Southwestern Tel., etc. Co., 556c
 v. Spencer, 760
 v. Tamborello, 448
 v. Taylor, 225

[References are to sections.]

- San Antonio, etc. R. Co. v. Turney,** 501
 v. Vaughn, 1
 v. Wallace, 27*b*, 207*b*
 v. Weigers, 739
 v. Yeager, 429
Sanborn v. Detroit, etc. Ry. Co., 470
Sanchez v. San Antonio, etc. Ry. Co., 457, 501
Sandborn v. Detroit, etc. R. Co., 464
 v. Madera, etc. R. Co., 204, 214
Sanders v. Chicago, etc. R. Co., 523
 v. Etiwan Phosphate Co., 187
 v. Lake Shore, etc. R. Co., 747
 v. Pa. Ry. Co., 459*a*
 v. Reed, 119
 v. Reister, 108, 343, 703
 v. Teape, 626, 629
Sanderson v. Frazier, 108, 519
Sandford v. Clarke, 120
 v. Pawtucket, 176
Sandham v. Chicago, etc. R. Co., 46
Sandifer v. Lynn, 654
 v. Louisville, etc. Ry. Co. (App. 2064)
Sands v. Southern, etc. Ry. Co., 489, 513
Sandwich v. Dolan, 95, 376
 v. Nolan, 743
Sandy v. St. Joseph, 287
 v. Swift, 49
Sanford v. Augusta, 258, 338
 v. Eighth Ave. R. Co., 61, 64, 151, 493
 v. Standard Oil Co., 224
Sangamon Coal Co. v. Wiggerhaus, 206, 717
 etc. Co. v. Young, 633
San Filippo v. American Bill Posting Co., 708*a*
San Marcos Elec., etc. Co. v. Comp-ton, 31, 122
Sanger v. Smith, 741
Sante Fe, etc. Tr. Co. v. Holmes, 187
Santore v. New York, etc. Ry. Co., 207
Sapp v. Christie Bros., 214*a*, 215
 v. Hunter, 332, 653*b*
Sappenfield v. Main St. R. Co., 192, 195
Sarch v. Blackburn, 639
Sargent v. St. Louis, etc. R. Co., 501, 506
 v. Stark, 708
Saska v. Chicago, etc. R. Co., 676
Satchwell v. Williams, 740
Sather v. Ness, 55
Satterfield v. Rowan, 734
Satterlee v. San Francisco, 313
Satterly v. Morgan, 241
Sauer v. Eagle Brewing Co., 59
Sauerborn v. New York, etc. R. Co., 463
Saulsbury v. Ithaca, 262, 289, 334, 334*a*, 335, 369
Saunders v. Chicago, etc. R. Co., 516
 v. Darling, 624
 v. Fort Madison, 291
 v. Gun Plains, 392
 v. Louisville, etc. R. Co., 135*a*
 v. Newman, 731
 v. Southern Pac. Co., 492, 505
Saussy v. South Florida R. Co., 671
Sautter v. N. Y. Central R. Co., 31, 742, 769, 775
Savacool v. Boughton, 303
Savage v. Bangor, 351
 v. Chicago, etc. R. Co., 424*a*, 425
 v. Corn Exchange Ins. Co., 92
 v. Gerstner, 649
 v. Marlborough St. Ry., 494, 516
 v. Rhode Island Co., 203, 207
 v. Steamship Co., 115
 v. Southern Ry. Co., 90
Savannah v. Cullins, 285
 v. Donnelly, 358
 v. Spears, 287
 v. Waldner, 354
 v. Welton, 371
Elec. Ry. Co. v. Hodges, 148
etc. Canal Co. v. Bourquin, 402, 731, 743
etc. Ry. Co. v. Barber (App. 2131)
 v. Beasley, 485*c*
 v. Beavers, 705
 v. Booth, 459*c*
 v. Boyle, 500, 512, 516
 v. Bryan, 485*e*, 513
 v. Buford, 735
 v. Day, 199, 207*g*
 v. Flanagan, 188, 485 (App. 2131)
 v. Flannigan, 190, 467, 773
 v. Folks, 103, 207*b*
 v. McConnell, 432
 v. McLeod, 760
 v. Meadors, 480
 v. Phillips, 58, 165
 v. Pughsley, 193
 v. Quo, 513
 v. Rice, 419
 v. Shearer, 767
 v. Slater, 458
 v. Smith, 73*a*
 v. Stewart, 480
 v. Watts, 520

[References are to sections.]

- Savannah, etc. Ry. Co. v. Williams (App. 2131)
- Saveljick v. Lytle Log Co., 134a
- Saversnick v. Schwarzschild, 207e
- Savings Bank v. Ward, 8, 117, 574
- Savoy v. Chapman, 573
- Sawyer v. Corse, 118, 289, 325
v. Hannibal, etc. R. Co., 16, 47, 494
v. McGillicuddy, 710
v. Marion County Lbr. Co. (App. 2183)
v. Minneapolis, etc. R. Co., 8
v. Newburyport, 272
v. Northfield, 358
v. Oakman, 104
v. Perry, 139 (App. 2065)
v. Roanoke, etc. Ry. Co., 484 (App. 2084)
v. Rutland, etc. R. Co., 225
v. Sauer, 102, 749
v. Vermont, etc. R. Co., 422
- Saxton v. Bacon, 55, 657, 662, 664
v. Hawksworth, 190
v. St. Joseph, 274
- Saylor v. Montesano, 289, 368
v. Parsons, 85b
- Sayward v. Carlson, 232, 239
- Scaggs v. Delaware, etc. Canal Co., 466
- Scagel v. Chicago, etc. Ry. Co. (App. 2140)
- Scales v. Chattahoochee Co., 256
- Scalpine v. Smith, 689
- Scammon v. Chicago, 298
- Scanlan v. Page Box Co., 218
- Scanlon v. Boston, 358
v. Boston & A. R. Co., 201, 209a
v. Philadelphia Tr. Co., 520
v. Tenny, -509
v. Watertown, 376
- Scannal v. Cambridge, 346
- Scarff v. Metcalf, 233
- Schaabs v. Woodburn, 654
- Schacherl v. St. Paul R. Co., 520
- Schadewald, Admr. v. Milwaukee, etc. Ry. Co. (App. 2105)
- Schaefer v. Fond du Lac, 346, 384, 485
v. Osterbrink, 122, 160
v. St. Louis, etc. R. Co., 486, 489, 520
v. Union Ry. Co., 523
- Schaefer v. Chicago, etc. R. Co., 426, 476
- Schaeffer v. Hardin, 337
v. Jackson, 346
- Schaefer v. Sandusky, 376
- Schafer v. Fond du Lac, 346, 373
v. New York, 334
- Schaible v. Lake Shore, etc. R. Co., 207, 239
- Schall v. Cole, 197
- Schanda v. Sulsberger, 710
- Schansten v. Toledo, etc. Ry. Co., 485e
- Scharenbroich v. St. Cloud Fiber Co., 207e
- Scharff v. Southern Ill. Const. Co., 60, 154
- Schattner v. Kansas City, 262, 274
- Schatz v. Pfel, 333
- Schaub v. Hannibal, etc. R. Co., 773
v. Kansas, etc. Ry. Co., 476
- Schaum v. Equitable Gas Co., 697
- Scheffer v. Railroad Co., 26, 30
v. Washington, etc. R. Co., 65, 742
- Scheffler v. Harden, 289
v. Minneapolis, etc. R. Co., 484
- Scheiber v. Chicago, etc. R. Co., 523
- Schelich v. Wilmington, 289, 354, 367, 375
- Schell v. German Flats, 122, 392
v. New York, 561
v. Plumb, 775
v. Second Nat. Bank, 702
- Scheller v. Silbermintz, 244
- Schenck v. Union Pac. R. Co., 422
- Schenkel v. Pittsburg, etc. Ry. Co., 758
- Schepers v. Union Depot R. Co., 490, 520
- Scherer v. Holly Mfg. Co., 233a
- Schermerhorn v. Metropolitan Gas Co., 160, 695
- Scheunke v. Pine River, 346, 356, 369
- Scheurer v. Banner Rubber Co., 187
- Scheuermann v. Scharfenberg, 705, 719
- Schexnaydre v. Texas, etc. R. Co., 484
- Schick v. Fleischauer, 120
- Schienfeldt v. Norris, 49
- Schierhold v. North Beach, 73a, 74
- Schiffmacher v. Kircher, 365
- Schigley v. Waseca, 289, 337
- Schild v. Central Park, etc. R. Co., 408
- Schilling v. Abernathy, 698
v. Chicago, etc. R. Co., 476
v. Smith, 639
- Schillinger v. Verona, 60a, 346
- Shimberg v. Cutter, 356
- Schimpf v. Sliter, 653
- Schindlebeck v. Moon, 708, 713

[References are to sections.]

- Schindler v. Milwaukee, etc. R. Co., 49, 78, 463, 464
 v. Schroth, 362
 Schlacker v. Ashland Iron Mining Co., 207*h*, 215
 Schlaff v. Louisville, etc. R. Co., 198, 198*a*
 Schlappendorf v. Amer. Ry. Traffic Co., 184*a*
 Schlemmer v. Buffalo, etc. Ry. Co., 179 (App. 2118)
 Schlenckner v. Risley, 313
 Schlereth v. Missouri Pac. R. Co., 27*a*, 238, 476, 484
 Schlessinger v. Manhattan Ry. Co., 501
 Schloemer v. St. Louis Transit Co., 497
 Schlichter v. Phillipy, 274
 Schlichting v. Wintgen, 140
 Schlimgen v. Chicago, etc. R. Co., 463, 475
 Schlitz v. Pabst Brewing Co., 215
 Scholtz v. Interborough, etc. R. Co., 501
 Schmeer v. Syracuse Gas Co., 693, 696
 Schmid v. Humphrey, 104
 Schmidt v. Adams, 146
 v. Bauer, 704
 v. Burlington, etc. R. Co., 466, 473, 475
 v. Chicago, 354
 v. Chicago, etc. R. Co., 65
 v. Cleveland, etc. Ry. Co., 493
 v. Cook, 61, 705, 710
 v. Fremont, 373
 v. Harkness, 649
 v. Kansas Distilling Co., 73
 v. Menasha Woodenware Co., 135*a* (App. 2105)
 v. Milwaukee, etc. R. Co., 73, 761*a*
 v. Missouri Pac. R. Co., 483
 v. Phila., etc. R. Co., 480
 v. St. Louis Tr. Co., 17
 v. Southwestern Brewery, etc. Co., 214*a*, 215
 v. Steinway, etc. R. Co., 485*a*
 v. Vandever, 151
 Schmitt v. Hamilton Mfg. Co., 207*g*
 Schmitz v. St. Louis, etc. R. Co., 461, 761
 Schmolze v. Chicago, etc. R. Co., 480
 Schnatter v. Bamberger, 704
 Schnbkegel v. Butler, 703
 Schneekloth v. Chicago, etc. R. Co., 410, 451*a*
 Schneider v. Amer. Bridge Co., 197
 Schneider v. Chicago, etc. R. Co., 241*c*, 469, 482 (App. 2154)
 v. Second Ave. R. Co., 89, 485*c*, 516
 v. Missouri, etc. Ry. Co., 224
 Schneir v. Chicago, etc. R. Co., 57
 v. Citizens' Tr. Co., 73*a*
 Schoen v. Chicago, etc. Ry. Co. (App. 2155)
 Schoenfeld v. Metropolitan, etc. Ry. Co., 508
 Schoenwald v. Metropolitan Savings Bank, 588
 Schofield v. Chicago, etc. R. Co., 90, 476
 Scholl v. Grayson, 741
 Schomer v. Rochester, 334*a*
 Schonhoff v. Jackson R. Co., 375
 School District v. Fuess, 298
 Schoonmaker v. New York, 285
 Schopman v. Boston, etc. R. Co., 488, 502
 Schoppel v. Daley, 708*a*
 Schow & Bros. v. McCloskey, 197
 Schreiber v. Twenty-third St. R. Co., 508
 Schriner v. Great Northern, etc. Ry. Co., 457, 480
 Schriver v. New York, etc. R. Co., 483
 Schroder v. Montana Iron Works, 207*g*, 217
 Schroeder v. Baraboo, 274
 v. Chicago, etc. R. Co., 185*a*, 213, 223, 233 (App. 2140)
 v. Flint, etc. R. Co., 230
 v. Joliet, 283
 v. Wolf, 573
 Schroyer v. Lynch, 319, 321
 Schuachne v. Barnett, 702
 Schrubble v. Connell, 144
 Schubert v. Clark, 117
 Schulman v. Houston, etc. R. Co., 485*a*
 Schulte v. New Orleans, etc. R. Co., 485*a*
 v. Pfaudler, 206, 207
 Schultz v. Bower, 701
 v. Byers, 701
 v. Chicago, etc. R. Co., 85, 92, 99, 203, 207*a*, 215, 760
 v. Michigan, etc. Ry. Co., 520
 v. Milwaukee, 262
 v. Second Ave. R. Co., 508
 v. Third Ave. R. Co., 150, 154, 513
 Shultze v. Missouri Pac. R. Co., 521
 Schulz v. Chicago, etc. R. Co., 463
 v. Johnson, 217
 v. Rohe, 192, 194*a*, 207

[References are to sections.]

- Schum v. Pennsylvania R. Co., 478
 Schumacher v. New York, 368
 v. Tuttle, 218
 Schumaker v. St. Paul, etc. R. Co.,
 207*h* (App. 2071)
 Schumpert v. Southern Ry., 248
 Schus v. Powers, etc. Co. (App. 2154)
 Schutt v. Adair, 62
 Schuyler v. Southern Pacific Co., 486,
 488
 Schuylkill Nav. Co. v. Farr, 750
 v. McDonough, 387, 399, 732
 Schwab v. Beam, 729
 Schwalk v. Louisville, 260*a*, 285, 337
 Schwander v. Birge, 702*a*
 Schwanenfeldt v. Chicago, etc. Ry.
 Co., 472, 482
 Schwanzer v. Brooklyn R. Co., 742,
 762
 Schwartz v. Atlantic, etc. Tel. Co.,
 534
 v. Cornell, 209*a*
 v. Gilmore, 47, 702
 v. R. M. Wilson Mfg. Co.,
 214*a*
 Schwarz v. Delaware, etc. Ry. Co.,
 464
 Schwarzschild v. Drysdale, 186
 Schweinfurth v. Cleveland, etc. Ry.
 Co., 61, 108
 Schweir v. N. Y. Central R. Co., 475,
 483
 Schwind v. Chicago, etc. Ry. Co., 482
 Schwingschlegel v. Monroe City, 258,
 472
 Schwondt v. Metzger, etc. Co., 708*a*
 Seidmore v. Milwaukee, etc. R. Co.,
 201
 Sciolina v. Erie Preserving Co., 219
 Scofield v. Myers, 654
 v. Pennsylvania, etc. Ry. Co.,
 493
 Scoggs v. Delaware, etc. Canal Co.,
 426
 Scott v. Bergen County Tr. Co., 516,
 523
 v. Central R. Co., 135
 v. Central Park, etc. R. Co.,
 519
 v. Cleveland, etc. R. Co., 493
 v. Derby Coal Co., 209*a*
 v. Des Moines, 285
 v. Dublin, etc. R. Co., 99
 v. Fishplate, 303
 v. Grover, 657
 v. Hunter, 28, 39, 55
 v. Iowa Tel. Co., 189
 v. London Docks Co., 59, 60,
 158
 v. Longwell, 728
 Scott v. Manchester, 286
 v. Montgomery, 356, 743
 v. Nat. Bank of Chester Val-
 ley, 24, 588, 589
 v. Nauss, 184*a*, 223
 v. Parlin, etc. Co., 214*a*, 215
 v. Pennsylvania R. Co., 476
 v. St. Louis, etc. Ry. Co., 477
 v. Seaboard, etc. Ry. Co., 113
 v. Shepherd, 37, 688
 v. Simons, 708, 709
 v. Sweeney, 233
 v. United States, 322
 v. Waithman, 624
 v. Wilmington, etc. R. Co.,
 432
 v. Wilson, 333
 v. Yazoo, etc. R. Co., 427
 Scotti v. Behsmann, 645
 Scottowe v. Oregon, etc. R. Co., 506
 Scoville v. Hannibal, etc. R. Co., 61,
 99
 v. Salt Lake City, 363
 Scranton v. Booth, 179
 v. Catterson, 334, 367, 368
 v. Hill, 352
 Scribner v. Kelley, 626, 628, 629
 Seroggins v. Metropolitan St. Ry.
 Co., 520
 Scudder v. Crossan, 614
 Scullin v. Dolan, 120, 343
 Sculley v. N. Y., Lake Erie, etc. R.
 Co., 520
 Sculman v. Houston, etc. R. Co.,
 485*a*
 Scurlock v. Boone, 376
 Sea Ins. Co. v. Vicksburg, 122
 Seaboard Mfg. Co. v. Woodson, 195,
 221, 760
 etc. R. Co. v. Joyner, 483
 v. Main, 384
 v. Scarborough, 761*a*
 v. Smith, 13
 v. Thompson, 518
 Seabrook v. Hecker, 702
 Seale v. Gulf, etc. Ry. Co., 35, 85*c*
 Seals v. Whitney, 187
 Seaman v. Koehler, 66
 v. Mott, 644
 v. New York, 285, 726
 v. Patten, 310
 Seare v. Prentice, 614
 Searey v. Holmes, 47
 Searight v. Austin (App. 2097)
 Searing v. Saratoga, 287
 Searle v. Kanawha, etc. R. Co., 51,
 495, 769, 771
 v. Lindsay, 180, 204
 v. Parke, 148
 Searles v. Ladd, 628

[References are to sections.]

- Searles v. Manhattan R. Co., 16, 26,
 56, 57, 676
 v. Milwaukee, etc. R. Co., 99,
 419, 451a
 Sears v. Central R. Co., 207
 v. Dennis, 89
 v. Seattle R. Co., 51, 495, 500
 Seats v. Georgia, etc. R. Co., 108
 Seattle v. Northern Pac. Co., 24a
 v. Regan, 384
 Lighting Co. v. Hawley, 164,
 168, 341
 Seaver v. Boston & Maine R. Co.,
 184, 187, 239
 v. Bradley, 487, 719a
 Sebeck v. Plattdeutsche Volksfest
 Verein, 688
 Sebert v. Alpena, 338, 369
 Seecombe v. Detroit Elec. Co., 189
 Seckinger v. Philibert Co., 192
 Second Nat. Bank v. Cummings, 580
 v. Merchants Nat. Bank, 579
 Secord v. Chicago, etc. R. Co., 209a
 v. St. Paul, etc. R. Co., 61, 95,
 760
 Secrest v. John, 748
 Seddon v. Bickley, 497
 Sedgwick v. Illinois Central R. Co.,
 207b (App. 2141)
 Seefield v. Chicago, etc. R. Co., 56,
 478
 Seeley v. Crane, 557
 v. Lake Shore, etc. R. Co., 425
 v. Littlefield, 351, 363
 v. N. Y. Central R. Co., 114,
 666
 v. Peters, 419
 Seely v. Peters, 655, 656
 Seen v. Southern Ry. Co., 135a
 Seese v. Northern Pac. R. Co., 207b
 Seeton v. Dunbarton, 356, 741, 742
 Seffél v. Western U. Tel. Co., 542
 Seger v. Barkhamsted, 761
 Segal v. St. Louis, etc. Ry. Co., 512
 Seibert v. Erie R. Co., 485
 v. Missouri, etc. R. Co., 448
 Seidel v. Woodbury, 356
 Seifert v. Brooklyn, 255, 262, 271,
 275, 287
 v. Schaible, 73
 Seifred v. Pennsylvania Ry. Co., 466
 Seifter v. Brooklyn, etc. Ry. Co., 769
 Seigel v. Eisen, 654
 Seiler v. Western U. Tel. Co., 543
 Seith v. Commonwealth Elec. Co., 25
 Seitzinger v. Burnham et al., 164,
 168, 518
 Selby v. Detroit St. Ry., 520
 Selden v. Delaware, etc. Canal Co.,
 359
 Selders v. Kansas, etc. R. Co., 424
 Seldombridge v. Chesapeake, etc. Ry.
 Co., 207
 Seley v. So. Pac. R. Co., 197
 Self v. Adel Lbr. Co., 207a
 Selfridge v. Lithgow, 619
 Selinas v. Vermont Agr. Soc., 706
 Sell v. Reitz Lumber Co., 719
 Seller v. Friedman, etc. Co., 219
 Sellick v. Janesville, 742
 v. Langdon, 28
 Selma, etc. R. Co. v. Lacy, 131
 v. Owen, 519
 v. Perkins, 256, 289
 Selover v. Sheardown, 590, 592
 Seltzer v. Saxton, 686
 Selz v. Collins, 587a
 Seneca Falls v. Zalinski, 384
 Senestre v. New York, 356
 Senf v. St. Louis, etc. Ry. Co., 508
 Senhenn v. Evansville, 346, 361, 362
 Senior v. Ward, 209a
 Senn v. Southern R. Co., 133 (App.
 2075)
 Sentman v. Baltimore, etc. R. Co.,
 735
 Sepert v. Alpena, 286
 Serano v. New York Central, etc.
 Ry. Co., 54, 72, 79, 464
 Seredinski v. Balaban, 197
 Serio v. Murphy, 701
 Service v. Shoneman, 195a
 Serwe v. No. Pacific R. Co., 761a
 Sesler v. Rolfe, etc. Co., 704
 Sessengut v. Posey, 702
 Sessions v. Newport, 350
 Settegast v. Houston, etc. Ry. Co.,
 283
 Settle v. St. Louis, etc. R. Co., 193,
 197, 215, 688a (App. 2075)
 Settoon v. Texas, etc. R. Co., 484
 Setzler v. Metropolitan St. Ry. Co.,
 520
 Seventeenth Ward Bank v. Smith,
 589
 Severin v. Eddy, 365
 Severy v. Chicago, etc. Ry. Co., 476
 v. Nickerson, 8, 97, 705
 Sevier v. Southern Ry. Co., 520
 v. Vicksburg, etc. R. Co., 510
 Sewall's Falls Bridge v. Fisk, 744
 Seward v. Draper, 704
 v. Milford, 92, 356
 v. Wilmington, 339, 369
 Sewell v. Atchison, etc. Ry. Co., 488
 v. Cohoes, 334, 334a, 335
 v. Detroit, etc. Ry. Co., 518
 v. Moore, 702a
 v. Webster, 104
 Sexton v. Nervers, 622

[References are to sections.]

- Sexton v. New York Cent., etc. Ry. Co., 120a, 162
 v. Turner, 207
 v. Zett, 359
- Seybold v. Terre Haute, etc. Ry. Co., 414
- Seybolt v. N. Y., Lake Erie, etc. R. Co., 57, 58, 59, 225, 492, 516
- Seyfer v. Otoe County, 380
- Seymour v. Cagger, 566
 v. Citizens' R. Co., 104, 523
 v. Cummins, 272, 371
 v. Greenwood, 145, 151
 v. Maddox, 222
 v. Salamanca, 334, 335
- Shaahe v. Atchison, etc. Ry. Co., 427
- Shaber v. St. Paul, etc. R. Co., 62, 417, 477, 485, 762
- Shackford v. Goodwin, 624
- Shackleford v. Louisville, etc. R. Co., 464, 470
- Shackelton v. Manistee, etc. R. Co., 209a
- Shadd v. Georgia, etc. R. Co., 230, 233, 233a
- Shades v. Bay, etc. Co., 698a
- Shadler v. Blair County, 257
- Shadwell v. Hutchinson, 119
- Shafer v. New York, 334a
- Shaffer v. Haish, 207c
 v. Riseley, 625
- Shafter v. Evans, 53
- Shally v. Danbury, etc. R. Co., 373
- Shamp v. Lambert, 87, 92, 151, 653a
- Shanahan v. St. Louis Tr. Co., 508, 520
- Shandrew v. Chicago, etc. Ry. Co., 184a
- Shank v. Edison, etc. Co., 235
- Shankenbury v. Metropolitan R. Co., 89
- Shanks v. Springfield Tr. Co., 88a, 99
- Shannon v. Boston, etc. R. Co., 520
 v. Jefferson County (App. 2053)
 v. Shaw, 215
 v. Tama City, 334a
 v. Union Ry. Co., 488
- Shanny v. Androscoggin Mills, 204, 226
- Sharp v. Erie Ry. Co., 114
 v. Evergreen, 338, 381
 v. Grey, 45, 51, 497
 v. Hawker, 561
 v. Kansas City Cable R. Co., 516
 v. Powell, 28
- Sharpton & Augusta St. Ry. Co. v. Wilson, 485ab
- Sharrer v. Payson, 93, 488
- Sharrod v. Northwestern R. Co., 460
- Shartle v. Minneapolis, 289, 374, 742
- Shatto v. Erie R. Co., 476
- Shattuck v. Rand, 719a
- Shaver v. Home Tel. Co., 207h
- Shaw v. Boston & Worcester R. Co., 60a, 463, 762
 v. City of Charleston, 285
 v. Craft, 632
 v. Crocker, 283
 v. Etheridge, 735
 v. Gilbert, 744
 v. Goldman, 8, 706
 v. Highland Park Mfg. Co., 231, 232
 v. Jewett, 477
 v. Kidder, 573
 v. Madrid, 345
 v. New York, etc. R. Co., 410
 v. Philadelphia, 367
 v. Reed, 148, 172
 v. Saline Tp., 392
 v. Seattle, 758
 v. Sheldon, 207c, 209, 215, 216
 v. Sun Prairie, 367, 369
 v. Waterbury, 373
- Shawmut v. St. Paul, etc. R. Co., 334a
- Shawhan v. Clarke, 18
- Shawneetown v. Mason, 367
- Shay v. Amer. Iron, etc. Mfg. Co., 148
 v. Camden, etc. Ry. Co., 516
- Shea v. Pacific Power Co., 223
 v. Potero, etc., R. Co., 92, 762
 v. Reems, 142, 147, 160
 v. St. Paul R. Co., 485, 485c
 v. Seattle Lbr. Co., 214a, 215
 v. Sixth Ave. R. Co., 151
 v. Wellington, 195, 241b
 v. Whitman, 356
- Shead v. Tomlinson, 614a
- Shealey v. South Carolina, etc. Ry. Co., 508
- Shear v. Singer Sewing Mach. Co., 146
- Shearer v. Town of Buckley, 66
- Sheates v. Rome, 375
- Sheboygan Lumber Co. v. Delta Tr. Co., 672
- Sheedy v. Chicago, etc. R. Co., 193
- Sheehan v. Edgar, 758
 v. Flynn, 735
 v. N. Y. Cent. R. Co., 202
 v. Philadelphia, etc. R. Co., 472, 475
 v. St. Paul, etc. Ry. Co., 457
- Sheehy v. Burger, 654
 v. Graves, 622, 625a
 v. Kansas City, 274

[References are to sections.]

- Sheel v. Appleton, 369
 Sheer v. Fisher, 713
 Sheerman v. Toronto, etc. R. Co., 61
 Sheets v. Chicago, etc. R. Co., 207*b*
 209, 241
 v. Connolly R. Co., 73*a*
 v. Ohio River R. Co., 493
 Sheff v. Huntington, 108, 114
 Sheffer v. Louisville, etc. Ry. Co., 508
 v. Railroad Co., 94
 Sheffield v. Central Union Tel. Co., 359
 v. Harris, 241*b*, 299
 v. Rochester, etc. R. Co., 476
 v. Morton, 698
 Sheffler v. Minneapolis, etc. R. Co., 124
 Shelby v. Clagett, 289, 368, 369
 v. Metropolitan St. Ry. Co., 150, 151, 513
 Shelby County v. Blair, 374
 v. Duprez, 257
 Shelbyville, etc. R. Co. v. Lewark, 744
 Shelbourne v. Yuba County, 266
 Sheldon v. Chicago, etc. R. Co., 428
 v. Flint, etc. R. Co., 54
 v. Hudson R. Co., 58, 672, 675
 v. Skinner, 635
 v. Western U. Tel. Co., 359
 Shellabarger v. Chicago, etc. R. Co., 434
 Shellabarger v. Fisher, 73*a*
 Shelley v. Austin, 73*a*, 367
 Shelton v. Haelip, 606, 614*a*
 v. Southern Ry. Co., 516, 518
 Sheltrawn v. Michigan, etc. Ry. Co., 459*c*
 Shenandoah Val. R. Co. v. Lucado, 202, 207*b*
 Shepard v. Buffalo, etc. R. Co., 62, 437, 441, 451*a*, 452
 v. Chicago, etc. R. Co., 748
 v. Creamer, 701*a*, 721
 v. Jacobs, 162, 653*a*
 v. N. Y. Central R. Co., 241*d*
 v. Pulaski County, 256
 v. Western U. Tel. Co., 542
 Shepardson v. Colerain, 351
 Shepherd v. Chelsea, 122, 346, 356
 v. Hees, 663, 664
 v. Lincoln, 313
 v. Midland R. Co., 506
 Shepp v. N. Y. Cent. R. Co., 675
 Shepperd v. Baltimore, etc. Ry. Co., 407
 Sherbourne v. Yuba County, 256
 Sherfey v. Bartley, 97, 629, 639
 Sheridan v. Baltimore Ry. Co., 1
 v. Bigelow, 28
 v. Bean, 635
 Sheridan v. Brooklyn R. Co., 66, 73*a*
 v. Charlick, 147
 v. Foley, 60
 v. Interborough R. Tr. Co., 54
 v. Krupp, 709
 v. Salem, 289
 Sherley v. Billings, 513
 Sherlock v. Alling, 51, 494, 495
 v. Louisville, etc. R. Co., 731
 v. Rushmore, 108*a*
 Sherly v. Billings, 154
 Sherman v. Anderson, 449, 466*a*
 v. Charlestown, 323
 v. Fall River Iron Co., 61, 95, 696, 734, 741, 745, 758
 v. Favour, 628
 v. Hannibal, etc. R. Co., 61
 v. Grenada, 299
 v. Inman Steamship Co., 39
 v. Johnson, 124 (App. 2100)
 v. Kortright, 57, 278
 v. Langham, 262
 v. Maine Cent. R. Co., 680
 v. Minominee Lumber Co., 188
 v. Oneonta, 367
 v. Southern Pacific Co., 494, 495, 516, 518
 v. Western Transp. Co., 404
 v. Williams, 258
 House Hotel Co. v. Gallagher, 175
 Sherrill v. Shuford, 619
 v. Western U. Tel. Co., 243, 540*a*, 542, 544, 553, 556*a*, 756
 Sherrin v. St. Joseph, etc. R. Co., 230
 Sherry v. N. Y. Central, etc. R. Co., 114, 476, 477, 482
 Sherwood v. Chicago, etc. R. Co., 758
 v. District of Columbia, 369
 v. Hamilton, 346
 v. New York Cent., etc. Ry. Co., 85*a*
 Shervel v. Fell, 625
 Shey v. Wellington, 195*a*
 Shields v. Durham, 260, 373
 v. Edinburgh, etc. R. Co., 159
 v. N. Y. Central R. Co., 207, 207*b*
 v. Norfolk, etc. Ry. Co., 678
 v. Pfanz, 618
 v. Pugh, 13, 27*b*
 Shimmer v. Merry, 487
 Shinkle v. Covington, 285
 v. McCullough, 653*b*, 653*d*
 Shinneck v. Marshalltown, 338, 368
 Shinnors v. Mullins, 195
 Shipley v. Bolivar, 369
 v. Colclough, 634

[References are to sections.]

- Shipley v. Fifty Asso., 17, 343, 710, 721
 v. Metropolitan St. Ry. Co., 99
 Shippers' Com., etc. Co. v. Davidson, 35 (App. 2098)
 Shippy v. Ausable, 78, 271, 353, 368
 Shipsey v. Bowery Nat. Bank, 581
 Shirk v. Chicago, etc. Ry. Co., 207*h*, 215
 Shirley v. Abbeville Furniture Co., 218
 Shiverca v. Brooklyn, etc. Ry. Co., 176
 Shively v. Hume, 729
 Shockley v. Shepherd, 649
 Shoemaker v. Kingsbury, 498
 v. Lacey, 65
 Shohoney v. Quincy, etc. Ry. Co., 223
 Shoninger v. Mann, 114*b*
 Shook v. Cohoes, 362, 368, 376
 Shores v. Southern Ry. Co., 413, 459
 Short v. Cherokee Mfg. Co. (App. 2132)
 v. New Orleans, etc. R. Co., 241*c* (App. 2158)
 v. Philadelphia, etc. Ry. Co., 467
 v. Railroad Co., 359
 Shortel v. St. Joseph, 207*h*
 Shorter v. Southern Ry. Co., 207
 Shortridge v. Scarlett, etc. Co., 758
 v. Scarritt Est. Co., 73*a*, 758, 761
 Showalter v. Fairbanks, 209*a*, 215
 Shrader v. Nashville, etc. Ry. Co., 457
 Shrewsbury v. Smith, 16, 17, 730
 Shriver v. Marion County Court, 56, 376
 Shroder v. Montana Iron Works, 209*a*
 Shue v. Central, etc. Ry. Co., 214*a*, 215
 Shufelt v. Flint, etc. R. Co., 476
 Shugart v. Atlanta, etc. Ry. Co., 186
 Shull v. Barton, 624
 Shults v. Chicago, etc. Ry. Co., 457
 Shulz v. Griffith, 636, 639
 Shumway v. Walworth Mfg. Co., 203, 207*g*, 226, 230, 231, 233
 Shuster v. Philadelphia, etc. R. Co., 232
 Shute v. Bills, 708, 708*a*
 v. Princeton, 176
 Shutt v. Cumberland Val. R. Co., 92
 Siacik v. Northern, etc. Ry. Co., 485*bc*
 Sias v. Consolidated, etc. Co., 208
 v. Reed City, 377
 v. Rochester Ry. Co., 502
 Sibbert v. Scotland Cotton Mills, 195 (App. 2085)
 Siber v. Blanc, 708
 Sibley v. Northern Pac. R. Co., 666
 Sick v. Toledo Con. St. Ry. Co., 485*a*
 Sickles v. Missouri, etc. R. Co., 523
 v. N. J. Ice Co., 111, 333
 v. Philadelphia, 375, 467
 Siddall v. Jansen, 73
 v. Pacific Mills, 219
 Sidekum v. Wabash, etc. R. Co., 758
 Sides v. Portsmouth, 358
 Siebrecht v. E. River Gas Co., 693
 Siefker v. Paysee, 686
 Siegel v. Milwaukee, etc. R. Co., 478
 v. New York, etc. Ry. Co., 197
 etc. Co. v. Norton, 67
 Cooper, etc. Co. v. Treka, 31, 65, 122
 Siegrist v. Arot, 142
 Siela v. Hannibal, etc. R. Co., 197
 Sienbida v. Tonawanda, etc. Co. (App. 2171)
 Sievers v. City and County of San Francisco, 253, 291
 Siewerssen v. Harris County, 256
 Sifers v. Johnson, 656
 Sights v. Louisville, etc. Ry. Co., 466
 Sigler v. Charlotte, etc. R. Co., 475
 Siglin v. Chicago, etc. Ry. Co., 201
 v. Coos Bay, etc. Ry. Co., 702
 Sikes v. Manchester, 369
 Silberman v. Dinder, 175
 Silberstein v. Houston, etc. R. Co., 359
 Silliman v. Lewis, 93, 99
 Sills v. Fort Worth, etc. R. Co., 772
 Silsby Mfg. Co. v. State, 398
 Silva v. Boston, etc. Ry. Co., 520
 Silver v. Bd. of Com'rs, 256
 v. Kansas City, etc. R. Co., 419, 423
 v. Missouri Pac. R. Co., 120, 395
 Bow Co. v. Davies, 590
 Mining Co. v. McDonald, 89
 Silvers v. Nerdlinger, 356
 Simeone v. Lindsay, 646, 653*a*, 653*d*
 Simkins v. Columbia, etc. R. Co., 432
 Simmerman v. Hills Creek Coal Co., 87
 Simonds v. Henry, 607, 609
 v. Maine Tel., etc. Co., 653*b*
 Simmonds v. N. Y. & New England R. Co., 667
 Simmons v. Bradford, 570, 572
 v. Brooklyn, 254
 v. Camden, 283
 v. Chicago, etc. R. Co., 209*a*

[References are to sections.]

- Simmons v. East Tennessee R. Co., 213
 v. Everson, 702
 v. Lewis, 653*a*
 v. Oregon, etc. Ry., 488
 v. Peters, 193
 v. McConnell, 688*a*
 v. N. Bedford, etc. Steamboat Co., 51, 494, 495, 497, 512, 515
 v. Oregon, etc. Ry. Co., 508, 513*a*
 v. Patterson, 359
 v. Peters, 194*a*
 v. Rose, 570
 v. Seaboard, etc. Ry. Co., 508
 Simms v. South Carolina R. Co., 56, 88, 410, 510
 Simon v. Black Lake Lbr. Co., 187
 -Reigel Cigar Co. v. Gordon-Burnham Co., 723
 v. Metropolitan, etc. Ry. Co., 73*a*, 485*bc*
 Simonds v. Baraboo, 518
 Simoneau v. Elec. Ry. Co., 773
 v. Pacific Elec. Co., 769
 v. Rice, 223*a*
 Simonin v. N. Y., Lake Erie, etc. R. Co., 510
 Simons v. Baraboo, 375, 376
 v. Casco, 355
 v. Gt. Western R. Co., 505
 v. Seward, 709
 Simonton v. Barrell, 573
 v. Citizens' Elec., etc. Co., 73
 v. Loring, 141, 723
 v. Perry, 164
 Simpson v. Central Vt. R. Co., 207*b*
 v. East Tennessee R. Co., 58, 676
 v. Hand, 63
 v. Griggs, 630, 635
 v. Keokuk, 89, 274
 v. Mercer, 24*a*
 v. N. Y. Rubber Co., 241*d*
 v. Pennsylvania Ry. Co., 760
 v. Rhode Island Co. (App. 2093)
 v. Waldby, 582
 v. Whatcom, 291
 Sims v. Am. Steel-Barge Co., 195
 v. American Ice Co., 672
 v. Butler County, 256
 v. Macon, etc. R. Co., 480
 v. Western Ry. Co., 481*b*
 v. Western U. Tel. Co., 755
 Simson v. London General Omnibus Co., 514, 632
 Sinai v. Louisville, etc. R. Co., 735
 Sinard v. Southern Ry. Co., 448
 Sinclair v. Chicago, etc. R. Co., 485
 v. Illinois Cent. Ry. Co., 207*b*
 Sindlinger v. Kansas City, 370
 Siner v. Great Western R. Co., 89, 509, 519, 521
 v. Stearne, 582
 Singer v. Steele, 577
 Mfg. Co. v. Holdfodt, 749
 v. Rahn, 143, 160
 Singleton v. Eastern Cos. R. Co., 74, 483
 Sinram v. Pittsburgh, etc. R. Co., 634
 Singleton v. Southwestern Ry. Co., 413, 459
 Sinkovitz v. Peters' Land Co., 343, 518
 Siordet v. Hall, 39
 Sioux City v. Finlayson, 214, 215
 etc. R. Co. v. Smith, 99, 758
 v. Stout, 705
 Sipes v. Michigan Starch Co., 207*b*, 223
 Sipple v. State, 249, 251, 401
 Sira v. Wabash R. Co., 513
 Siren, The, 249
 Sirois v. Henry, 186
 Sisco v. Lehigh, etc. R. Co., 201
 Sisk v. Crump, 702
 Sites v. Knott, 463, 464, 483
 Sitts v. Waiontha Knitting Co., 233*a*
 Skelton v. Larkin, 702
 v. Northwestern R. Co., 481
 v. Pacific Lbr. Co., 232
 Skeritt v. Scallen, 190
 Skidmore v. West Virginia, etc. R. Co., 207*e*
 Skinn v. Reutter, 633
 Skinner v. Brighton, etc. R. Co., 45
 v. Knickrehm, 644, 644*a*
 Skipp v. Eastern Counties R. Co., 191
 Skipper v. Clifton Mfg. Co., 154*a*
 Skipworth v. Mobile, etc. Ry. Co., 467
 Skottowe v. Oregon, etc. R. Co., 775
 Skow v. Green Bay, etc. Ry. Co., 509
 Sjorgren v. Hall, 203
 Slagle v. Village of Averyville, 195
 Slate v. Grover, 283
 Slater v. Baker, 612
 v. Chapman, 209, 230
 v. Jewett, 202, 231, 233*a*
 v. Mersereau, 31, 122, 166, 169, 174
 v. South Carolina R. Co., 16
 Slattery v. Lawrence Ice Co., 73, 73*a*
 v. New York, etc. Ry. Co., 65, 472, 476
 v. O'Connell, 72
 v. Toledo, etc. R. Co., 241

[References are to sections.]

- Slattery v. Walker, etc. Mfg. Co., 192
 Slavik v. Hirsh, 207*h*, 215
 Slavin v. State, 750
 Sledge v. Weldon Lbr. Co., 207
 v. Yazoo, etc. Ry. Co., 482
 Slee v. Lawrence, 377
 Sleeper v. Sandown, 88, 375, 481
 v. Worcester, etc. R. Co., 114
 Slensby v. Milwaukee St. Ry. Co.,
 485*bc*
 Slinger v. Henneman, 628
 Slingsby, The, 673
 Sloan v. Central Iowa R. Co., 241*c*,
 413 (App. 2140)
 v. Edwards, 739
 v. Little Rock, etc. Ry. Co.,
 114, 494, 516, 518
 Sloane v. Southern Cal. R. Co., 55,
 495, 758
 Slocum v. Riley, 625
 Sloman v. Herne, 619
 Sloppy v. Pennsylvania R. Co., 235
 Sloss-Sheffield, etc. Co. v. Austell,
 688*a* (App. 2121)
 Slosson v. Burlington, etc. R. Co.,
 58, 107, 675, 676, 679
 Sluder v. St. Louis Tr. Co., 760
 Slutsky v. Brooklyn, etc. Ry. Co.,
 512
 Sly v. Edgeley, 699
 Small v. Allington, etc. Co., 231, 232
 v. Chicago, etc. R. Co., 58,
 666, 676
 v. Howard, 607
 v. Kansas City, 368
 Smalley v. Appleton, 31, 338, 346
 v. Atlantic, etc. Ry. Co., 459*a*
 v. Detroit, etc. Ry. Co., 508
 v. Rio Grande Ry. Co., 73
 v. Southern Ry. Co., 457
 Smallwood v. Norton, 564, 570
 v. Tipton, 369
 Smart v. Kansas City, 88*a*, 350, 367,
 742
 v. Kansas City Pkg. Co., 88*a*
 v. Louisiana Electric Co., 216
 v. Morton, 701
 Smedes v. Elmendorf, 567
 v. Utica Bank, 579, 581
 Smedis v. Brooklyn, etc. R. Co., 468,
 477
 Smeed v. Foord, 40
 Smelting Co. v. Parry, 207*e*
 Smethurst v. Barton Square Cong.
 Church, 343, 370, 701*a*
 Smillie v. St. Barnard Dollar Store,
 190
 Smith v. Agawam Canal Co., 732
 v. Alexandria, 274
 v. Allen County, 256
 Smith v. American So., 649
 v. Atchison, etc. R. Co., 74
 v. Atlanta, etc. Ry. Co. (App.
 2085)
 v. Backus Lumber Co., 189,
 215
 v. Bailey, 158, 644
 v. Baker, 209*a*, 211*a*
 v. Baltimore, etc. R. Co., 114,
 478
 v. Barre R. Co., 449
 v. Belshaw, 144
 v. Boston Gas Co., 693
 v. Boston, etc. R. Co., 104,
 473, 476
 v. Boyer, 584*a*
 v. Brooklyn, 363
 v. Brooklyn Heights Ry., 485
 v. Buffalo, etc. R. Co., 207*g*
 v. Buttner, 709*a*
 v. Cairo, 375
 v. Causey, 628, 629
 v. Chicago, etc. R. Co., 108,
 419, 479, 494, 495, 508, 675
 v. Chicago, etc. Ry. Co., 481*a*
 (App. 2141)
 v. Cissel, 769
 v. Citizens' R. Co., 463
 v. Clarkstown, 346, 353
 v. Condry, 172, 744
 v. Connecticut, etc. Ry. Co.,
 485
 v. Conway, 649
 v. County Court, 346
 v. Cranford, 734
 v. Crescent City R. Co., 480
 v. Davenport, 144
 v. Day, 92, 705
 v. Dedham, 258, 338, 370
 v. Des Moines, 368, 369
 v. Dobson, 122
 v. Donohue, 628
 v. Dow, 92
 v. Dumond, 607, 614
 v. Eastern R. Co., 57, 108,
 113, 421
 v. Elbertson, 373
 v. Erie, etc. Ry. Co., 207*g*
 v. First National Bank, 56
 v. Fletcher, 717
 v. Floyd County, 256
 v. Foran, 24*a*
 v. French, 626
 v. Gardner, 649, 652, 654
 v. Georgia Pac. R. Co., 521
 v. Gillett, 56
 v. Gould, 262
 v. Grant, 617
 v. Great Eastern R. Co., 635
 v. Griffith, 751

[References are to sections.]

- | | |
|---|---|
| <p>Smith v. Hannibal, etc. R. Co., 58, 680
 v. Harlem R. Co., 225, 410, 495
 v. Havemeyer, 725
 v. Hays, 690, 691
 v. Hestonville, etc. R. Co., 71
 v. Hewitt, etc. Lbr. Co., 207
 v. Holland, 303
 v. Holmes, 592
 v. Humeston, etc. R. Co., 241c
 v. Humphreyville, 164, 166, 717
 v. Illinois, etc. Ry. Co., 457
 v. International, etc. Ry. Co., 480
 v. Irwin, 93, 218, 219
 v. Jackson, 704
 v. Jaques, 635
 v. Judkins, 619
 v. Kansas City, etc. R. Co., 452
 v. Keal, 142
 v. Kenrick, 717
 v. Kingston, 343
 v. Leavenworth, 24, 289, 353, 367, 369
 v. Lehigh Valley Ry. Co. (App. 2082)
 v. London, etc. Books Co., 704, 705
 v. London & So. West R. Co., 678
 v. Louisville, etc. R. Co., 151
 v. Lowell, 376
 v. McGinnis, 594
 v. Maddox-Rucker Bank. Co., 588
 v. Maine Cent. R. Co., 463, 471, 475
 v. Matteson, 639
 v. Memphis, etc. R. Co., 241
 v. Metropolitan R. Co., 485c
 v. Milwaukee, 274, 291, 395
 v. Milwaukee Builders', etc. Exch., 13, 701a, 743
 v. Minneapolis, etc. R. Co., 481b
 v. Missouri Pac. R. Co., 223 (App. 2142)
 v. Montgomery, 628
 v. National Coal, etc. Co., 73a
 v. New York, 275, 287, 350, 367
 v. N. Y. Central R. Co., 49, 51, 148, 195, 465, 505, 551
 v. N. Y. & Harlem R. Co., 45
 v. N. Y., Susquehanna, etc. R. Co., 104, 516</p> | <p>Smith v. Norfolk Trac. Co., 206, 482
 v. Norfolk, etc. R. Co., 85a, 99, 101, 122, 453, 475, 476, 484
 v. North Jellico Coal Co., 217
 v. North Jersey St. Ry. Co., 73a
 v. Northern Pac. R. Co., 666, 676
 v. Northumberland, 334
 v. Occidental S. S. Co., 114, 216
 v. O'Connor, 73, 78
 v. Ogden, etc. Ry. Co., 673, 678
 v. Old Colony, etc. R. Co., 675
 v. Overby, 761
 v. Oxford Iron Co., 204, 219a, 233, 235
 v. Pawtucket Gas Co., 693
 v. Pelah, 632, 639
 v. Pella, 271, 279, 350, 367, 368
 v. Peninsular Car Works, 193, 203, 214
 v. Pennsylvania Ry. Co., 359
 v. Pere Marquette Ry. Co., 470
 v. Philadelphia, 286, 744
 v. Philadelphia Ry. Co., 73a, 216
 v. Postal Tel., etc. Co., 540a, 756
 v. Potter, 204
 v. Public Service Corp., 28
 v. Race, 633, 635
 v. Richmond, etc. R. Co., 108, 513a
 v. Rio Grande R. Co., 114
 v. Rochester, 265, 299, 369, 729
 v. Rochester Ry. Co., 73a
 v. St. Joseph, 115, 376
 v. St. Louis, etc. R. Co., 189, 195
 v. St. Paul, etc. R. Co., 89, 241c, 490, 495
 v. Seattle, 367, 369
 v. Sedalia, 258
 v. Sellars, 207c
 v. Sibley Mfg. Co., 209a
 v. Simmons, 168
 v. Sioux City, etc. R. Co., 56
 v. Smith, 122
 v. South, etc. Ry. Co., 151, 168
 v. South Western R. Co., 28, 30, 666
 v. Southern Pac. Ry. Co., 99, 207g</p> |
|---|---|

[References are to sections.]

- Smith v. Spitz**, 148
 v. Spokane, etc. Ry. Co., 201
 v. State, 708*a*
 v. Steele, 172
 v. Team, 654
 v. Thackerah, 701
 v. Thompson, etc. El. Co. (App. 2068)
 v. Trawl, 303
 v. Trimble, 704
 v. Wabash, etc. R. Co., 207*b*, 233, 233*a*, 476, 477, 481*b*
 v. Waldorf, 640
 v. Washington, 262, 283
 v. Webster, 150
 v. Wendell, 351
 v. West Derby, 328
 v. Western R. of Alabama, 16
 v. Western U. Tel. Co., 531, 538, 542, 544, 547, 553, 554, 753*a*, 754
 v. Western, etc. Ry. Co. (App. 2132)
 v. Whittier, 11
 v. Wildes, 110, 375
 v. Wolf, 13, 27*a*
 v. Wright, 340, 390
 v. Wrightsville, etc. R. Co., 89
 v. Yankton, 274, 376
 & Son v. Garrison, 197, 217
 etc. Shoe Co. v. Western U. Tel. Co., 554
Smithers v. Wilmington, etc. Ry. Co., 497
Smithwick v. Hall, etc. Co., 94, 95
Smoot v. Mobile, etc. R. Co., 184, 187, 206
 v. Wetumpka, 108, 113, 289
Smothers v. Hanks, 606, 607
Smyth v. Bangor, 363
Snall v. Lonergan, 761
Snap v. People, 640
Snare v. Friedman, 73*a*, 683
 etc. Co. v. Friedman, 73
Snedicor v. Davis, 591
Snee v. Clear Lake Telep. Co., 375, 376
Sneed v. Marysville, etc. Gas Co., 769
Sneesby v. Lancashire, etc. R. Co., 57
Sneider v. Treichler, 193
Snell v. Rochester R. Co., 359, 408
 v. Smith, 135, 246
Snellen v. Kansas, etc. Ry. Co., 207*b* (App. 2122)
Snelling v. Brooklyn & New York Ferry Co., 508, 521
Snickles v. St. Joseph, 373
Snider v. N. Orleans, etc. R. Co., 57
Snider v. St. Paul, 260*a*, 285
Snipes v. Camp Mfg. Co., 484
 v. Southern Ry. Co., 207*b* (App. 2183)
Snodgrass v. Bradly, 150
 v. Carnegie Steel Co., 683
Snook v. City of Anaconda, 743
Snow v. Adams, 350
 v. Escanaba Power Co., 207*e*
 v. Housatonic R. Co., 193, 213, 214, 217, 225
 v. McCracken, 628
 v. Parsons, 729, 734
 v. Provincetown, 86, 379
Snowden v. Boston, etc. R. Co., 524
Snydor v. Arnold, 31
Snyder v. Lake Shore, etc. Ry. Co., 769, 772
 v. Philadelphia Co., 35, 717
 v. Pittsburgh, etc. R. Co., 92, 108, 113, 678, 679, 680
 v. Viola Mining Co., 235
 v. Witner, 719
Soard v. Western, etc. Co. (App. 2122)
Sobieski v. St. Paul, etc. R. Co., 203
Soccoroso v. Philadelphia, etc. Ry. Co., 207
Socola v. Ches Carley Co., 690
Soderlund v. Chicago, etc. Ry. Co. (App. 2155)
Soderman v. Kemp, 195
Sofferstein v. Bertels, 223
Sohier v. Boston, etc. R. Co., 525
Sohn v. Cambern, 370
Solan v. Chicago, etc. R. Co., 505
Solarz v. Manhattan R. Co., 195
Solen v. Virginia City, etc. R. Co., 461
Sollenberger v. Lineville, 373
Solomon v. Kingston, 261
 v. Manhattan R. Co., 89, 91, 520
Solt v. Canney, 207
Sommer v. Public Service Corp., 683, 704, 706
Somerville v. City R. Co., 359
Sommers v. Marshfield, 343, 373
Sonier v. Boston, etc. R. Co., 460, 490
Sonnebom v. Moore, 573
Sonnenfeld Co. v. People's R. Co., 485*c*, 747
Sontag v. O'Hare, 708*a*
Soper v. Henry Co., 257
Sorelle v. W. U. Tel. Co., 756
Sorensen v. Menasha, etc. Co., 58
 v. Northern Pac. R. Co., 135
Sorento v. Johnson, 368
Soronen v. Von Puston, 628

[References are to sections.]

- Sosnofski v. Lake Shore, etc. Ry. Co., 473, 475
- Soule v. New Haven R. Co., 767
- South v. Maryland, 617
- etc. Ala. R. Co. v. Donovan, 13, 791
- v. Jones, 431
- v. McLendon, 758
- v. Thompson, 463a, 467
- v. Williams, 431
- Baltimore Car Works v. Schaefer, 195
- Bend Iron Works v. Larger, 719
- v. Paxon, 750
- Carolina R. Co. v. Nix, 132, 493
- Chicago, etc. Ry. Co. v. Kin-nare, 85a
- Covington, etc. Ry. Co. v. Besse, 485ab
- v. Cleveland, 146
- v. Crutcher, 519
- v. Eichler, 485c
- v. Herrklotz, 73a, 485bc
- v. Nelson, 61
- v. Ware, 89
- Fla. R. Co. v. Rhoads, 493
- v. Weese, 217, 232
- Omaha v. Cunningham, 113
- Ottawa v. Foster, 256
- Side Realty Co. v. St. Louis, etc. Ry. Co., 728
- Southampton, etc. Bridge Co. v. Southampton L. Board, 254, 327
- Southcote v. Stanley, 706
- Southeast, etc. R. Co. v. Stotlar, 476
- Southerland v. Jackson, 334
- v. Troy, etc. R. Co., 190
- Southern Bell Tel. Co. v. Watts, 93
- Cotton-Oil Co. v. De Vond, 222
- v. Gladman, 217
- v. Walker, 214a
- v. Wallace, 164
- Cotton Press, etc. Co. v. Bradley, 49
- v. Skipper, 758 (App. 2131)
- Elec. Ry. Co. v. Hageman, 485ab
- Exp. Co. v. Brown, 160, 749
- v. Moon, 504
- v. Newby, 504
- v. Shea, 503
- v. Texarkana Water Co., 359
- v. Thornton, 503
- Hardware, etc. Co. v. Stan-dard, etc. Co., 751
- Southern Ind. Ry. Co. v. Harrell (App. 2137)
- v. Martin, 193
- v. Messick, 488
- v. Moore (App. 2061)
- Kan. R. Co. v. Croker, 215
- v. Drake, 209a
- v. Michaels, 201
- v. Walsch, 46
- Marble Co. v. Darnell, 750
- Oil Co. v. Church, 174
- v. Skipper, 203, 206
- v. Walker, 207h
- Pac. Co. v. Blake, 516
- v. Cavin, 488
- v. Hetzer, 189, 761
- v. Hogan, 494, 516
- v. Johnson, 207e
- v. McGill, 232
- v. Schuyler, 517
- v. Wilson (App. 2053)
- Pac. Ry. Co. v. Allen (App. 2118)
- v. Blake, 518
- v. Huntsman, 189
- v. Lafferty, 465
- v. Kennedy, 151, 493
- v. Johnson, 207, 207e
- v. Pool, 207
- v. Ryan, 238
- v. Seley, 197, 207
- Ry. Co. v. Adkins' Admr., 769
- v. Arnold, 207, 459a
- v. Bailey, 457, 475, 480
- v. Bandy, 508, 518, 520
- v. Banknight, 144
- v. Brewer, 494, 516
- v. Bush (App. 2052)
- v. Carroll, 475, 476
- v. Carson (App. 2117)
- v. Chatman, 457, 480, 483, 484
- v. Chance, 426
- v. Cheaves (App. 2157, 2158)
- v. Clariday, 520
- v. Clark, 477
- v. Coombs, 333
- v. Covenia, 770
- v. Crawford, 426
- v. Crowder, 495
- v. Cunningham, 494, 513a
- v. Davis, 61, 475, 476
- v. Darwin, 672
- v. Dawson, 516
- v. Decker, 132
- v. Dickens, 672, 673, 678
- v. Elliott, 224
- v. Evans' Admr., 769, 771
- v. Forest, 70
- v. Forrister, 481a, 483

[References are to sections.]

- Southern Ry. Co. v. Freeman (App. 2131)
 v. Gilmer, 752
 v. Grizzle, 244
 v. Elliott, 180
 v. Hansbrough, 463, 472
 v. Harrington, 488
 v. Horine, 1
 v. Howard, 410
 v. Johnson (App. 2131)
 v. Jones, 478, 751
 v. Kendrick, 508
 v. King, 67
 v. Lee, 500, 516
 v. Lewis, 175
 v. Lyons, 207^e, 215
 v. McGowan, 207, 207^a, 207^g
 v. McNeely, 150
 v. Mauzy, 232
 v. Moore, 211^a, 770
 v. Mouchet, 479
 v. Newton's Admr., 197
 v. Nichols, 518
 v. O'Bryan, 760
 v. Otis' Admr. (App. 2064)
 v. Patterson, 485^d, 679
 v. Pavey, 508, 521
 v. Pittman, 457
 v. Pope's Admr., 157
 v. Power Fuel Co., 148
 v. Reaves, 429
 v. Reeves, 428, 501^c
 v. Rice, 748
 v. Robbins, 53
 v. Sage, 459^a
 v. Salmon, 207 (App. 2131)
 v. Shelton, 113, 482, 483
 v. Shipp (App. 2053)
 v. Shumate, 207^b
 v. Simpson, 482
 v. Sittason, 120^a
 v. Slearns, 752
 v. Smith, 232, 235, 457, 483 (App. 2194)
 v. Stewart, 99, 481^b
 v. Sullivan, 140
 v. Sutton, 482
 v. Thompson, 672, 673, 678
 v. Torian, 463
 v. Vandergriff, 513^a
 v. Walsh, 516
 v. Watson, 103
 v. Webb, 35
 v. Wildman, 493
 v. Wiley, 64, 457
 v. Wilson, 679
 v. Winchester, 467, 472, 482
 v. Wood, 493
 v. Yancey, 64
 etc. Ry. Co. v. Martin, 232
- Southern, etc. Ry. Co. v. Sage, 195
 v. Svenson, 64
 States Portland Cement Co. v. Helms, 217
 Turpentine Co. v. Douglas, 207^e
 Southside Elev. Co. v. Nesvig, 201
 Pass. R. Co. v. Trich, 55
 Southwell v. Detroit, 289, 338
 South-West Imp. Co. v. Andrew, 185
 Va. Co. v. Andrew, 113
 Southwestern, etc. Tel. Co. v. Ables, 698
 R. Co. v. Hankerson, 93, 114
 v. Johnson, 480
 v. Paulk, 89
 v. Singleton, 520
 Tel. Co. v. Crank, 122
 v. Robinson, 359
 v. Woughter, 193
 Tel., etc. Co. v. Flood, 756
 v. Luckett, 754
 v. McCoy, 754
 v. Solomon, 757
 v. Taylor, 556^c, 757
 v. Wilcoxon, 757
 Southwick v. Estes, 146, 155
 Southworth v. Old Colony, etc. R. Co., 379, 451, 474
 v. Pecos, etc. Ry. Co., 520
 Soward v. Chicago, etc. R. Co., 434
 Sowards v. Amer. Coal Co., 187
 Sowden v. Idaho, etc. Mining Co., 185^a
 Sowles v. Moore, 379
 Spade v. Lynn, etc. R. Co., 742, 758, 761
 Spaight v. McGovern, 640
 Spalding v. Allred, 617
 Spaine v. Stiner, 709^a
 Spangler v. Markley, 653^b
 v. St. Joseph, etc. Ry. Co., 511
 v. San Francisco, 258, 274, 287
 v. Sellers, 568
 Sparhawk v. Salem, 356
 Sparks v. Siebrecht, 704
 Mfg. Co. v. Newton, 729
 Sparling v. Dwenger, 336
 Sparta Oil Mill v. Russell, 209^a
 Spatz v. Lyons, 60^a
 Spaulding v. Chicago, etc. R. Co., 58, 114, 150, 665, 676, 775
 v. Flynt Granite Co., 196, 213
 v. Jarvis, 480
 v. Sherman, 369
 Spead v. Tomlinson, 609
 Spear v. Cummings, 310
 v. Phila., etc. R. Co., 517
 v. Westbrook, 373

[References are to sections.]

- Spearbracker v. Larrabee, 289, 334, 369
 Spears v. Chicago, etc. R. Co., 54, 485
 Speck v. International Ry. Co., 509
 Speed v. Atlantic, etc. R. Co., 166, 469
 Speer v. Greencastle Road Co., 386
 Spelman v. Fisher Iron Co., 219a, 690
 v. Portage, 274
 Spellman v. Bannigan, 708
 v. Lincoln, etc. R. Co., 51, 495, 516, 517
 v. Richmond, etc. R. Co., 749
 Spence v. Chicago, etc. Ry. Co., 488, 513a
 v. Lake Drummond Canal Co., 399
 v. Schultz, 176
 Spencer v. Albert Lea Brick, etc. Co., 216
 v. Campbell, 683
 v. Illinois Cent. R. Co., 463, 476, 477
 v. Mayfield, 354, 356
 v. Milwaukee, etc. R. Co., 519
 v. Montana R. Co., 678
 v. N. Y. Central R. Co., 197
 v. Ohio, etc. R. Co., 209a, 233, 239
 v. Utica, etc. R. Co., 61
 v. Worthington, 192
 Spicer v. Chesapeake, etc. R. Co., 470, 484
 v. Chicago, etc. R. Co., 743
 v. Elkhart Co., 256
 v. Lynn, etc. R. Co., 761a
 v. South Boston Iron Co., 192
 Spier v. Brooklyn, 263
 v. New Utrecht, 334
 Spiking v. Consol. Ry., etc. Co., 485a, 485c
 Spillane v. Missouri Pac. R. Co., 73a, 363, 481a
 Spiller v. St. Louis, etc. Ry. Co., 13
 v. Woburn, 323
 Spinner v. N. Y. Central, etc. R. Co., 418, 425, 455
 Splittorf v. State, 8, 251, 377, 705
 Spofford v. Harlow, 93, 99, 104, 651
 Spohn v. Missouri Pac. R. Co., 89, 761
 v. Missouri, etc. Ry. Co., 511
 Spokane Truck, etc. Co. v. Hoefer, 47, 748
 etc. R. Co. v. Holt, 71, 705
 Spooner v. Brooklyn R. Co., 519, 523
 v. Delaware, etc. R. Co., 85, 97, 99, 406, 457, 481a, 483
 Spooner v. Freetown, 373
 v. Old Colony St. Ry. Co. (App. 2069)
 Spradley v. State, 625a
 Spragins v. Houghton, 310
 Sprague v. Attee, 218
 v. Baker, 574
 v. Farmers' Nat. Bank, 584a
 v. Fremont R. Co., 419
 v. Moore, 568
 v. Northern Pac. Ry. Co., 467, 468, 476
 v. Rochester, 368
 v. Western U. Tel. Co., 754
 v. Worcester, 737
 Spray v. Ammerman, 628, 640
 Spriggs' Admr. v. Rutland Ry. Co., 505
 Spring v. Williamstown, 393
 Valley v. Gavin, 352
 Springer v. Ford, 487, 494, 719a
 v. Schultz, 719a, 739
 Springett v. Balls, 775
 Springfield v. Burns, 353
 v. Doyle, 369
 v. Le Claire, 287, 289, 298, 356, 358
 v. Louisville, etc. Ry. Co., 151
 v. Rosenmeyer, 376
 Consolidated R. Co. v. Welsch, 60a
 Fire Ins. Co. v. Keeseville, 253, 265
 Milling Co. v. Lane Co., 334
 R. Co. v. Clark, 485c
 v. Flynn, 512
 v. Welsh, 73a
 Springler v. Bowdoinham, 367
 Sprong v. Boston, etc. R. Co., 110
 Sprouk v. Adyston Pipe, etc. Co., 207
 Sproul v. Seattle, 367
 Sprow v. Boston, etc. R. Co., 476
 Spurrier v. Front St. R. Co., 108, 485a
 Squire v. Western Union Tel. Co., 544, 755
 Squires v. Chillicothe, 369
 Srollery v. Cicero, etc. St. Ry. Co., 485
 Staal v. Grand St., etc. R. Co., 758
 Staats v. Hudson River R. Co., 422
 Stacey v. Dane Co. Bank, 582, 585, 598
 v. Phelps, 378
 v. Winona, etc. R. Co., 428, 455
 Stack v. Bangs, 313, 325, 397
 v. Cavanaugh, 121
 v. Portsmouth, 353

[References are to sections.]

- Stackhouse v. Lafayette, 262
 v. Vendig, 375, 703
 Stackman v. Chicago, etc. R. Co., 89,
 203, 207
 Stackpole v. Healy, 333, 659
 v. Wray, 193
 Stackus v. N. Y. Central R. Co., 476,
 477
 Stacy v. Milwaukee, etc. R. Co., 676,
 678
 v. Phelps, 356
 v. Portland Pub. Co., 748
 Stading v. Chicago, etc. Ry. Co., 428
 Staetter v. McArthur, 629
 Stafford v. Chippewa Valley, etc.
 Ry. Co., 485c
 v. Ingersoll, 627, 655, 657, 661
 v. Oskaloosa, 65, 367
 v. Reubens, 73a
 v. W. U. Tel. Co., 753a
 Stager v. Ridge Ave. Pass. R. Co.,
 508, 521
 Stahler v. Phila., etc. R. Co. (App.
 2091)
 Stalcup v. Louisville, etc. Ry. Co.,
 513a
 Stalder v. Huntington, 217
 Stamey v. Western U. Tel. Co., 540,
 546, 552
 Stamford Oil Mills v. Barnes, 683,
 704, 706
 Stamm v. Southern R. Co., 458
 Stanbridge v. Nassau, etc. Ry. Co.,
 516
 Stanchfield v. Newton, 274
 Standard Distilling Co. v. Harris,
 207
 Distilling, etc. Co. v. Hill, 759
 Mfg. Co.'s Appeal, 206
 Milling Co. v. White Line, etc.
 Co., 727a
 Mills v. Collum, 224
 Oil Co. v. Anderson, 151, 162,
 225
 v. Bowker, 95, 192
 v. Brown, 203
 v. Hartman, 644, 649
 v. Murray, 117, 690
 v. Swan, 665
 v. Tierney, 690
 v. Wakefield's Admr., 683
 Sanitary Co. v. Minor, 191
 Wine Co. v. Chipman, 622
 Stanford v. Roberts, 574
 v. San Francisco, 273
 v. St. Louis, etc. Ry. Co., 99
 Standlee v. St. Louis, etc. Ry. Co.,
 769
 Staniszewski v. Sullivan, 708a
 Stanley v. Chicago, etc. R. Co., 207
 Stanley v. Davenport, 263, 355, 358
 v. Schumpert, 614a
 Stannard v. Ullithorne, 559, 570, 574
 Stanton v. Louisville, etc. R. Co., 27,
 426
 v. Metropolitan R. Co., 104
 v. Norfolk, etc. R. Co., 735
 v. Salem, 363
 v. Springfield, 363
 Stanwood v. Clancey, 704, 706
 Stappenhorst v. American Mfg. Co.,
 723
 Stapf v. Loewer, etc. Co., 193
 Staple v. Spring, 120
 Staples v. Dickson, 363
 v. Schmid, 145
 v. Staples, 556, 567
 Stapley v. Brighton, etc. R. Co., 466
 Starck v. Washington Union Coal
 Co., 215
 Stark v. Lancaster, 28, 55
 Starling v. Bedford, 373
 Starnes v. Pine Woods Lbr. Co., 206,
 209a
 Starkey v. Western U. Tel. Co., 540a
 Stasney v. Second Ave. R. Co., 183
 State, *Ex parte*, 249
 v. Alburgh, 388
 v. Allen, 313
 v. Atkinson, 333, 334a
 v. Baltimore Mfg. Co., 203
 (App. 2066)
 v. Baltimore, etc. R. Co., 25,
 106, 108, 113, 124, 133, 249,
 457, 475, 481, 483, 489
 v. Bangor, 394
 v. Barnes, 625a
 v. Barksdale, 340
 v. Beeman, 352
 v. Beckner, 625a
 v. Bell Tel. Co., 536, 556c
 v. Benner, 56b
 v. Berdetta, 333
 v. Birks, 518
 v. Blanch, 619
 v. Board of Comm'rs, etc., 256
 v. Bolles, 56
 v. Boston, etc. R. Co., 51, 66,
 417, 466
 v. Boyce, 709 (App. 2066)
 v. Boyd, 625a
 v. Bradford, 370
 v. Brown, 625a
 v. Broyles, 336, 340
 v. Burlington, 258
 v. Burton, 323
 v. Cadwallader, 534, 556c
 v. Canterbury, 390
 v. Carrick, 303
 v. Chappell, 340

[References are to sections.]

State v. Clausmier, 625a	State v. Mayo, 332
v. Collins, 370, 653	v. Meyer, 602
v. Commissioners, 310	v. Miller, 340
v. Compton, 390	v. Minneapolis, etc. R. Co., 415
v. Conover, 625a	v. Minnesota, etc. Ry. Co., 414
v. Culver, 336	v. Mobile, 359
v. Cumberland, 257, 262, 534	v. Moore, 97, 720
v. Daniels, 310	v. Morris, etc. R. Co., 334a, 362
v. Davis, 23, 492	v. Murfreesboro, 332
v. Delesdenier, 249	v. Nebraska Tel. Co., 536, 556c
v. Deliesceline, 310	v. O'Neill, 625a
v. Devitt, 617	v. Ownby, 619
v. Dickmann, 625a	v. Perry, 657
v. Durkin, 745	v. Philadelphia, etc. R. Co., 57, 93
v. Fowler, 625a	v. Pittsburgh, etc. R. Co., 131
v. Fox (App. 2066)	v. Porter, 619
v. Frazer, 333	v. Powell, 95, 740
v. Frysburg, 348, 363	v. Prater, 559
v. Fuller, 332	v. Proctor, 333
v. Gas Co., 358	v. Railroad Co., 104
v. Gennon, 258	v. Raymond, 334
v. Gideon, 590	v. Rixie, 334
v. Goff, 104	v. Robb, 310
v. Gorham, 332, 343, 358, 390	v. Ruland, 591
v. Goss, 313	v. Rye, 374
v. Grand Trunk R. Co., 139, 490, 510	v. St. Louis Co., 256
v. Halifax, 340	v. St. Paul, etc. R. Co., 359
v. Hampton, 262	v. Seawell, 390
v. Hannibal, etc. Ry. Co., 415	v. Sexton, 394
v. Harrington, 619	v. Shinkle, 332
v. Hastings, 310	v. Sloane, 591
v. Herod, 622	v. Society, etc., 343
v. Hill, 249	v. Stokes, 619
v. Hogg, 340	v. Swagerty, 653b
v. Hood, 332	v. Tarrell, 332
v. Horn, 334	v. Tickel, 56b
v. Housekeeper, 614 (App. 2066)	v. Timmons, 617, 625a
v. Hudson Co., 256	v. Tupper, 672
v. Illinois Cent. Ry. Co., 392	v. Unwin, 649, 653a
v. Jenkins, 623	v. Vandalia, 365
v. Jones, 336	v. Vermont Cent. R. Co., 362
v. Joyce, 334	v. Wabash Ry. Co., 414
v. Kinlock Tel. Co., 556c	v. Waterman, 653a
v. Kinney, 151, 493	v. Webber, 323
v. Lanesville, etc. Turnp. Co., 397	v. Welpton, 334
v. Lanier, 249	v. Western Maryland R. Co., 234, 239 (App. 2066)
v. Laverack, 332	v. Whittaker, 303
v. Leffingwell, 253, 256	v. Wilkinson, 333
v. Linton, etc. Mfg. Co., 207	v. Williams, 332
v. Lloyd, 334	v. Wilmington Bridge Co., 359
v. Maine Central R. Co., 65, 114, 475, 476, 524	v. Wolever, 303
v. Mainey, 336	v. Yopp, 370
v. Malster, 178, 222, 232	Bank v. Bank of the Capitol, 580a
v. Manchester, etc. R. Co., 28, 53, 65	
v. Mann, 178	

[References are to sections.]

- State Board of Pharmacy v. Matthews, 690
 ex rel. Co. v. Clawson, 140b
 Statler v. Ray Mfg. Co., 117, 117a, 690
 v. Norfolk, etc. Ry. Co., 407a
 Stausell v. Western U. Tel. Co., 756
 Steamboat New World v. King, 46, 47, 51
 Stearnfels v. Metropolitan St. Ry., 769
 Stearns v. Old Colony, etc. R. Co., 418, 437, 440
 v. Reidy, 233
 v. Richmond, 285
 Coal Co. v. Evans, 60a
 etc. Co. v. Fowler, 180, 207e
 etc. Lbr. Co. v. Fowler, 235
 Stebbins v. Central, etc. R. Co., 741
 v. Crooked Creek, etc. Co. (App. 2141)
 v. Keene, 379
 v. Vermont Cent. R. Co., 61, 95
 Stedman v. O'Neill, 1
 v. Rome, 368, 373
 Steefel v. Rothschild, 709
 Steffen v. McNaughton, 147a
 Steeg v. St. Paul City R. Co., 508
 Steel v. Kurtz, 766 (App. 2088)
 v. Lester, 122
 v. Southeastern R. Co., 395
 Co. v. McCash, 193
 v. Wingle, 225
 etc. Co. v. Holloway, 189
 Steele v. Boston, 262, 285, 370
 v. Burkhardt, 64, 99, 104, 654
 v. Central R. Co., 92
 v. Kellogg, 747
 v. Northern Pac. Ry. Co., 408, 461, 471, 482
 v. Pacific Coast R. Co., 678
 v. Smith, 629
 v. Southern Ry. Co., 494, 516
 v. Thompson, 592
 v. Townsend, 550
 Steen v. St. Paul, etc. R. Co., 221
 Steere v. Field, 625
 Steffen v. McNaughton, 151, 653a
 Steffenson v. Chicago, etc. R. Co., 241c (App. 2154)
 Steger v. Barrett, 168, 747
 v. Immen, 704
 Stein v. Burden, 733
 v. Council Bluffs, 367
 v. Grand Ave. R. Co., 60a
 Steinberger v. Western U. Tel. Co., 754
 Steinbrunner v. Pittsburgh, etc. R. Co., 760, 775
 Steindorff v. St. Paul Gaslight Co., 114
 Steinhauser v. Spraul, 209a, 245
 Steinke v. Diamond Match Co., 186
 Steinmann v. St. Louis Tr. Co., 485
 Steinmetz v. Kelly, 64
 Steinmeyer v. St. Louis, 262
 Steinweg v. Biel, 723
 v. Erie R. Co., 45, 51, 195, 496, 673
 Steiskal v. Marshall Field, etc. Co., 497, 704, 706
 Steivermann v. White, 359
 Stelz v. Van Dusen, 708a
 Steman v. Harrison, 543
 Stenberg v. Wilcox, 709a
 Stendal v. Boyd, 705
 Stenger v. Tharp, 729
 Stenvog v. Minnesota Tr. Ry. Co., 207h, 207i
 Stephani v. Brown, 365
 v. Manitowoc, 368, 396
 Stephen v. Duffy, 184a, 203
 v. Woodruff, 742
 Stephens v. Amer. Car, etc. Co., 108
 v. Boswell, 625a
 v. Davenport, etc. R. Co., 445
 v. Elliott, 193
 v. Hannibal, etc. R. Co., 207h
 v. Head, 618
 v. Hudson Knitting Co., 215
 v. Louisiana, etc. Lbr. Co., 122
 v. Macon, 108, 368
 v. Martins, 92
 v. Wilson, 302, 618, 619
 etc. Transp. Co. v. Western U. Tel. Co., 737
 v. White, 562
 Stephenson v. Duncan, 215, 216
 v. Rowland, 559, 564
 v. Scheffield Brick, etc. Co., 110, 114
 v. Southern Pac. R. Co., 89, 154
 Stephenville, etc. Ry. Co. v. Carter, 168
 v. Couch, 164, 166, 168, 175, 176
 Stepp v. Chicago, etc. R. Co., 483
 Steppe v. Alter, 702
 Ster v. Tuety, 361
 Sterger v. Van Sicklen, 705, 709a
 Sterling v. Schiffmacher, 359
 v. Union Carbide Co., 219
 Stern v. Brooklyn Heights R. Co., 485a
 v. Knowlton, 624
 v. Lanng, 609
 v. Michigan, etc. Ry. Co., 485

[References are to sections.]

- Stern v. State Board of Dental Examiners, 250
 Sternenberg v. Mailhos, 139
 Sternfels v. Metropolitan St. Ry. Co., 775
 Sterns v. Missouri, etc. Ry. Co., 463
 Stertz v. Stewart, 675, 750
 Stetler v. Chicago, etc. R. Co., 186, 196
 Stetson v. Faxon, 371
 v. Kempton, 254, 299
 Stettin, The, 172
 Steubenville v. King, 334
 Stevens v. Adams, 557
 v. Armstrong, 65, 144, 160
 v. Bunn, 224
 v. Chatham, 354
 v. Dudley, 313, 647
 v. European, etc. R. Co., 497
 v. Gair, 223a
 v. Hannibal, etc. Ry., 211a
 v. Kansas City Elec. Ry., 509
 v. Missouri, etc. Ry. Co., 407a
 v. Monges, 557
 v. Nichols, 705, 718
 v. Oswego, etc. R. Co., 62, 90
 v. Rowe, 623
 v. San Francisco, 190, 207, 241a
 v. Stevens, 359
 v. Walker, 559, 567
 v. Woodward, 147
 Stevenson v. Boston, etc. Ry. Co., 519
 v. Chicago, etc. R. Co., 89
 v. Jewett, 197, 205
 v. Joy, 159, 703, 710
 v. Montreal Tel. Co., 544
 v. New Orleans, etc. R. Co., 419
 v. Pullman Car Co., 520
 v. Ravenscroft, 203
 v. Ritter Lbr. Co., 138 (App. 2102)
 v. Wallace, 701
 Steves v. Oswego, etc. R. Co., 469, 476, 481
 Stewart v. Milford, 351
 Stewart v. Benninger, 655
 v. Birchfield, 700
 v. Brooklyn, etc. R. Co., 146, 150, 154, 513
 v. California Impr. Co., 162
 v. Cary Lbr. Co., 748
 v. Cincinnati, etc. R. Co., 412, 416, 417a
 v. Clinton, 274
 v. Cushing, 708
 v. Davis, 104
 v. Gracy, 727a
 v. Harmon, 184, 217, 518
 Stewart v. Hinkle Iron Co., 235
 v. International Paper Co., 180, 501
 v. International, etc. R. Co., 506
 v. Lanier House Co., 709
 v. Leonard, 619
 v. Louisville, etc. Ry. Co., 2120
 v. Nashville, 375
 v. New Orleans, 291
 v. North Carolina, etc. Ry. Co., 483
 v. Ohio River R. Co., 207c, 223
 v. Pennsylvania Co., 434
 v. Portland, etc. Ry. Co., 99
 v. Quincy, etc. Ry. Co., 485, 679
 v. Ripon, 742
 v. St. Paul, etc. Ry. Co., 508
 v. Scholl, 592
 v. Seaboard Air Line Ry., 216
 v. Southern Ry. Co., 209a
 v. State, 398
 v. Terra Haute, etc. R. Co., 135
 Stickel v. Riverview Park Co., 176
 Stickney v. Maidstone, 346
 v. Munroe, 142, 708
 v. Salem, 258, 370
 Stienhoff v. Kent, 378
 Stier v. Oskaloosa, 377
 Stierle v. Union Ry. Co., 495
 Stiewel v. Borman, 244
 Stiles v. Cardiff Steam Nav. Co., 630
 v. Geesey, 99, 102
 v. Hooker, 731
 v. West Point, etc. R. Co., 492a
 Still v. Nassau Elec. Co., 523
 v. San Francisco, etc. Ry., 190
 Stilling v. Thorpe, 289
 Stillson v. Hannibal, etc. R. Co., 77, 78, 479
 Stillwell v. N. Y. Central R. Co., 60a
 Stimmel v. Brown, 701
 Stimpson v. Sprague, 562
 v. Wood, 773
 Stimson v. Milwaukee, etc. R. Co., 500
 v. Union Pac. R. Co., 421
 Stinnett v. Sherman, 260a
 Stinson v. Edgewater, etc. Co., 725
 v. Fishel, 735
 v. Gardiner, 351, 370
 v. N. Y. Central R. Co., 471, 505
 Stirk v. Central Railroad Co., 199
 Stirling Bridge Co. v. Pearl, 53

[References are to sections.]

- Stisser v. New York, etc. Ry. Co., 722
 Stock v. Boston, 22, 286
 v. Harris, 319
 v. Hillsdale, 729
 v. Kern, 187
 v. Wood, 107
 Stockdale v. Lancashire, etc. R. Co., 488
 Stockport Waterworks v. Potter, 734
 Stockton v. Frey, 494, 495, 514, 516, 758, 762
 Automobile Co. v. Confer, 368
 Stockwell v. Fitchburg, 334, 337, 356
 Stoddard v. St. Louis, etc. R. Co., 53, 87
 v. Saratoga Springs, 258, 262, 274
 v. Winchester, 291, 369
 Stodden v. Anderson Mfg. Co., 203
 Stodder v. N. Y., Lake Erie, etc. R. Co., 413
 Stoeber v. St. Louis Tr. Co., 759
 Stoeckman v. Terre Haute, etc. R. Co., 110
 Stoehr v. St. Paul, 274
 Stoetzel v. Swearingin, 703
 Stoker v. St. Louis, etc. R. Co., 197, 407, 748
 Stokes v. Attleborough, 351
 v. Barber Asphalt Co., 214a, 215, 221, 223a
 v. Cheshire R. Co., 173, 699
 v. Dry Dock, etc. R. Co., 73a, 107
 v. Hills, 147
 v. Hubbardstown, 346, 355, 363, 379
 v. Hunt, 113, 702
 v. New York, 254
 v. Poughkeepsie, 363
 v. Railroad Co., 502
 v. Saltonstall, 89, 487, 516
 v. Southern Ry. Co., 485
 v. Tift, 397
 v. Trumper, 569
 v. Uniontown Water Co., 265
 Stolicker v. Boston, 341, 356, 373
 Stollery v. Cicero, etc. St. Ry. Co., 73, 110, 140a
 Stone v. Boston, etc. Ry. Co., 476
 v. Forest City Exp. Co., 61, 518
 v. Postal Tel., etc. Co., 540, 543a, 554
 v. Rottman, 589
 v. Seattle, 272, 374
 v. Union Pac. Ry. Co., 1, 202, 206, 207b, 209a (App. 2189)
 Stonebridge v. Nassau Elec. Ry. Co., 494
 Stonehewer v. Farrar, 734
 Stoneman v. Atlantic, etc. R. Co., 27, 427
 Stoner v. Patten, 729
 v. Penn. Co., 521
 v. Shugart, 656
 v. Texas, etc. R. Co., 750
 v. Zachary, 579
 Stooke v. Foote, 669
 Storey v. Ashton, 147
 Stork v. American Surety Co., 594
 v. Stoppler, etc. Co., 193
 Stolarz v. Algonquin Co., 219
 Stormfeltz v. Manor Turnp. Co., 332
 v. Turnp. Co., 385
 Storrs v. Los Angeles Tr. Co., 758
 v. Utica, 14, 174, 175, 176, 298, 356, 358
 Story v. Chicago, etc. R. Co., 451a
 v. St. Louis Tr. Co., 485
 Stotler v. Chicago, etc. Ry. Co., 469
 Stott v. Grand Trunk R. Co., 426
 v. Harrison, 574
 Stoughton v. Dimick, 322
 v. Porter, 365
 Stout v. McAdams, 731
 v. St. Louis, etc. Ry. Co., 435, 749
 Stoutimore v. Chicago, etc. R. Co., 440
 Stover v. Bluehill, 28, 741, 742
 Mfg. Co. v. Millane, 223
 Stowe v. Bishop, 53
 Stowers v. Citizens' St. Ry. Co., 525
 Furniture Co. v. Brake, 123
 Strack v. Missouri-Kansas Tel. Co. (App. 2075)
 Strader v. Monroe Co., 393
 v. N. Y., Lake Erie, etc. R. Co., 225
 Strain v. Babb, 591
 Strand v. Chicago, etc. R. Co., 93
 v. Grinnell Automobile, etc. Co., 653b, 654, 758
 Strange v. Wrightsville, etc. Ry. Co., 207
 Strasburger v. Vogel, 56
 Strattner v. Wilmington City Ry. Co., 758
 Stratton v. New York, 289, 354
 v. Staples, 709
 Strauhel v. Asiatic S. S. Co., 122
 Strause v. Western U. Tel. Co., 539a, 543, 739
 Strauss v. Buchman, 54
 v. Francis, 573
 v. Newburgh R. Co., 66, 474
 v. Postal Tel., etc. Co., 754
 Strawbridge v. Philadelphia, 367
 Streater v. Christman, 376

[References are to sections.]

- Street v. Holyoke, 352, 363
 R. Co. v. Eadie, 78
 Streett v. Laumier, 645, 654
 Strehlau v. Schroeder Lbr. Co., 180
 Streicher v. Davenport Brick, etc.
 Co., 189, 235
 Streiff v. Milwaukee, 287
 Streissguth v. Nat. German-Amer.
 Bank, 582
 Stremble v. Brooklyn, etc. Ry. Co.,
 497
 Striker v. Plath, 702
 Stringer v. Alabama, etc. Ry. Co., 49
 v. Frost, 644, 644a, 654
 v. Missouri Pac. R. Co., 91
 Stringham v. Hilton, 195
 v. Stewart, 192, 197, 719a
 Stroble v. Chicago, etc. Ry. Co.
 (App. 2141)
 Strode v. St. Louis, etc. Tr. Co., 742
 Strohl v. Levan, 644
 Strohm v. N. Y., Lake Erie, etc. R.
 Co., 614, 743
 Strom v. Georgia, etc. Ry. Co., 481b
 Strong v. Campbell, 313
 v. Canton, etc. R. Co., 482
 v. Chicago, etc. R. Co., 424
 v. Grand Trunk, etc. Ry. Co.,
 472
 v. Iowa Cent. R. Co., 202,
 207b, 213
 v. Pickering Hardware Co.,
 703
 v. Sacramento, etc. R. Co., 87,
 478
 v. Western U. Tel. Co., 21,
 534
 Strother v. Lucas, 317
 v. South Carolina, etc. Ry.
 Co., 467, 469 (App. 2093)
 Strottman v. St. Louis, etc. Ry. Co.
 (App. 2074, 2160)
 Strouse v. Whittlesey, 654
 Stuart v. Hawley, 666
 Strubble v. De Witt, 354
 Struber v. McEntee (App. 2084)
 Strubing v. Mahar, 628
 Struble v. Pennsylvania Co., 525
 Struck v. Chicago, etc. R. Co., 463,
 477
 Strudgeon v. Sand Beach, 73a, 95
 Strutzel v. St. Paul Ry. Co., 73a,
 485b
 Stryker v. Crane, 633
 Stuart v. Clark, 333
 v. Havens, 358, 359, 361, 374,
 703
 v. Hawley, 669
 v. Machias, 114
 v. Machiasport, 110
 Stuart v. West End St. R. Co., 203
 v. W. U. Tel. Co., 756
 Stubbs v. Atlantic Oil Mills, 217
 v. Beene, 559
 v. Omaha, etc. Ry. Co. (App.
 2160)
 Stuber v. Gannon, 639
 Stuble v. Allison Realty Co., 173
 v. Northwestern R. Co., 56,
 463, 466, 476
 Stucke v. Milwaukee, etc. R. Co., 102,
 418
 v. Orleans Ry. Co., 202
 Stucky v. Atlantic, etc. R. (App.
 2093)
 Studeor v. Gouveneur, 355
 Studer v. Buffalo, etc. R. Co., 425
 Studley v. Oshkosh, 353
 v. St. Paul, etc. R. Co., 481b,
 482, 484
 Studwell v. Ritch, 419, 657, 664
 Stuetgen v. Wisconsin Cent. R. Co.,
 466a
 Stumbo v. Duluth, etc. Co., 772
 v. Seeley, 731
 Stumm v. Western U. Tel. Co., 754
 Stump v. Chicago, etc. Ry. Co., 448
 Stumps v. Kelley, 628, 629
 Sturges v. Robbins, 668
 v. Sturges (App. 2064)
 Sturm v. Consolidated Coal Co., 759
 Sturtevant v. Plymouth, Co., 385
 Stutz v. Armour, 232
 v. Chicago, etc. R. Co., 743
 Styles v. Receivers of Richmond, etc.
 Ry. Co. (App. 2084)
 Styne v. Boston, etc. Ry. Co., 758,
 760
 Suben v. Georgia, etc. R. Co., 492a
 Submarine Tel. Co. v. Dickson, 21
 Substitute, etc., Matter of, 249
 Suburban Elec. Co. v. Nugent, 58
 Ry. Co. v. Balkwill, 176, 459a
 Suchomel v. Maxwell, 214a
 Suchreil v. John, 761
 Sudbury v. Stearns, 310
 Suehr v. Sanitary Dist., 750
 Sufferling v. Heyl, 164, 225
 Sugarman v. Manhattan R. Co., 676,
 679
 Sulder v. Pennsylvania R. Co., 476
 Sullens v. Chicago, etc. R. Co., 729
 Sullivan v. Boston, 258, 267
 v. Boston & Albany R. Co.,
 698
 v. Boston Elev., etc. Co., 20
 v. Capital Tr. Co., 518, 523
 v. Dunham, 688a
 v. Fitchburg R. Co., 207e
 v. Hannibal, etc. R. Co., 214

[References are to sections.]

- Sullivan v. Helena, 289, 358
 v. Holyoke, 291
 v. Indian Mfg. Co., 46, 203, 218, 219
 v. Jefferson Ave. R. Co., 495, 500
 v. Jones, 303
 v. Louisville Bridge Co., 87, 93, 209_a
 v. Lowell, etc. R. Co., 764
 v. Mississippi, etc. R. Co., 180, 235, 241_a
 v. Missouri Pac. R. Co., 99, 129, 235, 238, 482 (App. 2074)
 v. New Bedford, etc. Co., 164
 v. N. Y., New Haven, etc. R. Co., 190, 195, 232, 477
 v. N. Y., Lake Erie, etc. R. Co., 481_b
 v. New York, etc. Ry. Co., 457, 470, 476
 v. Old Colony R. Co., 493
 v. Oregon R. Co., 749
 v. Pennsylvania Co., 471
 v. Philadelphia, etc. R. Co., 65, 500, 516
 v. Scripture, 18, 629, 634, 647
 v. Syracuse, 606
 v. Tioga R. Co., 95, 225, 478
 v. Union R. Co., 58
 v. Union Pac. R. Co., 124 (App. 2084)
 v. Vicksburg, etc. R. Co., 458
 v. Wamsutta Mills, 195
 v. Western U. Tel. Co., 754
 v. Zeiner, 701
 etc. Lbr. Co. v. Watson, 491
 Co. v. Arnett, 259, 752
 v. Sisson, 355
 Sultan v. Parker Washington Co., 359
 v. Western U. Tel. Co., 754
 Sulzbacher v. Dickie, 174
 Summer v. Kinney, 758
 Summerfield v. W. U. Tel. Co., 756, 761
 Summerhays v. Kansas Pac. R. Co., 180, 189, 241
 Summers v. Daviess Co., 266
 Sunderlin v. Hollister, 719
 Sumner v. Kinney, 742
 Sundheimer v. New York, 287
 Sundmaker v. Yazoo, etc. Ry. Co., 460 (App. 2064)
 Superior Coal, etc. Co. v. Kaiser, 217
 Min. Co. v. Kaiser, 207_g
 Sury v. Gulf, etc. Ry. Co. (App. 2187)
 Susquehanna Depot v. Simmons, 358
 Susquehanna Fertilizer Co. v. Malone, 701_a
 etc. Turnp. Co. v. People, 387
 Sussex County v. Strader, 256, 258, 285, 289, 390, 393
 Suter v. Park, etc. Lumber Co., 197, 209_a, 214
 Sutherland v. Albany Cold Storage Co., 727_a
 v. Great Western R. Co., 505
 v. McKinney, 625_a
 v. Murray, 302
 v. Standard Life Ins. Co., 523
 v. Troy, etc. R. Co., 54, 61, 114, 192, 207_b, 233_a
 Sutliff v. Johnson, 731
 Sutphen v. Hedden, 343, 703
 v. North Hempstead, 370
 Sutter v. Kansas City, 369
 Suttle v. Southern, etc. Ry. Co., 518, 524
 Sutton v. Board of Police, 256, 298
 v. Bennett, 686
 v. Chicago, etc. Ry. Co., 463
 v. Clarke, 14, 278
 v. Des Moines Bakery Co., 207, 209_a
 v. N. Y. Central, etc. Co., 8, 56, 464, 465, 705
 v. N. Y., Lake Erie, etc. R. Co., 190
 v. Omnibus Co., 645
 v. Snohomish, 289, 356, 368, 369, 373
 v. Southern Ry. Co., 495, 515
 v. Waite, 624
 v. Wauwatosa, 104
 Sutzin v. Chicago, etc. R. Co., 483
 Suydam v. Grand St. R. Co., 485_a, 652
 v. Moore, 244, 248, 422, 446
 v. Vance, 559, 566
 Swaboda v. Ward, 114
 v. Union Pac. (App. 2163)
 Swadley v. Missouri Pac. R. Co., 197, 207_a
 Swain v. Fourteenth St. R. Co., 485_c
 Swainson v. North Eastern R. Co., 225
 Swan v. Norvell (App. 2105)
 v. Western U. Tel. Co., 54_a, 755
 Swannell v. Ellis, 566, 569
 Swanson v. Chicago, etc. Ry. Co., 73_a, 455
 v. Crandell, 686
 v. Great Northern Ry. Co., 207_e
 v. Groat, 656
 v. La Fayette, 207_e

[References are to sections.]

- Swanson v. Milton, 434
 v. Mississippi, etc. Boom Co., 371
 v. New Jersey, etc. Ry. Co., 476
- Swanwick v. Monongahela, 108
- Swart v. Justh, 165
- Swarts v. Wilson Mfg. Co., 215
- Swartz v. Gilmore, 166
- Sweat v. Boston, etc. Ry. Co., 189, 193
- Sweatland v. Illinois, etc. Tel. Co., 544, 545
- Sweeden v. Atkinson Imp. Co., 146, 151, 487, 497, 513, 719a
- Sweeney v. Barrett, 704
 v. Berlin, etc. Co., 192, 207e
 v. Berlin, etc. R. Co., 178, 185, 185a, 195, 209
 v. Butte, 353, 375
 v. Central Pac. R. Co., 216
 v. Gulf, etc. R. Co., 233b
 v. Kansas City Cable Co., 519
 v. Merrill, 666, 668
 v. Murphy, 162
 v. N. Y. Steam Co., 99
 v. Railroad Co., 706
 v. Rozell, 683
- Sweeny v. Old Colony R. Co., 410, 417a, 473, 705, 706
- Swearinger v. Missouri, etc. R. Co., 434
- Sweat v. Boston, etc. R. Co., 194a
- Sweet v. Ballentine, 659
 v. Birmingham, etc. Ry. Co., 520
 v. Perkins, 31, 65, 122
 v. Postal Tel., etc. Co., 540, 540a, 546, 553
 v. Providence, etc. Ry. Co., 481a (App. 2093)
 v. Western U. Tel. Co., 540a, 753a
- Sweetland v. Lynn, etc. Ry. Co., 519
- Swenson v. Metropolitan St. Ry. Co., 195
- Swett v. Cutts, 729, 735
- Swezey v. Lott, 623
- Swice v. Maysville, etc. Ry. Co., 413
- Swift v. Applebone, 628
 v. Gaylord, 769
 v. O'Brien, 107, 110
 v. New York, 255
 v. Raleigh, 743
 v. Redhead, 740
 v. Staten Island, etc. R. Co., 54, 73a, 464, 472, 484
 Mfg. Co. v. Phillips, 189
 etc. Co. v. Johnson, 769
- Swigelsky v. Interurban St. Ry. Co., 518
- Swindell v. Chicago, etc. R. Co., 471
- Swindler v. Hilliard, 550
- Swinfen v. Lord Chelmsford, 557, 569
 v. Swinfen, 569
- Swinyard v. Bowes, 587, 602
- Swisher v. Interurban Ry. Co., 13
- Swords v. Edgar, 120, 285, 343, 708, 709a, 725
- Svenson v. Atlantic Mail S. S. Co., 158, 225
- Syas v. Southern Pac. Co., 773
- Sykes v. Lawlor, 646
 v. Packer, 184
 v. Pawlet, 370
 v. St. Louis, etc. Ry. Co., 459c
- Sykora v. Case Mach. Co., 140 (App. 2071)
- Sylvester v. Maay, 639
- Syme v. Richmond, etc. R. Co., 483
- Symes v. Nipper, 559
- Symms v. Cutter, 592
- Symonds v. Clay County, 256, 260
- Syracuse, etc. Plank-road Co. v. People, 386, 387
- Szathmary v. Adams, 708
- Syneszewski v. Schmidt, 207
- Szymansky v. Bloomingthal, 134a
- Taber v. Delaware, etc. R. Co., 46, 51, 111, 495, 520
 v. Graffmiller, 333
- Tabor v. Buffalo, 358, 368
 v. Missouri, etc. R. Co., 476
- Tackett v. Henderson Bros. Co., 698
- Tacoma Lumber Co. v. Tacoma, 680
 Ry., etc. Co. v. Hays, 485c
- Taft v. N. Y., etc. R. Co., 425
- Tagg v. McGeorge, 207h, 219
- Taillon v. Mears, 495
- Taintor v. Worcester, 253, 265
- Talbert v. Western U. Tel. Co., 756
- Talbot v. McGee, 569
 v. Townston, 353
- Tallahassee v. Fortune, 289, 379
 Falls Mfg. Co. v. Moore, 203
 Mfg. Co. v. Moore, 207, 207a, 207b
- Talley v. Great Western R. Co., 526
 v. Beever & Hines, 117a, 690
- Tally v. Ayres, 686
- Talmadge v. Central Ry. Co., 665
 v. Rensselaer, etc. R. Co., 422, 437
- Talty v. Atlantic, 356
- Tampa Waterworks Co. v. Cline, 729, 734
- Tanas v. Municipal Gas Co., 134a (App. 2083)

[References are to sections.]

- Tanger v. Southwest, etc. Ry. Co., 493
 Tankard v. Ry. Co. (App. 2085)
 Tankersly v. Anderson, 573
 Tanner v. Harper, 186
 v. Hitch, 209a
 v. Louisville, etc. R. Co., 64, 480
 v. N. Y. Cent. R. Co., 675, 680
 Tarbutton v. Town of Tennille, 262
 Tarrant v. Webb, 180
 Tarras v. Winona, 356
 Tarry v. Ashton, 343, 712
 Tarwater v. Hannibal, etc. R. Co., 52, 419
 Tatarewiez v. United Tr. Co., 485bc
 Tate v. Chambers, 303
 v. Illinois, etc. Ry. Co., 500, 511
 v. Salmon, 249
 v. St. Paul, 272, 287
 Tateman v. Chicago, etc. Ry. Co., 459c
 Tattan v. Detroit, 373
 Tatum v. Rock Island, etc. Ry. Co., 472, 476, 482
 Taylor v. Alexander, 303
 v. Atlantic Ins. Co., 11, 738
 v. Austin, 287
 v. Baldwin, 207, 697
 v. Baltimore, etc. R. Co., 182, 731
 v. Blacklow, 576
 v. Carew Mfg. Co., 62, 207e, 214, 719a
 v. Chesapeake, etc. R. Co., 219
 v. Constable, 375, 376
 v. Cumberland, 262
 v. Davis County, 257
 v. Delaware, etc. Canal Co., 464
 v. Evansville, etc. R. Co., 203a, 233
 v. Feil, 144
 v. Georgia Marble Co., 232
 v. Grand Trunk R. Co., 51, 60a, 495, 499, 748, 749
 v. Haddonfield, etc. Co., 705
 v. Hancock, 623
 v. Houston, etc. Ry. Co., 283
 v. Lake Shore, etc. R. Co., 14, 343
 v. Loring, 708a
 v. Louisville, etc. R. Co., 207a
 v. McVernon, 375
 v. Manchester, etc. R. Co., 486
 v. Manson, 258, 289, 313, 336, 354
 v. Monroe, 53
- Taylor v. New York, 520, 708, 710, 725
 v. Parker, 625a
 v. Peckham, 258, 350
 v. Penn. R. Co., 501, 506
 v. Penn. Val. R. Co., 676, 678
 v. Penn., etc. Ry. Co., 674
 v. Trask, 303
 v. Vicksburg, etc. Ry. Co., 463, 467
 v. Washington Mill Co., 232
 v. Winsor, 164, 166
 v. Wootan, 219
 v. Yonkers, 26, 31, 363, 376
 etc. R. Co. v. Taylor, 207g
 v. Warner, 73a, 417, 769, 773
 Taylorville v. Stafford, 367
 Teakle v. San Pedro, etc. Ry. Co., 99, 457
 Teall v. Barton, 668
 v. Felton, 321
 Tearney v. Smith, 340
 Teat v. McGaughey, 313
 Teator v. Seattle, 393
 Tebbutt v. Bristol, etc. R. Co., 704, 706
 Tecker v. Seattle Ry. Co., 73a, 485bc
 Teel v. Bravo Oil Co., 701
 v. Coal, etc. Co., 513
 Teepen v. Taylor, 702
 Teipel v. Hilsendegen, 107, 112, 114
 Tefft v. Wilcox, 606, 612
 Telegraph Co. v. Griswold, 553, 555, 556
 v. Texas, 534
 Telfair Co. v. Webb, 752
 Telfer v. Northern, etc. R. Co., 61, 62, 65, 463, 469, 766
 Temperance Hall Asso. v. Giles, 60b, 703
 Templeton v. Linn County, 256
 v. Voshloe, 274, 736
 Templin v. Boone, 363, 376
 Ten Eyck v. Delaware, etc. Canal Co., 739
 Tennessee v. Hill, 617
 Coal, etc. Co. v. Hamilton, 734
 v. Jarrett, 207i
 v. King, 207e
 v. Gandy, 207
 etc. Co. v. Bonner (App. 2121)
 R. Co. v. Horndon, 207a, 774
 etc., R. Co. v. Markins, 66
 Tenney v. Lenz, 628
 Tennis v. Interstate, etc. R. Co., 480
 Terre Haute Elec. Co. v. Kiely, 223
 Elec. Ry. Co. v. Yant, 485bd
 Tr. Co. v. Payne, 495
 etc. R. Co. v. Augustus, 57, 419, 421

[References are to sections.]

- Terre Haute, etc. R. Co. v. Barr,** 478
 v. Buck, 111, 520, 521, 742
 v. Clark, 476
 v. Clem, 60c
 v. Graham, 20, 88, 100, 102, 457, 480
 v. Hudnut, 278, 744
 v. McKinley, 412
 v. Mansberger, 207a, 233a
 etc. Ry. Co. v. Rittenhouse (App. 2138)
 v. Shaeffer, 434
 etc. R. Co. v. Sheeks, 494, 516
 v. Smith, 417a, 437
 v. Voelker, 54, 472, 477
 etc. Ry. Co. v. Williams, 466a
- Terrel v. Louisville Water Co.,** 291
 v. State, 619
 County v. York, 256
- Terry v. Jewett,** 477, 490, 525
 v. New York, 267, 286, 291, 750
 v. N. Y. Cent. R. Co., 57, 61, 418, 437, 440
- Tesch v. Milwaukee Elec. Ry. Co.,** 485a
- Tessmer v. New York, etc. Ry. Co.,** 467
- Tetherow v. St. Josephs, etc. R. Co.,** 49, 485, 771, 773
- Tewksbury v. Bucklin,** 635, 664
 v. Lincoln, 289
- Texarkana Tel. Co. v. Pemberton,** 205, 206, 232 (App. 2122)
 etc. Ry. Co. v. Anderson, 761
 v. Bullington, 482
 v. Parsons, 27a
 v. Toliver, 760
- Texas** Loan Agency v. Fleming, 135a
 Short Line Ry. Co. v. Waymire, 217
 etc. Tel. Co. v. Mackenzie, 753a, 754
 etc. Coal Co. v. Kowsikowski, 184a
 v. Manning, 232
 etc. Ry. Co. v. Adams, 523
 v. Alexander, 508
 v. Archibald, 207f
 v. Ball, 481a
 v. Barrett, 184a, 193, 206
 v. Bayliss, 751
 v. Bean, 88a
 v. Behymer, 12a
 v. Bellar, 31
 v. Berry, 133
 v. Best, 485d, 492a
 v. Bigham, 29a
- Texas, etc. Ry. Co. v. Bingle,** 207g, 208, 211, 214a, 215
 v. Black, 150, 513a
 v. Born, 508
 v. Bourman, 232
 v. Bowlin, 513
 v. Breadow, 482, 484
 v. Brick, 218, 219
 v. Brouillette, 457, 463, 760
 v. Brown, 27a, 506, 508
 v. Buckelew, 497, 516
 v. Byrd, 457, 464, 480, 484
 v. Carlins, 30, 54, 739
 v. Chapman, 426
 v. Clippinger, 758
 v. Cody, 475, 482, 485c
 v. Conway, 196
 v. Corn, 424a, 455
 v. Cornelius, 506
 v. Cox, 132
 v. Craskell, 225
 v. Crow, 184a
 v. Crowder, 222, 481b
 v. Crutcher, 427
 v. Cumpston, 202
 v. Cunningham, 427
 v. Davidson, 508
 v. Dean, 513
 v. Dick, 490
 v. Diefenbach, 493
 v. Douglas, 203, 219a, 761
 v. Easton, 225
 v. Eberhart, 186
 v. Edmond, 513
 v. Elliott, 508
 v. Ellison, 490, 520
 v. Endsley, 480
 v. Estes, 419, 424a
 v. Fenwick, 505
 v. French, 216
 v. Frey, 508, 509, 518
 v. Gardner, 508
 v. Geiger, 129, 192, 202, 209a
 v. Gentry, 111, 481b
 v. Glenn, 436, 455
 v. Graffeo, 750
 v. Gray, 508
 v. Green, 138, 769
 v. Hamilton, 497, 516
 v. Harby, 772
 v. Hare, 480
 v. Harrington, 189, 241
 v. Hervey, 763
 v. Hohn, 201
 v. Horn, 467
 v. Huber, 463
 v. James, 493, 509
 v. Johnson, 189, 190, 197, 208, 472, 513
 v. Jones, 207e, 500, 511

[References are to sections.]

- Texas, etc. Ry. Co. v. Jumper, 495, 516
- v. Kelly, 114*b*
 - v. Kirk, 237
 - v. Langham, 429
 - v. Lee, 508, 742
 - v. Lester, 207*b*
 - v. Levi, 54
 - v. Levine, 676
 - v. Lewis, 207*h*
 - v. Lively, 476
 - v. Lowry, 463
 - v. Lynch, 493
 - v. McAtee, 192
 - v. McCoy, 218
 - v. McDonald, 480
 - v. McGraw (App. 2187)
 - v. McGilvary, 492*a*
 - v. McKee, 209*a*
 - v. McKensie, 95
 - v. McKinsie, 95
 - v. McLane, 521
 - v. Mahoney, 728
 - v. Mays, 506
 - v. Meeks, 752
 - v. Miller, 508, 510
 - v. Minnick, 209
 - v. Mitchell, 435
 - v. Moody, 151
 - v. Moore, 198, 207*b*
 - v. Morin, 760
 - v. Mosley, 494, 516, 518, 758
 - v. Mother, 151, 493
 - v. Murphy, 108, 113
 - v. Nichols, 214*a*, 223, 225
 - v. Nolan, 501
 - v. Ochiltree, 750
 - v. O'Donnell, 78
 - v. Overall, 519
 - v. Overheiser, 213
 - v. Parsons, 146, 151, 168
 - v. Payne, 485
 - v. Pelfrey, 186 (App. 2187)
 - v. Phillips, 484
 - v. Pierce, 518
 - v. Pollard, 508
 - v. Prude, 672, 750
 - v. Quails, 672
 - v. Randall, 485
 - v. Reed, 207*a*, 233*b*, 472
 - v. Roberts, 483
 - v. Robertson, 133
 - v. Rogers, 209*a*, 231
 - v. Ross, 678, 679
 - v. Rutherford, 680
 - v. Scarborough, 85*b*, 99, 481*b*
 - v. Scott, 424
 - v. Scoville, 154*a*
 - v. Sealy, 419
 - v. Sherman, 207*h*
 - v. Shivers, 475
- Texas, etc. Ry. Co. v. Shoemaker, 60*a*, 481*a*, 518
- v. Smith, 209*a*
 - v. Spradling, 468, 473
 - v. Staggs, 482
 - v. Storey, 497
 - v. Suggs, 516
 - v. Tarkington, 513
 - v. Tatman, 241*c*
 - v. Thompson, 192
 - v. Vallie, 406
 - v. Walker, 481*a*, 769, 773
 - v. Watkins, 85*a*, 89, 457, 464, 484
 - v. Watts, 760
 - v. Webb, 421, 451*a* (App. 2187)
 - v. Wheeler, 501
 - v. White, 223, 741
 - v. Whitmore, 230
 - v. Wilder, 772
 - v. Williams, 513
 - v. Woods, 509
 - v. Wooldridge, 672
 - v. Yarborough, 772
 - v. Young, 92, 419, 439
 - etc. Tel. v. Mackenzie, 753*a*, 754, 755
 - v. Owens, 754
 - v. Scott, 760
 - v. Seiders, 540
- Thacker v. Chicago, etc. Ry. Co. (App. 2137, 2138)
- Thain v. Old Colony R. Co., 203
- Tharsis Sulphur Co. v. Loftus, 310
- Thatcher v. Central Traction Co., 31, 480, 485*c*
- v. Great Western R. Co., 516
 - v. Maine Cent. R. Co., 675, 676
- Thayer v. Arnold, 655, 664
- v. Boston, 259, 299
 - v. Chickly, 143
 - v. St. Louis, etc. R. Co., 189, 495
 - v. Smoky Hollow Coal Co., 223
- Theall v. Yonkers, 345, 394
- Thermond v. Ash Grove, etc. Ass'n, 688*a*
- Thibodeaux v. Thibodeaux, 274
- Thiele v. Trac. Co., 485*a*
- Thieme v. Gillen, 359
- Thies v. Thomas, 653*d*
- Thiessen v. Belle Plaine, 367
- Third Nat. Bank v. Vicksburgh Bank, 582
- Thirkfield v. M. V. Cemetery Ass'n (App. 2099)
- Thirteenth St. R. Co. v. Boudron, 94, 523

[References are to sections.]

- Thoburn v. Campbell, 667
 Thom v. Pittard, 230
 Thoman v. Chicago & N. W. R. Co., 207
 Thomas v. Altoona, etc. Ry. Co., 164
 v. Bellamy, 221
 v. Boyson, 626
 v. Brooklyn, 332, 760
 v. Chicago, etc. R. Co., 457, 460, 481a, 484
 v. Delaware, etc. R. Co., 464
 v. Findlay, 265
 v. Hammer Lbr. Co., 672
 v. Harrington, 175
 v. Henges, 709a, 725
 v. Kenyon, 61, 93, 95, 721, 728, 736
 v. Lancaster Mills, 40, 727a
 v. Leland, 332
 v. Manhattan R. Co., 494
 v. Markmann, 625a
 v. Missouri Pac. R. Co., 196, 207e
 v. Morgan, 629, 632
 v. Phila., etc. R. Co., 516
 v. Quartermaine, 114b, 214, 241b
 v. Railroad, 120a
 v. Rhymney R. Co., 459, 503
 v. Royster, 645
 v. San Pedro, etc. Ry. Co., 520
 v. Schee, 574
 v. Smith, 186
 v. Springer, 160a
 v. State, 323
 v. Weed, 625
 v. Western U. Tel. Co., 60, 87, 357, 376, 542, 754, 756
 v. Winchester, 26, 38, 116, 117a, 690, 691
 Iron Co. v. Allentown Min. Co., 717
 Thompkins v. N. Hudson Ry. Co., 703
 Thompson v. Albuquerque Tr. Co., 99
 v. Allis Co., 207a, 219a
 v. Amer., etc. Paper Co., 207g
 v. Bank of So. Car., 581, 585
 v. Beaver, 323
 v. Belfast, etc. R. Co., 509
 v. Boston & M. R. Co., 207
 v. Bridgewater, 62, 375
 v. Buffalo, etc. R. Co., 476, 481a, 485o
 v. Central, etc. Co. (App. 2131)
 v. Cambridge, etc. Light Co., 692, 696
 v. Chicago, etc. R. Co., 135, 207h, 241, 700, 750
 v. Cincinnati, etc. R. Co., 451
 Thompson v. Clemens, 708, 708a
 v. Crocker, 730
 v. Cumberland, etc. Tel. Co., 73
 v. Delaware, etc. Co. (App. 2091)
 v. Dickinson, 567
 v. Dodge, 370, 653
 v. Duncan, 113
 v. Evans, 310
 v. Great Northern Ry. Co., 195
 v. Harlem R. Co., 441
 v. Jackson, 302, 303
 v. Johnson, 773
 v. Johnston Co., 197, 218
 v. Kyler, 655
 v. Louisville, etc. R. Co., 31, 125 (App. 2120)
 v. Lowell, etc. St. Ry. Co., 176
 v. Manhattan R. Co., 119
 v. Metropolitan St. Ry. Co., 115, 485bb
 v. Missouri Pac. Ry. Co., 481a
 v. Nashville, etc. Ry. Co., 513a
 v. Nat. Express Co., 645, 654
 v. North Missouri R. Co., 108
 v. N. Y. Central, etc. R. Co., 460, 463, 467, 476, 477
 v. Polk Co., 274
 v. Quincy, 368
 v. Salt Lake Tr. Co., 88a, 99, 485ba
 v. St. Louis, etc. Ry. Co., 516
 v. Truesdale, 493
 v. West Bay, 358
 v. Western U. Tel. Co., 531, 542, 553, 756
 v. Yazoo, etc. R. Co., 488, 493
 Thomson v. Manhattan R. Co., 512
 Thorburn v. Smith, 150
 Thoresen v. La Crosse R. Co., 485a (App. 2105)
 Thorn v. Williams, 143
 Thornberry v. Old Judge Min. Co., 207
 Thornburg v. American Strawboard Co., 136
 Thornbury v. City, etc. Co., 698a
 Thorne v. California Stage Co., 488
 v. Lehigh Val. R. Co., 445
 Thornton v. Cleveland, etc. R. Co., 476
 v. Dow, 117, 690
 v. Franklin Square House, 331
 v. Maine Agri. Soc. (App. 2065)
 Thorogood v. Bryan, 66, 74, 75, 77, 86
 Thorp v. Brookfield, 114
 v. Concord R. Co., 493
 v. Minor, 144, 157, 635

[References are to sections.]

- Thorp v. Western U. Tel. Co., 554, 755
 Thorpe v. Brumfitt, 734
 v. Missouri Pac. R. Co., 113, 191, 214, 215
 v. N. Y. Central R. Co., 526
 v. New York, etc. Ry. Co., 513
 v. Rutland, etc. R. Co., 422
 v. Union Pac., etc. Co. (App. 2106)
 Thrussell v. Handyside, 211a
 Thuis v. Vincennes, 352
 Thum v. Rhodes, 120
 Thunborg v. City of Pueblo, 338
 Thurber v. Harlem, etc. R. Co., 73, 74, 481a
 v. Martin, 729
 Thuringer v. N. Y. Cent., etc. R. Co., 55, 95, 345
 Thurman v. Cherokee R. Co., 241c
 v. Louisville, etc. R. Co., 64
 v. Western U. Tel. Co., 756
 Thurn v. Taylor Brewing, etc. Co., 158
 Thurston v. Hancock, 701
 v. Percival, 557
 Thwaites v. Mackerson, 567
 Thyng v. Fitchburg R. Co., 195
 Thyssen v. Davenport Ice, etc. Co., 146, 157
 Tibby v. Missouri Pac. R. Co., 492, 505
 Tice v. Bay City, 368, 369
 Tickell v. St. Louis, etc. Ry. Co., 523
 Tiernan v. Commercial Bank, 585
 Tierney v. Chicago, etc. R. Co., 463
 v. Minneapolis, etc. R. Co., 205
 v. Syracuse, etc. R. Co., 146, 225
 v. Troy, 295, 343
 Tiers v. New York, 346
 Tiffin v. McCormack, 160, 164, 167, 701a
 v. St. Louis, etc. Ry. Co., 476
 Tift v. Tift, 626
 v. Buffalo, 332
 Tift v. Jones, 95, 397
 v. N. Y., Providence, etc. R. Co., 451a
 v. Towns, 386, 389
 Tighe v. Atchison, etc. Ry. Co., 750
 v. Lowell, 370
 Tilford v. New York, 299
 Tillett v. Lynchburg, etc. R. Co., 519
 v. Norfolk, etc. R. Co., 519
 Tilley v. Hudson River R. Co., 135, 137, 769, 771, 775 (App. 2082)
 v. Rockingham, etc. Co., 231
 v. St. Louis, etc. R. Co., 58, 86
 Tillman v. St. Louis Tr. Co., 495
 Tillock v. Webb, 104
 Tillotson v. Smith, 729, 735
 Tillson v. Maine Cent. Ry. Co., 197
 Timlin v. Standard Oil Co., 120, 709, 712
 Timm v. Michigan Cent. R. Co., 190
 Timmons v. Central Ohio R. Co., 61
 Timpson v. Manhattan R. Co., 506
 Timony v. Brooklyn, etc. R. Co., 485c
 Tindley v. Salem, 258
 Tingley v. Ry. Co., 505
 Tinker v. N. Y., Ontario, etc. R. Co., 406
 v. Ontario, etc. R. Co., 426
 v. Russell, 262, 336
 Tinkham v. Sawyer, 219
 v. Stockbridge, 392
 Tinsley v. Western U. Tel. Co., 114
 Tinsman v. Belvidere, etc. R. Co., 250, 283
 Tipping v. St. Helen Smelting Co., 701a
 Tipton v. Freeman, 353
 Tirrell v. New York, etc. Ry. Co. (App. 2068)
 Tisdale v. Norton, 8
 Tissue v. Baltimore, etc. R. Co., 187
 Titecomb v. Fitchburg R. Co., 392
 Titter v. Iowa Co., 257
 Titus v. Bradford, 185
 v. Mechanics' Nat. Bank, 582
 v. New Scotland, 377
 v. Northbridge, 346, 378
 Tobey v. Burlington, etc. R. Co., 213
 v. Hudson, 363
 Tobias v. Michigan Cent. R. Co., 415, 463, 475, 481b
 v. Peoples Ry. Co., 1
 Tobin v. Missouri Pac. R. Co., 481a, 483, 485c
 v. Portland, etc. R. Co., 410, 492a, 506
 v. Western U. Tel. Co., 555, 556a
 Tobler v. Pioneer Mfg. Co., 180, 195
 Toby v. Leonard, 618
 Todd v. Cochell, 47, 701a
 v. Flight, 708, 709
 v. Minneapolis, etc. R. Co., 362
 v. Old Colony, etc. R. Co., 491, 519
 v. Rome, 334
 v. Rowley, 606, 105
 v. Troy, 346, 363, 376
 v. York Co., 735
 Tolbot v. West Virginia, 748
 Toledo v. Cone, 289, 291
 Stove Co. v. Reep, 164
 Tr. Co. v. Cameron, 485b

[References are to sections.]

- Toledo Tr. Co. v. McFall, 510
 etc. R. Co. v. Apperson, 499
 v. Baddeley, 758
 v. Bailey, 111
 v. Barlow, 428, 430
 v. Biggs, 497
 v. Black, 178
 v. Brooks, 489
 v. Burgan, 443
 v. Clark, 408
 v. Cline, 468, 477
 v. Cohen, 425
 v. Cole, 421
 v. Conroy, 184, 193, 204, 499
 v. Coen, 673
 v. Crittenden, 67, 426
 v. Cupp, 434, 435
 v. Daniels, 425
 v. Darst, 436
 v. Deacon, 13
 v. Durkin, 238
 v. Eder, 425
 v. Eddy, 221
 v. Endres, 678
 v. Fenstermaker, 445, 675
 v. Foster, 53, 427
 v. Fowler, 425
 v. Franklin, 434
 v. Fredericks, 197
 v. Fergusson, 470
 v. Gallagher, 469
 v. Goddard, 61, 63, 69, 87, 463, 476
 v. Gordon, 151, 207
 v. Grush, 492a
 v. Hammett, 88a
 v. Harmon, 155, 461, 463
 v. Hauck, 471
 v. Howell, 435, 436
 v. Ingraham, 197, 428
 v. Jackson, 436
 v. Jones, 483
 v. Kingman, 676
 v. Larmon, 58
 v. McGinnis, 458
 v. Maine, 458
 v. Maxfield, 680
 v. Miller, 66, 424
 v. Moore, 60, 65, 234, 238
 v. Muthersbaugh, 666
 v. O'Connor, 58, 238, 467
 v. Owen, 435
 v. Parker, 95
 v. Pence, 440
 v. Pindar, 55, 674, 741
 v. Riley, 93
 v. Rumbold, 444
 v. Sieberns, 439
 v. Sweeney, 368, 434
 v. Thomas, 455
- Toledo, etc. R. Co. v. Trimble, 219
 v. Tucker, 740, 741, 758
 v. Wand, 678
 Tolin v. Terrell, 639
 Toll Bridge Co. v. Langrell, 396
 Tolland v. Wilmington, 390, 393, 394
 Tolman v. Chicago, 365
 v. Syracuse, etc. R. Co., 107, 111, 112, 114, 476, 481b
 Tombs v. Rochester, etc. R. Co., 437, 452
 Tomer v. Aiken et al., 613
 Tomkins v. N. Y. Ferry Co., 511
 Tomle v. Hampton, 703, 706, 709a
 Tomlinson v. Brown, 119
 v. Chicago, etc. Ry. Co., 494
 v. Derby, 8
 Tompkins v. Boston, etc. Ry. Co., 495, 519
 v. Clay St. R. Co., 66, 122
 v. Kanawha, 94
 v. Sands, 303
 Toms v. Whitby, 346
 Tonawanda R. Co. v. Munger, 1, 20, 433
 Toncray v. Dodge Co., 49
 Tondy v. Norfolk, etc. R. Co., 429
 Tone v. New York, 295
 Toner v. Chicago, etc. R. Co., 232, 233
 Tonnesen v. Ross, 189
 Toohey v. Interurban St. Ry. Co., 485bb
 Toohy v. McLean, 719a
 Toole v. Beckett, 710
 Toomey v. Albany, 262
 v. Brighton, etc. R. Co., 56, 58, 410, 502
 v. Delaware, etc. R. Co., 145
 Toomey v. Donovan, 186, 188, 241b (App. 2152)
 v. New York, 295
 v. Sanborn, 705, 705a
 v. Southern Pac. R. Co., 480, 484
 Tooney v. Avery (App. 2178)
 Tootle v. Kent, 744
 Topeka v. Sherwood, 334a, 343
 v. Tuttle, 289, 355
 R. Co. v. Higgs, 495, 523
 Topolewski v. Plankington Pkg. Co., 748, 749
 Topp v. United Railways, etc. Co., 508
 Toppi v. McDonald, 1, 25
 Topping v. St. Lawrence, 137, 766 (App. 2104)
 Topton Light, etc. Co. v. Newcomer, 696
 Torbush v. Norwich, 265

[References are to sections.]

- Torgeson v. Schultz, 117, 117a
 Torians v. Richmond, etc. R. Co., 193, 238
 Torongo v. Salliotte, 223
 Torphy v. Fall River, 335, 368
 Torrey v. Boston, etc. R. Co., 523
 v. Scranton, 735
 Totten v. Cole, 640
 v. Phipps, 87, 91, 377
 Touchberry v. Northwestern Ry., etc. Co., 407
 Toudy v. Norfolk, etc. Ry. Co., 427
 Tounsens v. Rich, 727a
 Tourtellot v. Phelps, 729
 v. Rosebrook, 8, 57, 668, 669
 Tousey v. Roberts, 710, 719a
 Toutloff v. Green Bay, 343, 703a
 Towaliga Power Co. v. Sims, 359
 Towanda Coal Co. v. Heeman, 64
 Tower v. Providence, etc. R. Co., 418, 437
 v. Rutland, 334
 v. Utica, etc. R. Co., 526
 Towle v. Morse, 653d
 Towler v. Baltimore, etc. R. Co., 94
 Town v. Armstrong, 708
 of Elba v. Bullard, 758, 760
 of Knightstown v. Musgrove, 31
 v. Lampshire, 634
 v. Michigan Cent. R. Co., 186
 of New Castle v. Grubbs, 760
 of Southeast v. New York, 286
 Towne v. Nashua, etc. R. Co., 418
 v. Thompson, 708
 Tower v. Providence, etc. Ry. Co., 655
 Towner v. Missouri Pac. R. Co., 207
 Townley v. Chicago, etc. R. Co., 73a, 464, 484
 v. Fall Brook Coal Co., 668
 Towns v. Cheshire R. Co., 418
 v. Railroad Co., 186
 v. Vicksburg, etc. R. Co., 233
 Townsend v. Bell, 734
 v. Boston, 31, 259
 v. Briggs, 761
 v. Butte, 363
 v. Joplin, 339
 v. Langles, 219a
 v. Libbey, 619
 v. McDonald, 729
 v. N. Y. Cent. R. Co., 493, 749
 v. Norfolk, etc. Co., 359
 v. Paola, 743
 v. Susquehanna Turnp. Co., 272, 386
 v. Wathin, 97, 720
 Tozer v. N. Y. Cent. R. Co., 743
 Toye v. Exeter Borough School Dist., 323
 Toye v. United Dressed Beef Co., 215
 Trabing v. California, etc. Co., 513
 Tracey v. Page, 120
 v. Poughkeepsie, 363
 v. South Haven Tp., 379
 Traction Co. v. McClerey, 761a
 v. Scott, 73
 Tracy v. Cloyd, 322
 v. Hornbuckle, 249
 v. Pullman Car Co., 526
 v. Troy, etc. R. Co., 57, 421, 434, 435, 444
 Tradesmen's Nat. Bank v. Third Nat. Bank, 582
 Trally v. Williams, 197
 Traneek v. Heard, 625a
 Transit, The, 751
 Transportation Co. v. Chicago, 249, 262, 283
 v. Bownser, 223
 v. Ullman, 120a
 Tranter v. Sacramento, 289
 Traphagen v. Erie Ry. Co., 51
 Trapnell v. Red Oak, 368
 Trask v. California, etc. R. Co., 216
 v. Hallowell, etc. Co., 725, 727a
 v. Old Colony R. Co., 241b (App. 2151)
 v. Shotwell, 719
 Trauffer v. Detroit, etc. Nav. Co., 66a
 Traver v. Eighth Ave. R. Co., 763
 Travers v. Kansas Pac. R. Co., 749a
 v. Murray, 60
 Travis v. Kansas City, etc. Ry. Co., 120a
 v. Pierson, 751
 Treadwell v. New York, 286, 291
 v. Whittier, 487, 719a
 Treasurers, etc. v. McDowell, 573
 Trect v. Bates, 735
 v. Lord, 333
 Trego v. Honeybrook, 298
 Tremain v. Cohoes Co., 688a, 701a
 Tremblay v. Harndin, 223
 v. Kimball, 690
 Trenton Water-Power Co., Matter of, 359
 Treschman v. Treschman, 742
 Tretter v. Chicago, etc. Ry. Co., 407, 750
 Trevett v. Prison Ass'n, 734
 Trevor v. Wood, 543
 Trexler v. Greenwich, 356, 378
 Triber v. New York, etc. Ry. Co., 508
 Tribette v. Ill. Cent. R. Co., 674, 675
 Trice v. Chesapeake, etc. R. Co., 493
 v. Hannibal, etc. R. Co., 422
 Triese v. St. Paul, 334
 Trigg v. McDonald, 619

[References are to sections.]

- Trigg v. St. Louis, etc. R. Co., 761
 v. Water, etc. Tr. Co., 99
 Triggs v. Lindsay, 190
 Trihay v. Brooklyn Lead Min. Co., 230
 Trinidad Nat. Bank v. Denver Nat. Bank, 587*a*
 Trinity Lumber Co. v. Denham, 195
 Valley Ry. Co. v. Stewart, 500
 etc. R. Co. v. Lane, 413
 v. O'Brien, 501
 v. Schofield, 750
 Triolo v. Foster, 626
 Tripp v. Lyman, 350, 363, 367, 374
 Tritz v. Kansas City, 334
 Trombley v. Stevens-Duryea Co., 653*b*, 654
 Trompen v. Verhage, 628
 Tronghear v. Lower Vein Coal Co., 241
 Trott v. Birmingham Ry. (App. 2053)
 Trotta's Admr. v. Briggs (App. 2064)
 Trotter v. Furniture Co., 215
 Trousdale v. Pacific Coast S. S. Co., 61
 Trout v. Altoona, etc. Ry. Co., 485*c*
 v. Virginia, etc. R. Co., 419, 430
 Troutwine v. Louisville, etc. Ry. Co., 427, 429
 Trow v. Thomas, 115, 770
 v. Vermont, etc. R. Co., 99, 418, 430, 451*a*
 Trower v. Chadwick, 701
 Troy v. Cape Fear, etc. R. Co., 114
 v. Troy, etc. Ry. Co., 384
 etc. R. Co. v. Boston, etc. R. Co., 120*a*
 Troxel v. Vinton, 350, 378
 Trudell v. Grand Trunk Ry. Co., 481*a*
 True v. International Tel. Co., 547
 v. Meridith, 683
 v. Woda, 26, 774
 & True Co. v. Woda (App. 2060)
 Truex v. Erie R. Co., 523
 Trull v. Seaboard Air Line Ry. Co., 476
 Trullinger v. Howe, 737
 Truly v. North Lbr. Co., 207*h*
 Trumball v. Erickson, 495, 523
 Trumble v. Happy, 627
 Trumbull v. Nicholson, 573
 Truntle v. North Star Woolen-Mill Co., 203, 214
 Truro, The, 197
 Trustees, etc. v. Tatman, 256
 Trussel v. Morris Co. Tr. Co., 520
- Tubervil v. Stamp, 665, 669
 Tubbs v. Michigan Cent. R. Co., 525
 v. Roberts, 750
 Tucker v. Baltimore, etc. R. Co., 480
 v. Bradley, 619
 v. Buffalo Cotton Mills, 183
 v. Chicago, etc. Ry. Co., 476
 v. Conrad, 334
 v. Draper, 73*a*, 140*a*, 704
 v. Henniker, 87, 378
 v. Illinois Cent. R. Co., 702
 v. Mowrey, 104
 v. Newman, 119, 721
 v. N. Y. Central R. Co., 73*a*, 122, 476, 481*b*
 v. Oelrichs, 727*a*
 v. Pittsburg, etc. Ry. Co., 520
 v. State (App. 2066)
 v. West, 104
 v. Winders, 762
 Tuckett v. Amer. Steam Laundry, 209*a*
 Tudor v. Bowen, 1
 Tuel v. Weston, 141
 Tuell v. Paris, 368
 Tuff v. Warman, 61, 93, 94, 99, 100
 Tuffree v. State Centre, 90, 379
 Tuller v. Talbot, 496, 514
 Tullis v. Lake Erie, etc. Ry. Co., 202
 Tully v. Philadelphia, etc. Ry. Co., 73, 99
 Tully v. N. Y. & Texas S. S. Co., 216
 v. Texas S. S. Co., 719
 Tunney v. Midland R. Co., 239
 Tunncliffe v. Bay R. Co., 764
 Tupper v. Clark, 631, 657
 Turbyfill v. Atlantic, etc. Ry. Co., 52, 469 (App. 2093)
 Turley v. Thomas, 649
 Turner v. Buchanan, 355
 v. City, etc. Ry. Co., 509
 v. Cocheo Mfg. Co., 223
 v. Craighead, 632
 v. Cross, 241*c*
 v. Haar, 39
 v. Hannibal, etc. R. Co., 120*a*
 v. Hawkeye Tel. Co., 544
 v. Indianapolis, 265, 370
 v. Louisville, etc. Ry. Co. (App. 2064)
 v. Missouri Pac. Ry. Co., 191
 v. Newburgh, 92, 298, 367, 369, 375
 v. Norfolk, etc. R. Co., 218 (App. 2104)
 v. Phillips, 557
 v. St. Louis, etc. R. Co., 57, 482
 v. Southern Pac. Ry. Co., 208

[References are to sections.]

- Turner v. Southwest, etc. Ry. Co., 289, 338, 353, 378
 v. Terminal, etc. Co. (App. 2160)
 v. Thomas, 703
 v. Tuolumne Water Co., 402
 v. Vicksburg, etc. R. Co., 509
 v. Yazoo, etc. Ry. Co., 481
 Turnier v. Lathers, 57, 704
 Turnpike Co. v. Champney, 310
 v. Jackson, 376
 Road v. Brosi, 385
 Turrentine v. Wilmington, etc. R. Co., 727a
 Tuteur v. Chicago, etc. R. Co., 771 (App. 2105)
 Tutis v. Northbridge, 379
 Tutt v. Illinois Cent. Ry. Co., 480
 Tuttle v. Chicago, etc. R. Co., 59, 115
 v. Farmington, 378, 741
 v. Gilbert Mfg. Co., 708, 709
 v. Holyoke, 356
 v. Lawrence, 379
 v. Love, 243, 618
 Tvedt v. Wheeler, 27a
 Twickell v. Pecos, etc. Ry. Co., 516
 Twigg v. Ryland, 630
 Twilley v. Perkins, 370
 Twist v. Winona, etc. R. Co., 73a
 Twogood v. New York, 368, 376
 Twombly v. Leach, 612
 Twomey v. Swift, 195
 Twomley v. Central Park, etc. R. Co., 89, 518, 519
 Tyler v. Chesapeake, etc. Ry. Co., 56b
 v. Kelley, 483
 v. Nelson, 654
 v. Old Colony R. Co., 468
 v. New York, etc. R. Co., 477
 v. Revere, 258
 v. Ricamore, 666
 v. Sites, 481, 484
 v. Sturdy, 333
 v. Third Ave. R. Co., 739
 v. Western U. Tel. Co., 536, 540, 553, 556, 755, 756
 v. Wilkinson, 730
 v. Williston, 393, 394
 Tylor v. Alvord, 303
 Tyma v. Tarrant Foundry Co., 221
 Tyndale v. Old Colony R. Co., 222
 Tyrrell v. Eastern R. Co., 407
 Tyson v. Keokuk, etc. R. Co., 455
 v. South & N. Ala. R. Co., 232
 v. State Bank, 580, 582
 Udkin v. New Haven, 253, 259
 Ugglä v. Brokan, 343
 v. West End R. Co., 47, 54, 516
- Ulbrecht v. Keokuk, 373
 Ulbricht v. Eufala Water Co., 729
 Uline v. N. Y. Cent. R. Co., 743
 Ulrich v. Dakota Trust Co., 701
 v. St. Louis, 260
 v. Stephens, 665
 Ulrick v. Dakota Light, etc. Co., 16a
 Umback v. Lake Shore, etc. R. Co., 195
 Umsted v. Colgate, etc. Elev. Co., 218
 Underhill v. Manchester, 261
 Underwood v. Waldron, 99
 Undheism v. Hastings, 654
 Unger v. Forty-second St. R. Co., 647
 Union v. Durkes, 258
 Bank v. Geary, 572
 Brass Mfg. Co. v. Lindsay, 709a
 Bldg. Co. v. Soderquist, 559, 562
 Canal Co. v. Pinegrove, 401
 Ice Co. v. Crowell, 726
 Light, etc. Co. v. Arnston, 698
 Pac. R. Co. v. Adams, 90, 474, 477
 v. Arthur, 676, 679
 v. Billiter, 225
 v. Brady, 207
 v. Brown, 114
 v. Buck, 678
 v. Callaghan, 55, 222, 233a, 485
 v. Connolly, 463
 v. Daniels, 193, 206, 223
 v. De Busk, 675, 676
 v. Doyle, 233, 233a, 233b
 v. Dunden, 73, 775
 v. Dyche, 729, 735
 v. Entsminger, 451
 v. Erickson, 238
 v. Estes, 207, 218, 221 (App. 2143)
 v. Evans, 485d, 501
 v. Fort, 207a, 218, 233
 v. Gilland, 674, 678
 v. Hand, 495
 v. Harris, 421 (App. 2142)
 v. Harwood, 465
 v. High, 421
 v. Holmes, 747
 v. James, 57, 192
 v. Jarvi, 207g, 223
 v. Jones, 743, 764
 v. Keller, 675, 676
 v. Kelley, 225
 v. Knowlton, 435
 v. McCollum, 679
 v. McDonald, 13, 56, 72, 118, 467, 705, 717
 v. Mertes, 99, 483

[References are to sections.]

- Union Pac. R. Co. v. Mitchell, 151
 v. Monden, 217
 v. Motzner, 672
 v. Murphy, 750
 v. Nichols, 486, 492
 v. O'Brien, 108, 192, 197, 410
 v. Patterson, 428
 v. Rassmussen, 431, 467
 v. Rollins, 102, 418
 v. Rosewater, 473, 477
 v. Springsteen, 206
 v. Sue, 506
 v. Williams, 676
 v. Young, 180
 R. Co. v. Kallaher, 160, 459
 v. Schlacklet, 133
 v. State, 472, 476, 548
 v. Stone, 341, 346
 v. Waddington (App. 2138)
 Packet Co. v. Clough, 491, 518
 S. S. Co. v. New York, 61
 Stock Yards, etc. Co. v. Goodman, 195, 480
 Stock Yards Co. v. Larson, 193
 Trust Co. v. Cuppy, 731
 v. Keiter, 520
 v. Sullivan, 518
 v. Thomason (App. 2142)
 v. Vandercook, 485*c*
 etc. Co. v. Rourke, 705
 United Breweries Co. v. O'Donnell, 54
 Elec. Power Co. v. State, 769
 Elec. R. Co. v. Shelton, 122
 Gas, etc. Co. v. Larsen, 164
 Oil Co. v. Roseberry, 697
 Rys., etc. Co. v. Beidelman, 516
 v. Carmeal, 485*b**c*, 707
 Rolling Stock Co. v. Wilder, 207*i*
 So. of Shakers v. Underwood, 150, 588, 589
 States v. Abul, 591
 v. Arredondo, 317
 v. Atchison, etc. Ry. Co. (App. 2118)
 v. Bell, 590, 591
 v. Chicago, etc. Ry. Co. (App. 2116)
 v. Cincinnati, etc. Ry. Co., 392
 v. Clark, 251
 v. Clarke, 249
 v. Collier, 319
 v. Colorado, etc. Ry. Co. (App. 2116)
 v. Denver, etc. Ry. Co. (App. 2118)
 v. Eckford, 249
 v. Hillegas, 249
- United States v. Lee, 249
 v. McLemore, 249
 v. Nevada, etc. Ry. Co., 197
 v. O'Keefe, 249
 v. Peachy, 701
 v. Sault Ste. Marie, 118
 v. Thompson, 249
 Brewing Co. v. Stoltenberg, 73*a*, 772
 Elec., etc. Co. v. Sullivan (App. 2057)
 Express Co. v. Everest, 1
 v. Wahl, 760
 Mortgage Co. v. Henderson, 558
 Rolling Stock Co. v. Wilder, 186*a*, 217
 Natural Gas Co. v. Hicks, 692, 696
 Sugar Refinery v. Welcher, 214*a*
 Tel. Co. v. Gildersleeve, 545, 548
 v. Lipscomb (App. 2057)
 v. Wenger, 755
 Tel. Co. v. Cleveland, 588
 Zinc Cos. v. Wright, 214*a*, 215, 221
 University of Louisville v. Hammock, 2, 31
 Upham v. Detroit City R. Co., 523
 Upp v. Darner, 1, 704
 Uppington v. New York, 283
 Urquhart v. Boutell, 646
 v. Ogdensburg, 262, 271, 363
 v. Smith, etc. Co., 188
 Urtel v. Flint, 258
 Urtz v. New York, etc. Ry. Co. (App. 2083)
 Usher v. West Jersey R. Co., 133
 Utah Con. Min. Co. v. Bateman, 207*g*
 Savings, etc. Co. v. Diamond Coal, etc. Co. (App. 2106)
 etc. Co. v. Diamond, etc. Co. (App. 2099)
 Uther v. Rich, 20
 Uthermohlen v. Boggs, etc. Co., 1, 8
 Vaccari v. Maxwell, 313
 Vadas v. Pittsburg, etc. Ry. Co., 413
 Vagemann v. Amer. Docks, etc. Co., 24*a*, 168, 725, 726
 Vail v. Amenia, 256
 v. Broadway R. Co., 522, 523
 v. Jackson, 573
 Vaisbord v. Nashua Mfg. Co., 197
 Vale v. Bliss, 703
 Valin v. Milwaukee, etc. R. Co., 484
 Valente v. American Bridge Co., 518, 758

[References arc to sections.]

- Valenti v. Sierra, etc. Ry. Co., 495
 Valentine v. Englewood, 253
 Valjago v. Carnegie Steel Co., 223*a*
 Vallaster v. Atlantic City Ry. Co., 673
 Valleau v. Chicago, etc. R. Co., 421
 Valley Ry. Co. v. Keigan, 215
 Vallo v. U. S. Exp. Co., 89, 362, 741
 Valparaiso v. Cartwright, 287
 Van Alstyne v. Freeday, 340
 Van Amburg v. Vicksburg, etc. R. Co., 233, 233*a*
 Van Antwerp v. Linton, 243
 Van Atta v. McKinney, 557
 Van Bergen v. Van Bergen, 731
 Van Brunt v. Cincinnati, etc. Ry. Co. (App. 2070)
 Van Camp Hardware, etc. Co. v. O'Brien, 1
 Van Cleef v. Chicago, 289, 339, 353, 358, 375
 Van de Bogart v. Marinett Paper Co., 203
 Van Den Heuvel v. National Furnace Co., 195
 Van Doorn v. Heap, 223
 Van Dusen v. Letellier, 193, 233*a*
 Van Duzer v. Elmira, etc. R. Co., 395, 407
 Van Dyke v. Atlantic Ave. R. Co., 197
 v. Fruit Co., 224
 v. Grand Trunk Ry. Co., 674, 679
 v. Missouri, etc. Ry. Co., 207
 Van Epps v. Commissioners, 256
 Van Fleet v. N. Y. Cent. R. Co., 665
 Van Frachen v. Ft. Howard, 373
 Van Hoesen v. Coventry, 729
 Van Horn v. Burlington, etc. R. Co., 419, 428, 451*a*
 v. Des Moines, 265
 v. St. Louis Transit Co., 497
 Van Inwegen v. Erie Ry. Co., 184*a*
 Van Inwegen v. N. Y., Lake Erie, etc. R. Co., 53
 Van Leuven v. Lyke, 17, 626, 627, 629, 657
 Van Ness v. Murphy, 704
 Van Natta v. People's R. Co., 73*a*
 Van Nostrand v. N. Y., Lake Erie, etc. R. Co., 675
 v. Wallkill Val. R. Co., 678
 Van Norden v. Robinson, 13, 683
 Van Pelt v. Davenport, 262, 274, 278
 Van Praag v. Gale, 703
 Van Sandau v. Brown, 568
 Van Schaick v. Hudson River R. Co., 480, 521
 v. Sigel, 590, 592
 Van Skike v. Potter, 606
 Van Slyck v. Hogeboom, 625
 Van Steenburgh v. Thornton, 192
 v. Tobias, 123, 638
 Van Steuben v. Central, etc. Ry. Co., 413
 Van Vranken v. Clifton Springs, 356
 Van Wart v. Woolley, 581, 582, 602
 Van Wickle v. Manhattan R. Co., 241
 Van Winkle v. Amer. Steam Boiler Ins. Co., 122
 v. Brooklyn R. Co., 500
 v. Chicago, etc. R. Co., 184
 Van Winckle v. New York, etc. Ry. Co., 476
 Van Winkler v. N. Y., etc. Ry., 463
 Vance v. Franklin, 376
 Vandalia v. Huss, 355
 Coal Co. v. Yemm, 758 (App. 2138)
 Vandegrift v. Delaware, etc. R. Co., 418, 419
 v. Rediker, 57, 418, 428, 446
 Vandemark v. Porter, 335
 Vandenberg v. Connorly (App. 2099)
 Vandenburg v. Truax, 19, 26, 37
 Vanderbeck v. Hendrey, 97, 705
 Vanderbilt v. Richmond Turnpike Co., 154
 Vanderheyden v. Young, 303, 310
 Vanderkar v. Rensselaer, etc. R. Co., 435
 Vanderpool v. Husson, 361
 Vanderslice v. Philadelphia, 368, 369
 Vander Velde v. Leroy, 758
 Vanderwerken v. New Haven R. Co., 131
 Vanderworker v. Missouri Pac. R. Co., 434, 435
 Vandever v. Moran, 13, 27*a*
 Vandewater v. N. Y., New England R. Co., 463, 464, 467, 468
 v. Williamson, 598
 Vanduzer v. Lehigh, etc. R. Co., 421
 Vandyke v. Cincinnati, 343
 Vanesse v. Catsburg Coal Co., 207*g*
 Vannata v. New Jersey, etc. Ry. Co., 225
 Vannest v. Fleming, 735
 Vansant v. State, 591
 Vantine v. The Lake, 744
 Varick v. Smith, 333, 737
 Varney v. Manchester, 370
 Varnham v. Council Bluffs, 759
 Varnum v. Martin, 566, 567
 Vasele v. Grant, etc. Ry. Co., 505
 Vass v. Waukesha, 363
 Vassor v. Atlantic, etc. Ry. Co., 439
 Vaughan, The Mary J., 747

[References are to sections.]

- Vaughan v. Biggers**, 317
 v. Menlove, 665
 v. Taff Vale R. Co., 11, 16, 47,
 85, 672, 674, 680
Vaughn v. Bunker Hill, etc. M. Co.
 (App. 2060)
 v. California Cent. Ry. Co.
 (App. 2055)
 v. Lemp Brewing Co., 1
Vaught v. East Tenn. Tel. Co., 556c
 v. Johnson Co., 257
Vaughtman v. Waterloo, 291
Vaux v. Scheffer, 61
Vawter v. Missouri Pac. R. Co., 132
Veal v. Hanlon, 708a
Veatch v. Wabash R. Co., 485
Veazie v. Penobscot R. Co., 359, 384,
 414
Vecchioni v. N. Y., etc. Ry. Co., 2069
Veeder v. Little Falls, 48, 334a
Veerhusen v. Chicago, etc. R. Co.,
 418, 434, 449
Veitch v. Jenkins, 168
Velte v. United States, 251, 729
Venables v. Smith, 147
Venburr v. La Fayette Worsted
 Mills, 65
Vennal v. Garner, 92, 100
Ventress v. Gage Co., 108
Veraguth v. Denver, 253
Verdon v. Brooklyn, etc. Ry. Co., 726
Vermillion Co. v. Chipps, 380
Vermont v. Leicester, 334
Verner v. Alabama R. Co., 484, 525
Verrill v. Minot, 370, 749a
Verrone v. Rhode Island, etc. Ry.
 Co., 523
Vertrees v. Newport News, etc. R.
 Co., 472, 489
Vessel Owners' Towing Co. v. Wil-
 son, 737
Vetahoro v. Perkins, 134a
Vianello v. Washington Iron Works,
 203
Vick v. N. Y. Cent. R. Co., 184, 239
Vickers v. Atlanta, etc. R. Co., 73a
 v. Kanawha, etc. Ry. Co., 164,
 168, 206
Vicksburg v. Hennessey, 92, 107, 289,
 375
 etc. R. Co. v. Hart, 467
 v. Howe, 490
 v. McLain, 98, 113, 286
 v. McGowan, 97
 v. O'Brien, 518
 v. Patton, 419, 748
 v. Putnam, 758
Victor Coal Co. v. Muir, 207, 209a,
 217
Victor Min. Co. v. Morning Star Min.
 Co., 701
 v. Penna. R. Co., 520
Victorian R. Com. v. Coultles, 761
Victory v. Baker, 343, 705
Viebahn v. Crow Wing Co. Com'rs,
 256, 363
Viellesse v. Green Bay, 369
Vieths v. Skinner, 377
Vigo Co. v. Daily, 256, 257
Vilas v. Bryants, 582
 v. Downer, 557
Village of Atkinson v. Fisher, 95
 Bloomer v. Town of Bloomer,
 394
 Haverstraw v. Eckerson, 701
 Mineral City v. Gilbow, 704
Vinal v. Dorchester, 350, 358
Vincennes v. Spees, 351
 etc. Co. v. White, 207e
 Water Supply Co. v. White,
 166, 217
Vincent v. Brooklyn, 254, 291
 v. Crandel, 653a
 v. Groome, 569
 v. Lake Erie Transp. Co., 726
 v. Morgan's R. Co., 476
Vincett v. Cook, 60, 343
Vindicator, etc. Min. Co. v. First-
 brook, 209a (App. 2126)
Vinton v. Middlesex R. Co., 493
 v. Schwab, 53
 Vinyard v. St. Louis, etc. R.
 Co., 450
Virgin v. Saginaw, 375
Virginia Iron & Coal Co. v. Munsey,
 207
 etc. Ry. Co. v. Clawson's
 Admr., 73a (App. 2189)
 v. Harris, 207h
 v. Hill, 486
 v. Roach, 91
 v. Sanger, 14, 51, 406
 v. Washington, 413
 v. White, 467, 471
 Midland R. Co. v. Barksdale,
 480
 v. Boswell, 480
 v. Washington, 413
Virtue v. Police Commissioners, 326
Vizacchero v. Rhode Island Co., 457,
 480
Voak v. Northern Central R. Co., 89,
 426, 427, 468
Voeker v. Yeager, 164
Vogel v. McAuliffe, 761
 v. New York, 262, 298
 v. Union Ry., etc. Co., 494,
 516
Vogelgesang v. St. Louis, 346

[References are to sections.]

- Vogemann v. American Dock, etc. Co., 24a, 168, 725, 726
 Vogg v. Missouri Pac. R. Co., 476
 Vohs v. Shorthill, 203
 Voight v. Baltimore, etc. Ry. Co., 505
 Voligny v. Stillwater Water Co., 728
 Volkman v. Chicago, etc. R. Co., 432
 Volkmar v. Manhattan R. Co., 60
 Volquarsden v. Iowa Tel. Co., 754
 Volz v. Chesapeake, etc. R. Co., 180, 233b
 Von Brock v. Mo., etc. Ry. Co., 99
 Von Raden v. N. Y., New Haven, etc. R. Co., 13
 Von Steuben v. Central R. Co., 413
 Von Trebra v. Laclede Gaslight Co., 108
 Von Wallhoffen v. Newcombe, 572
 Vonderhorst Brewing Co. v. Amrhine, 647
 Voorhees v. Martin, 303
 Vormus v. Coal Co., 188
 Vosbeck v. Kellogg, 164
 Vosburgh v. Lake Shore, etc. R. Co., 192
 Vosper v. New York, 354
 Voss v. Cleveland, etc. R. Co., 526
 Voyt v. Grinnell, 374
 Vreeland v. Chicago, etc. R. Co., 207, 483
 Vruland v. Cincinnati, etc. R. Co., 476
 Vroman v. Rogers, 726
 Vrooman v. Lawyer, 629
 Waaler v. Great Northern Ry. Co., 150
 Wabash v. Carver, 380
 River Tr. Co. v. Baker, 520
 R. Co. v. Brow, 190
 v. Farrell, 223
 v. Hassett, 132, 236
 v. Jones, 481, 484
 v. Keister, 476
 v. Lackey, 30
 v. McDaniels, 187, 189, 202
 v. Miller, 680
 v. Reynolds, 25
 v. Williamson, 417a, 424, 455
 etc. Ry. Co. v. Barrett, 464a
 v. Brown, 187, 436
 v. Forshee, 435, 436
 v. Fretts, 436
 v. Hawk, 233
 v. Hicks, 478, 485
 v. Koenigsam, 494
 v. Locke, 16, 57, 193
 v. Mathew, 758
 v. Nice, 434, 451a
 v. Rector, 749
 Wabash, etc. Ry. Co. v. Shacklet, 66, 122, 135, 520
 v. Wallace, 102, 482
 Western R. v. Brow, 60a, 192
 Wabasha v. Southworth, 384
 R. Co. v. Defiance, 334
 Wachser v. Interborough Tr. Co., 500, 512
 Wade v. Columbia, etc. Ry. Co., 519
 v. Detroit, etc. Ry. Co., 485o
 v. Herndl, 751
 v. Leroy, 758, 760
 v. Miller, 590
 v. Mount Vernon, 741
 Wadsworth v. Duke, 225
 v. McDougall, 730
 v. Marshall, 568, 688, 688a
 v. Tillotson, 729, 730
 v. Walliker, 625a
 v. Western U. Tel. Co., 531, 756
 Waffle v. N. Y. Central R. Co., 735
 Wagen v. Minneapolis, etc. Ry. Co., 182
 Waggoner v. Sneed, 207, 217
 Wagner v. Bissell, 656
 v. Jayne Co., 209a, 215
 v. Long Tel. R. Co., 729
 v. Missouri Pac. R. Co., 513a
 v. Portland, 208, 291
 v. Western U. Tel. Co., 757
 v. Woolsey, 125
 Wagoner v. Wabash, etc. Ry. Co., 497
 Wahlgren v. Market St. Ry. Co., 114
 Wahrman v. New York Board of Education, 262
 Wailes v. Smith, 313
 Wait v. Bennington, etc. R. Co., 424, 455, 466a
 v. Burlington, etc. R. Co., 455
 v. Omaha, etc. Ry. Co., 513a
 Waite v. Northeastern R. Co., 74, 77
 Waixel v. Harrison, 688
 Wakefield v. Boston Coal Co., 146, 376
 v. Connecticut, etc. R. Co., 13, 27, 426, 468, 469
 v. Moore, 616
 v. Newport, 258, 299
 Wakeham v. St. Clair, 351, 369, 375
 Wakelin v. Southeastern R. Co., 109, 114
 Wakeman v. Gowdy, 566, 587
 v. Hazleton, 557
 v. Robinson, 16
 Walbert v. Trexler, 188
 Walcott v. Swampscott, 291
 Waldele v. N. Y. Central R. Co., 60a, 477
 Walden v. Western U. Tel. Co., 753a

[References are to sections.]

- Wald v. Louisville, etc. R. Co., 727a
 Waldo v. Beckwith, 47
 v. Goodsell, 134, 135a, 138
 v. Wallace, 302, 303
 Waldock v. Winfield, 162
 Waldron v. Boston, etc. Ry. Co., 483
 v. Haverhill, 259, 285
 v. Hopper, 644
 Wales v. Motor Co., 769
 Walger v. Jersey City, etc. Co., 490, 520
 Walkenhauer v. Chicago, etc. R. Co., 466a
 Walker v. Bank of State of N. Y., 580, 581
 v. Bolling, 204
 v. Boston & Maine R. Co., 241, 426
 v. Butz, 731
 v. Chicago, etc. R. Co., 689
 v. Columbia, etc. R. Co., 432
 v. El Paso Elec. Ry. Co., 160a
 v. Erie R. Co., 517, 758, 760
 v. Georgia Ry., etc. Co., 520
 v. Globe Mfg. Co., 723
 v. Goodman, 567
 v. Great Northern R. Co., 116
 v. Hallock, 313
 v. Hannibal, etc. R. Co., 148
 v. Herron, 633, 662
 v. Hobbs, 709
 v. Interborough R. Tr. Co., 516
 v. Kansas City, 393
 v. Kendall, 675
 v. Lake Shore, etc. R. Co., 216, 775
 v. Lansing, etc. Co. (App. 2070)
 v. Lockport, 353
 v. McNeill, 769
 v. Midland R. Co., 466
 v. New Mexico, etc. Ry. Co., 735
 v. Pt. Pleasant, 334
 v. Reidsville, 377
 v. St. Louis, etc. Sawmill Co., 206
 v. Scott, 216, 217
 v. Second Ave. R. Co., 763
 v. Stevens, 577
 v. Strosnider, 701
 v. Texas, etc. Ry. Co., 143
 v. Vicksburg, etc. R. Co., 520
 v. Ontario, 379
 v. Wasco Co., 256
 v. Westfield, 108
 v. Wildman, 576
 v. Winstanley, 705
- Walkowski v. Penokee, etc. Mines, 189
 Walkup v. May, 654
 Wall v. Delaware, etc. R. Co., 196
 v. Des Moines, etc. R. Co., 432
 v. Highland, 373, 375
 v. Livezey, 516
 v. Platt, 751
 Wallace v. Casey Co., 70, 73a, 150
 v. Central Vt. R. Co., 199, 207a, 207g, 213
 v. Farmington, 376
 v. Lent, 709
 v. Merrimack River Nav. Co., 104, 154
 v. Morss, 121
 v. Muscatine, 287
 v. New Albion, 356
 v. New Haven, 339
 v. New Haven, etc. R. Co., 73a, 339
 v. New York, etc. Ry. Co., 672, 674, 678
 v. Norman, 261
 v. Oregon, etc. Co., 429
 v. Pennsylvania Ry. Co., 739, 741, 742, 760
 v. St. Louis, etc. R. Co., 427, 460, 467
 v. Southern Oil Co., 143
 v. South, etc. Ry. Co., 209a
 v. Standard Oil Co., 219
 v. Suburban R. Co., 483, 485c
 v. Western N. C. R. Co., 513a, 760
 v. Wilmington, etc. R. Co., 506, 521
 Wallenburg v. Missouri Pac. Ry. Co., 476
 Waller v. Dubuque, 291
 v. Hebron, 338, 356
 v. Lasher, 14
 v. Southeastern R. Co., 241
 v. Wilmington, etc. Ry. Co., 508
 Walley v. Holt, 121
 Walling v. Congarce Constr. Co., 207e
 Wallingford v. Maysville, etc. Ry. Co., 729
 Wallis v. Lambat, 557
 Walls v. Peoples' Ry. Co., 187, 208
 Wallsworth v. McCullough, 303
 Waln v. Beaver, 563
 Walpole v. Carlisle, 559
 Walrath v. Redfield, 739
 Walser v. Western U. Tel. Co., 753a, 754
 Walsh v. Boston, etc. Ry. Co., 132, 482

[References are to sections.]

- Walsh v. Buffalo, 363, 373
 v. Central N. Y. Tel. Co., 376
 v. Consol. Laundry Co., 207e
 v. Cullen, 487, 490, 497, 719a
 v. Fitchburg R. Co., 410, 705, 706
 v. Loreem (App. 2068)
 v. Mead, 343
 v. Missouri Pac. R. Co., 485
 v. New York, 295, 330
 v. N. Y., etc. R. Co., 410
 v. Oregon, etc. R. Co., 108
 v. St. Paul, etc. R. Co., 205, 207e
 v. Trustees of Brooklyn Bridge, 295, 330
 v. Virginia, etc. Ry. Co., 449
 v. Wallace, 729
- Walter v. Chicago, etc. R. Co., 519, 523
 v. Kensinger, 115
 v. Kirsh, 620
 v. Middleton, 625a
 v. Mitchell (App. 2077)
 v. Post, 744
- Walters v. Chicago, etc. R. Co., 65, 72, 78, 84, 85, 508
 v. Collins Park R. Co., 520
 v. Denver, etc. Co., 698a
 v. Exeter, 289, 339, 353
 v. Missouri, etc. Ry. Co., 508
 v. Ottowa, 373
 v. Phila. Traction Co., 508
 v. Sykes, 618
- Waltham v. Kemper, 256, 258
- Walther v. Pacific R. Co., 436
 v. Southern Pac. Co., 491
- Walthers v. Missouri Pac. R. Co., 425
- Walthough v. Pennsylvania Ry. Co., 508
- Walton v. Booth, 691
 v. Brighton, etc. R. Co., 634, 639
 v. Burchel, 135, 218
 v. Miller's Admx., 683
 v. N. Y. Central Sleeping Car Co., 148
 v. Van Guard, etc. Co., 653e
- Wanata, The, 93
- Wanless v. Northeastern R. Co., 466
- Wann v. Western U. Tel. Co., 552, 553
- Wannamaker v. Burke, 209a
- Wanstall v. Pooley, 157
- Wanzer v. Chippewa, etc. Ry. Co., 519
- Warber v. State, 399
- Warburton v. Great Western R. Co., 178, 225, 334
- Ward, The, 132
 v. Andrews, 701
- Ward v. Bonner, 466a
 v. Brooklyn Heights Ry. Co., 65a
 v. Brown, 635
 v. Central Park R. Co., 523
 v. Chesapeake, etc. R. Co., 207
 v. Chicago, etc. R. Co., 93, 461, 463, 471, 509
 v. Dampskibsselskabet Kjoevenhaven, 107, 481b (App. 2091)
 v. Fagan, 710
 v. Fagin, 708
 v. Farwell, 334
 v. Folly, 334
 v. Hartford County, 256
 v. Jefferson, 258, 367
 v. Lee, 577
 v. Louisville, 261
 v. Maine Cent. Ry. Co., 107
 v. Meredith, 653b
 v. Milwaukee, etc. R. Co., 679
 v. Newark, etc. Turnp. Co., 386, 388
 v. N. Y. Cent. R. Co., 493
 v. North Haven, 346, 394
 v. Powell, 665
 v. Pullman Co., 690
 v. Southern Pac. R. Co., 97, 114, 457, 484, 485
 v. Young, 150, 160
- Warden v. Bayfield Co., 313
 v. Louisville, etc. Co. (App. 2120)
 v. Old Colony R. Co., 197
- Wardlaw v. California R. Co., 56, 521
- Wardwell v. Chicago, etc. R. Co., 493
- Ware v. Allen, 729
 v. Fowler, 623
 v. Gay, 516
- Warfield v. N. Y., Lake Erie, etc. R. Co., 477
 v. Louisville, etc. Ry. Co., 493
- Warn v. N. Y. Central R. Co., 202
- Warner v. Baltimore, etc. Ry. Co., 490
 v. Berks County Poor Directors, 303
 v. Chamberlain, 632, 761
 v. Erie R. Co., 184, 230
 v. Ford Lbr. Co., 333
 v. Griswold, 577
 v. Holyoke, 262, 356
 v. McGarry, 384
 v. Mier Carriage, etc. Co., 706
 v. N. Y. Central R. Co., 460, 463, 475
 v. St. Louis, etc. Ry. Co. (App. 2075)
 v. Southern Pac. Co., 749

[References are to sections.]

- Warner v. State, 398
 Warren v. Bangor, etc. Ry. Co., 485c
 v. Boston, etc. R. Co., 466, 761
 v. Chicago, etc. R. Co., 430, 436
 v. Clement, 338
 v. Erie, etc. Ry. Co., 207b
 v. Fitchburg, etc. R. Co., 65, 91, 473, 477, 488, 490, 506
 v. Jeunesse, 223
 v. Kauffman, 709
 v. Keokuk, etc. R. Co., 437
 v. Manchester St. Ry. Co., 485ba
 v. Robison, 589
 v. Wright, 353
 Bank v. Suffolk Bank, 585, 598
 County v. Evans, 367
 Vehicle Co. v. Siggs, 207
 etc. Ry. Co. v. Waldrop, 769, 775
 Warsaw v. Dunlap, 358
 Waschow v. Kelly Coal Co., 223a
 Washburn v. Tracy, 652, 654
 etc. Mfg. Co. v. Worcester, 258
 Washington v. Baltimore, etc. R. Co., 419
 v. Missouri, etc. R. Co., 223
 v. Nashville, 343
 v. Pac. Elec. R. Co., 760
 v. Raleigh, etc. R. Co., 503
 v. Small, 369
 v. Spokane R. Co., 519
 Gas Co. v. Dist. of Columbia, 384, 692
 Ice Co. v. Lay, 333, 334
 Mfg. Co. v. Barnett, 99
 Market Co. v. Clagett, 706
 Mills v. Cox, 87, 207
 Natural Gas Co. v. Wilkinson, 332
 etc. R. Co. v. Brown, 502
 v. Cheshire, 203
 v. Grant, 508
 v. Harmon, 104, 108, 114, 508, 743
 v. Hickey, 519, 747
 v. McDade, 184, 187, 188
 v. Taylor, 193
 etc. Co. v. Trimyer, 495
 Wasmer v. Delaware, etc. R. Co., 85, 85c, 94, 379, 408, 415, 459
 Wasmuth v. Butler, 645
 Wasson v. Canfield, 303
 v. Mitchell, 310
 v. Pettit, 56, 703
 Wastl v. Montana Union R. Co., 56b
 Water Co. v. Duncan, 118, 175, 298
 Waterbury v. N. Y. Central, etc. R. Co., 61, 489
 v. Waterbury Tr. Co., 384
 v. Westervelt, 618
 Waterford, etc. R. Co. v. Kearney, 416
 etc. Turnp. Co. v. People, 386, 387
 Waterhouse v. Wait, 618
 Waterloo v. Waterloo, etc. Ry. Co., 365
 Milling Co. v. Kuenster, 582
 Waterman v. Chicago, etc. R. Co., 55, 108, 743
 v. Connecticut, etc. R. Co., 412
 Watertown v. Cowen, 333
 Waters v. Atlantic City, 673
 v. Bay View, 274
 v. Greenleaf Lumber Co., 165, 750
 v. Moss, 656
 v. Pioneer Fuel Co., 165
 Pierce Oil Co. v. King, 680
 v. Snell, 704, 706
 Watier v. Chicago, etc. R. Co., 451a
 Watkins v. Birmingham, etc. Co., 520
 v. County Court, 354
 v. Goodall, 710
 v. Lynch, 336
 v. Penna. R. Co., 503
 v. Raleigh, etc. R. Co., 520
 v. Roberts, 39
 v. Union Tr. Co., 485c
 Land Co. v. Clements, 729
 Watkinson v. Bennington, 619
 Watson v. Augusta, etc. Co., 690
 v. Bauer, 57
 v. Calvert Bldg. Ass'n, 574
 v. Georgia Pac. R. Co., 520
 v. Houston, etc. R. Co., 207e
 v. Kingston, 271, 274, 283
 v. Lisbon Bridge Co., 392, 752
 v. Loughran, 751
 v. Manitou, etc. Ry. Co., 457, 705
 v. Minneapolis R. Co., 485a, 485c
 v. Mound City R. Co., 485c
 v. Muirhead, 558, 559, 574
 v. New Milford, 721
 v. New York, etc. Ry. Co., 197
 v. Northern R. Co., 522
 v. Oxanna Land Co., 506, 705
 v. St. Paul City R. Co., 51, 135, 495 (App. 2071)
 v. Seaboard, etc. Ry. Co., 769
 v. Southern, etc. Ry. Co., 481a
 v. Todd, 618
 v. Town of New Milford, 734
 Lodge v. Drake, 701

[References are to sections.]

- Watt v. Nevada Cent. R. Co., 672,
 675, 745, 751
 Watts v. Boston Towboat Co., 221
 v. Hart, 184, 185, 203, 241
 v. Norfolk, etc. Ry. Co., 407a,
 412
 v. Porter, 575
 v. Richmond, etc. R. Co., 480
 Waud v. Polk County, 369, 376
 Waxahachie v. Connor, 334
 Waxham v. Fink, 235, 238
 Way v. Chicago, etc. R. Co., 207, 488
 v. Illinois, etc. R. Co., 56, 107
 v. Powers, 144, 147
 v. R. R. Co., 111, 112
 v. Townsend, 303
 Wayne Turnp. Co. v. Berry, 389
 Weare v. Chase, 730
 Weare v. Fitchburg, 89, 333, 353
 Weatherford, etc. Co. v. Pope, 683,
 703, 706
 Weatherhed v. Bray, 374
 Weatherly v. Nashville, etc. Ry. Co.,
 65, 463, 467, 472, 476, 482
 Weaver v. Ann Arbor Ry. Co., 505
 v. Baltimore, etc. R. Co., 132,
 138
 v. Bullis, 73, 75
 v. Chicago, etc. Ry. Co., 424a
 v. Columbus, etc. Ry. Co., 478
 v. Devendorf, 249, 303
 v. Goulden Log. Co., 180
 v. Iselin, 218
 v. Northwestern, etc. Ry. Co.,
 455
 v. Southern Ry. Co., 475
 v. Ward, 686
 Weavers v. Wood, 121
 Webb v. Browning, 557
 v. Denver, etc. R. Co., 238,
 763, 767 (App. 2099)
 v. Detroit Board of Health,
 291
 v. Heintz, 375
 v. Moore, 653a
 v. Portland Mfg. Co., 730, 733
 v. Portland, etc. R. Co., 457,
 466
 v. Rennie, 192
 v. Rome, etc. R. Co., 30, 55,
 665, 666
 Webbe v. Western U. Tel. Co., 543
 Webber v. Closson, 418
 v. Hoag, 632
 v. Piper, 193, 195
 v. Swallow, 653
 Weber v. Atchison, etc. R. Co., 461,
 479
 v. Buffalo Ry. Co., 164, 176
 v. Chicago, etc. Ry. Co., 119
 Weber v. Creston, 334a, 369
 v. Illinois, etc. Ry. Co., 207h
 v. Kansas City R. Co., 520
 v. Morris, etc. R. Co., 765
 v. New Orleans, etc. Ry. Co.,
 516
 v. N. Y. Cent. R. Co., 417, 457,
 463, 466, 476
 v. Third Ave. Ry. Co. (App.
 2083)
 Wagon Co. v. Kehl, 215
 Webster v. Elmira, etc. R. Co., 516
 v. Fitchburg R. Co., 488
 v. Fleming, 729
 v. Harris, 733
 v. Hillsdale County, 256, 260a
 v. Hudson River R. Co., 31,
 65, 66, 359
 v. Norwegian Min. Co., 135
 (App. 2055)
 v. Quimby, 623
 v. Rome, etc. R. Co., 39, 92,
 465, 519, 523
 v. Stewart Iron Works, 192,
 207g
 v. Symes, 30, 666, 668
 Weckerly v. Geyer, 310
 Weddell v. Hapner, 735
 Wedgwood v. Chicago, etc. R. Co.,
 193, 204
 Weed v. Ballston Spa, 368, 369, 374,
 376
 v. Greenwich, 259
 v. N. Y. Central R. Co., 477
 v. Panama R. Co., 14, 146, 150,
 155, 495, 513
 v. Saratoga, etc. R. Co., 22
 Week v. Fremont Mill Co., 216
 Weeklund v. So. Oregon Co., 185, 195
 Weeks v. Chicago, etc. Ry. Co., 475
 v. Lyndon, 379
 v. New Orleans, etc. R. Co., 93,
 477, 480
 v. New York, etc. Ry. Co., 526
 v. Shirley, 338, 749a
 Weems v. Mathieson, 185, 192
 Weet v. Brockport, 118, 281, 289
 Weger v. Pennsylvania R. Co., 180
 Wegmann v. Jefferson City, 274
 Wegner v. Calder, 612
 Welin v. Gage County, 256
 Weick v. Lander, 31, 35, 359
 Weidekin v. Snelson, 735
 Weideman v. Tacoma R. Co., 60
 Weidner v. Rankin (App. 2088)
 Weightman v. Louisville, etc. R. Co.,
 510
 v. Washington, 118, 256, 272,
 278, 285

[References are to sections.]

- Weil v. Dry Dock, etc. R. Co., 72,
73a, 82
v. Krentzer, 653a
- Weiler v. Manhattan R. Co., 55, 521
- Weimer v. Sloane, 558
- Weinecker, etc. Co. v. Ott, 151
- Weiner v. Scherern, 683
v. Shover, 706
- Weingartner v. Louisville, etc. Ry.
Co., 451
- Weinstein v. Toledo, etc. Ry. Co., 467
- Weir v. Herbert, 1
- Weirs v. Jones County, 367, 369, 376
- Weis v. Madison, 56, 274
- Weisenberg v. Appleton, 369, 743
v. Winneconne, 122, 394, 396
- Weisenfield v. McLean, 56b
- Weiss v. Kohlhagan, 701
v. Pennsylvania R. Co., 108,
114
- Weisser v. Denison, 69
- Weissner v. St. Paul City R. Co., 72
- Weitmann v. Barber Asphalt Co., 705
- Weitner v. Delaware, etc. Canal Co.,
399
- Welch v. Alabama, etc. R. (App.
2158)
v. Baltimore, etc. Ry. Co., 463,
476
v. Bath Iron Works, 202
v. Brainard, 207
v. Durand, 748
v. Jackson, etc. Ry. Co., 122
v. McAllister, 704
v. Pullman Car Co., 526
v. Sage, 20
v. Waterbury, 216
v. Wesson, 64, 646
- Weld v. Chadbourne, 618
v. N. Y., Lake Erie, etc. R.
Co., 115
v. Postal Tel., etc. Co., 542,
553, 741, 753a
- Weldes v. Edsell, 590
- Weldon v. Harlem R. Co., 147, 629,
634
v. Philadelphia, etc. Ry. Co.,
73a, 463
- Welfare v. Brighton R. Co., 56, 159,
192
- Wellcome v. Leeds, 358
- Wellenbrook v. Spekert, 577
- Weller v. Burlington, 262
v. Chicago, etc. R. Co., 92, 114,
472, 473, 476, 481b
v. Consol. Gas Co., 704, 706
v. London, etc. R. Co., 509
v. McCormick, 343, 354, 703
- Welles v. Hutchinson, 592
- Wellihan v. National Wheel Co., 231
- Welling v. Judge, 645, 654
- Wellington v. Downer Oil Co., 117
v. Greyson, 358, 367
- Welliver v. Irondale, etc. Co., 728
v. Pennsylvania Canal Co., 399
- Wellman v. Metropolitan, etc. Ry.
Co., 508, 758
v. Susquehanna Depot, 346,
356, 376, 378
- Wellmeyer v. St. Louis Tr. Co., 520,
759
- Wells v. Ballou, 120
v. Beal, 418
v. Brooklyn R. Co., 485c
v. Burlington, etc. R. Co., 198
v. Coe, 217
v. Denver, etc. Ry. Co., 111,
773
v. Ferry-Banker Lbr. Co., 606
v. Gortorski, 209a
v. Howell, 655
v. Lisbon, 289
v. N. Y. Central R. Co., 102,
505
v. Remington, 356
v. Sibley, 368, 703
v. Western U. Tel. Co., 532,
739, 753a, 754
v. World's Med. Asso., 612
Fargo, etc. Co. v. Zimmer, 31
etc. Co. v. Miskowicz, 218
- Wellsborough, etc. Co. v. Griffin, 388
- Welsch v. Hannibal, etc. R. Co., 466
- Wellston Coal Co. v. Smith, 206
- Welsh v. Alabama, etc. Ry. Co. (App.
2157)
v. Argyle, 376
v. Barber Asphalt Co., 223a
v. Butz, 219, 219a
v. Jackson, 99
v. Lansing, 356
v. Rutland, 265, 273
v. St. Louis, 298
v. Tri-City Ry. Co., 100, 485ab
v. Wilson, 362
- Welter v. St. Paul, 289
- Welty v. Indianapolis, etc. R. Co.,
452
- Wenck v. Carroll County, 256
- Wencker v. Missouri, etc. Ry. Co., 1
- Wend v. Bond, 559
- Wendall v. Baxter, 725, 726
v. N. Y. Central, etc. R. Co.,
73a
v. Pratt, 16
- Wendell v. Corbin, 525
v. Leo, 189, 191
v. New York Cent. R. Co., 73a
v. N. Y. Central, etc. R. Co.,
90, 475, 476

[References are to sections.]

- Wendell v. Troy, 118, 263, 289, 358, 367, 374
 Wenship v. Boston, 356
 Wenzlick v. McCotter, 343 721
 Wentworth v. Jefferson, 104
 Werk v. Illinois Steel Co., 207
 Werely v. Persons, 60a
 Werle v. Long Island R. Co., 523
 Werner v. Popp, 735
 Werten v. Koosa & Co., 741
 Westbrook v. Mobile, 73a
 Wertheimer v. Howard, 303
 Wertheimer v. Saunders, 708
 Wertz v. Southern Ry. Co., 359
 v. Western U. Tel. Co., 553
 Westcott v. N. Y. & New England R. Co., 207b
 Wesley Coal Co. v. Healer, 89
 West v. Blackshear (App. 2058)
 v. Chicago, etc. R. Co., 198, 198a, 678, 679
 v. Eau Clair, 369, 375
 v. Forrest, 758
 v. Lynn, 350
 v. Louisville, etc. R. Co., 709a
 v. Martin, 93
 v. Missouri Pac. Ry. Co., 455
 v. Northern Pac. Ry. Co., 421, 427, 452
 v. St. Paul Nat. Bank, 581
 v. Southern Pac. Co., 213
 v. Ward, 39
 v. Western U. Tel. Co., 543, 756
 Branch Bank v. Fulmer, 581, 587a
 Chicago, etc. Ry. Co. v. Anderson, 459a
 v. Camp, 485 bc
 v. Craig, 490
 v. Devyer, 207a
 v. Martin, 516
 v. Dougherty, 66
 v. Horne, 518
 v. James, 508, 748
 v. Liderman, 85b, 107, 114
 v. Manning, 518
 v. Marx, 523
 Covington v. Schultz, 283
 End, etc. R. Co. v. Mozely, 508
 Jersey R. Co. v. Ewan, 114
 v. Paulding, 60c
 Ky. Tel. Co. v. Pharis, 376
 Mahoney v. Watson, 346
 Memphis Packet Co. v. White, 511, 512
 Orange v. Field, 274
 Point Iron Co. v. Reimert, 729
 Pratt Coal Co. v. Andrews, 209a
 West Pratt Coal Co. v. Dorman, 716
 Riding, etc. Ry. Co. v. Wakefield Local Bd. of Health, 414
 River Bridge Co. v. Dix, 737
 Westaway v. Chicago, etc. R. Co., 464
 v. Frost, 562
 Westbrook v. Mobile, etc. R. Co., 71, 73a, 78, 113
 Westchester, etc. R. Co. v. McElwee, 53, 54
 R. Co. v. Miles, 493
 Westcott v. Central Vermont R. Co. (App. 2100)
 v. Fargo, 555
 Westerberg v. Kinzua R. Co., 71
 Westerfield v. Lewis, 73, 78
 Westerkamp v. Chicago, etc. Ry. Co., 476, 482
 Westerlund v. Rothschild, 204
 Western Coal, etc. Co. v. Buchanan, 231 (App. 2122)
 v. Burns, 207b, 214a, 215, 218
 v. Ingraham, 207g, 717
 v. Moore, 207h
 College v. Cleveland, 261
 Indiana Coal Co. v. Brown, 716
 Maryland R. Co. v. Herold, 490, 500
 v. Kehoe, 457, 476, 484
 v. Martin, 729
 v. Shivers, 485, 516, 517
 v. State, 497, 516, 769
 v. Stockdale, 493
 Mining Co. v. Ingraham, 233a
 News Co. v. Wilmarth, 749
 Paving, etc. Co. v. Citizens' St. Ry. Co., 408
 Ry. Co. v. Mitchell, 431
 v. Sistrunk, 13
 v. Walker, 497, 517
 v. Wallace, 64
 etc. R. Co. v. Atlanta, 289
 v. Bishop, 195, 241d
 v. Bradford (App. 2132)
 v. Bussey, 1
 v. Clark, 769
 v. Kehoe, 476
 v. King, 457
 v. Ledbetter, 761a
 v. Milligan (App. 2120)
 v. Moore, 769
 v. Roberson, 61
 v. Rogers, 73
 v. Schaun, 486
 v. Shivers, 494
 v. State, 519

[References are to sections.]

- Western, etc. R. Co. v. Steadly, 431
- v. Stowe, 431
 - v. Strong, 132, 178, 241*d*
 - v. Trimmier, 429
 - v. Vaughn, 49
 - v. Young, 13, 73, 761
 - Real Estate Trustees v. Hughes, 108, 146, 741
 - Savings Fund v. Philadelphia, 285, 286
 - Stone Co. v. Whalen, 190
 - Transp. Co. v. Newhall, 550
 - U. Tel. Co. v. Adams, 540*a*, 553, 757
 - v. Adams Mach. Co., 755
 - v. Allen, 531
 - v. Arevine, 552
 - v. Askew, 754
 - v. Aubrey, 755
 - v. Austlet, 753*a*
 - v. Avant, 756
 - v. Bangs, 756
 - v. Barefoot, 540*a*
 - v. Barkley, 753*a*, 754
 - v. Barnes, 450*a*
 - v. Beals, 553
 - v. Bellew, 548
 - v. Bennett, 542, 553
 - v. Benson, 542, 756
 - v. Beringer, 543, 756
 - v. Bierhaus, 531
 - v. Birge-Forbes Co., 540, 540*a*
 - v. Blackwell, etc. Co., 542
 - v. Blanchard, 534, 538, 553, 554, 555
 - v. Blanchell, 542
 - v. Bodkin, 754
 - v. Boots, 541
 - v. Bowen, 753*a*
 - v. Braxton, 531
 - v. Brightwell, 531
 - v. Broesche, 539, 540, 555, 756
 - v. Brown, 542, 739, 753*a*, 756
 - v. Bruner, 540*a*
 - v. Buchanan, 539, 543*a*, 756
 - v. Burns, 756
 - v. Call Pub. Co., 534, 536
 - v. Carew, 532, 534, 537, 548, 553
 - v. Carter, 540*a*, 754, 756, 756*a*
 - v. Carver, 755
 - v. Cashman, 538, 762
 - v. Catlett, 1, 7
 - v. Chamblor, 553, 556*a*
 - v. Christenson, 543*a*
 - v. Church, 756
 - v. Clarke, 531, 540*a*, 541
 - v. Cleveland, 756
 - v. Clifton, 754
 - v. Cline, 756
- Western U. Tel. Co. v. Cobb, 540*a*
- v. Cobbs, 554
 - v. Coffin, 543, 754, 756, 756*a*
 - v. Coggin, 555
 - v. Cohen, 537, 755
 - v. Collins, 755
 - v. Connell Land Co., 755
 - v. Cook, 542, 755
 - v. Cooledge, 554
 - v. Cooper, 540*a*, 542, 543*a*, 546, 756, 757
 - v. Courtney, 548, 554
 - v. Crall, 542, 553, 753*a*
 - v. Crawford, 553, 554, 556*a*, 753*a*, 755
 - v. Crenshaw, 542, 543*a*
 - v. Crider, 539*a*, 540*a*
 - v. Crowley, 542, 756
 - v. Crumpton, 756
 - v. Culberson, 554
 - v. Cunningham, 239, 543, 549, 749, 754, 756
 - v. Davis, 531, 540*a*
 - v. De Jarles, 539, 540*a*
 - v. Dougherty, 554
 - v. Dozier, 540
 - v. Dubois, 543
 - v. Dunfield, 554
 - v. Edmundson, 756*a*
 - v. Edsall, 537, 540, 541, 542, 552, 754
 - v. Edwards, 531
 - v. Elliott, 542
 - v. Emerson, 542, 753*a*
 - v. Erwin, 756
 - v. Eskridge, 539, 542, 754
 - v. Eubank, 547, 553, 753*a*
 - v. Evans, 543
 - v. Eyser, 85, 359
 - v. Fatman, 555, 754, 755
 - v. Fellner, 753*a*
 - v. Fenton, 553, 555, 755, 757
 - v. Ferguson, 538, 554, 756, 757
 - v. Fisher, 542
 - v. Flint River Lbr. Co., 542
 - v. Fontaine, 534
 - v. Ford, 539*a*, 543*a*
 - v. Fore, 543
 - v. Fuel, 543*a*, 756
 - v. Georgia Cotton Co., 540, 546
 - v. Gidcumb, 756
 - v. Gilliland, 542, 756
 - v. Greer, 554
 - v. Griffin, 531, 543*a*, 756
 - v. Griswold, 542
 - v. Gullege, 756
 - v. Hall, 23, 755
 - v. Halton, 756

[References are to sections.]

Western U. Tel. Co. v. Haman, 754	Western U. Tel. Co. v. McGill, 135
v. Hamilton, 531	v. McGown, 542
v. Hanley, 543a	v. McGuire, 546
v. Harding, 540, 540a, 756	v. McIlroy, 544
v. Harper, 538, 542, 556a, 753a	v. McKibben, 531, 543, 554, 755
v. Harris, 7, 540, 540a	v. McLaurin, 538
v. Harvey, 546	v. McMorris, 542, 756
v. Hays, 543, 554	v. McMullen, 203
v. Hearn, 553	v. McNair, 756
v. Henderson, 540a, 546, 554, 756	v. Mamker, 543, 756
v. Heney, 754	v. Mansfield, 531
v. Henley, 546, 754	v. Martin, 754
v. Hill, 532, 536, 540, 542, 543a, 756	v. Matthews, 753a
v. Hoffman, 71, 77, 78	v. May, 546, 554, 756
v. Hope, 537	v. Meek, 542, 547
v. Houghton, 540a	v. Mellon, 531, 543
v. Houston Rice Mills Co., 754	v. Mellor, 754
v. Howell, 542	v. Meredith, 554
v. Hoyt, 754	v. Merrill, 540a, 542
v. Hutcheson, 538	v. Merritt, 754
v. Hyer, 541, 754	v. Meyer, 539a, 540a
v. Jackson, 542	v. Michelson, 531, 555
v. James, 537, 554, 755	v. Miller, 754
v. Jennings, 546	v. Milton, 547, 754, 755
v. Jobe, 540a, 554, 754, 756	v. Mitchell, 540a
v. Johnson, 542	v. Moore, 531, 54 ^a , 545, 546
v. Jones, 531, 540, 543, 544, 552, 554	v. Moran, 540a
v. Karr, 540a, 554	v. Morris, 113
v. Kemp, 531, 541, 554	v. Mosley, 540a
v. Kendzora, 753a	v. Moss, 531
v. Kerr, 756	v. Mullins, 148
v. Kingsley, 756	v. Munford, 544
v. Kinney, 757	v. Murphey, 531
v. Kinsley, 554, 756	v. National Bank, 539a, 541
v. Krichbaum, 543, 756	v. Nations, 756
v. Lacer, 543a	v. Neel, 540, 540a, 549, 756
v. Landry, 749	v. Neil, 534
v. Lawson, 753a	v. Neill, 555
v. Lehman, 554, 753	v. Newhouse, 540a, 756
v. Liddell, 543, 546	v. Norris, 542, 553
v. Lillard, 538	v. North Packing Co., 755
v. Linn, 555, 754, 756, 756a	v. North, etc. Co., 741
v. Linney, 755	v. Northcutt, 754, 756
v. Lively, 754	v. Nye, etc. Grain Co., 755
v. Longwill, 543, 755	v. O'Keefe, 549, 756
v. Louisville, etc. Co., 553	v. Parsley, 543a
v. Love Banks Co., 755	v. Parsons, 540a
v. Lowrey, 531, 553, 754	v. Patrick, 531, 556a
v. Luck, 756, 757	v. Pearce, 548
v. Lydon, 756	v. Peazler, 756
v. Lyman, 544, 555	v. Pelzer, 540
v. McCants, 755	v. Pendleton, 531, 757
v. McCaul, 540a	v. Phillips, 554, 555
v. McCoy, 540a, 554	v. Piner, 552, 554
v. McDaniel, 556a	v. Portlow, 754, 753
v. McDonald, 539, 542, 544	v. Potts, 543
	v. Power, 531
	v. Pratt, 754
	v. Prevatt, 548

[References are to sections.]

- Western U. Tel. Co. v. Pruett, 540*a*, 552
 v. Quinn, 18
 v. Rains, 554
 v. Randles, 756
 v. Reeves, 541
 v. Reid, 756
 v. Reynolds, 534, 546, 754
 v. Rich, 756
 v. Richman, 542, 555
 v. Robertson, 542, 753*a*, 754, 755
 v. Robinson, 755
 v. Rogers, 756
 v. Rosentreter, 540*a*, 555, 756
 v. Rountree, 531
 v. Rowell, 540*a*
 v. Rust, 162
 v. Ryals, 531
 v. Saunders, 754, 756
 v. Schlur, 756
 v. Schriver, 8, 25, 539*a*, 543
 v. Scircle, 542, 757
 v. Seals, 544
 v. See, 543*a*
 v. Shaw, 540*a*
 v. Sheffield, 754, 755, 756
 v. Short, 542, 553, 754
 v. Shotter, 755
 v. Shumate, 544
 v. Simpson, 555, 756
 v. Smith, 542, 553, 555, 556*a*, 753*a*, 756
 v. Snodgrass, 546
 v. Spivey, 755
 v. State, 534 (App. 2066)
 v. Stevenson, 540, 552
 v. Stiles, 756*a*
 v. Stokes, 754
 v. Stone, 756
 v. Stratemeier, 554, 756
 v. Sullivan, 753*a*, 754
 v. Swearingen, 546
 v. Sweetman, 756
 v. Taber, 553
 v. Taylor, 540*a*
 v. Teague, 546
 v. Terrell, 554
 v. Thompson Mill Co., 755
 v. Thorn, 698
 v. Timmons, 54, 531
 v. Tobin, 542
 v. Todd, 553, 756
 v. Totten, 539*a*
 v. Trotter, 546
 v. True, 541, 754
 v. Truitt, 754
 v. Trumbell, 554
 v. Twaddell, 754
 v. Uvalde National Bank, 543
- Western U. Tel. Co. v. Valentine, 754, 755
 v. Van Cleave, 540*a*, 543, 546
 v. Waller, 543
 v. Warren, 756
 v. Watson, 753*a*
 v. Waxelbaum, 542, 543
 v. Way, 555, 754
 v. Webb, 754
 v. Webb & Smith, 755
 v. Wilhelm, 753*a*, 755
 v. Williams, 753*a*, 755
 v. Williford, 755
 v. Wilson, 540, 543, 754
 v. Wingate, 540*a*, 546
 v. Womack, 546, 756, 756*a*
 v. Wood, 543, 756
 v. Woodard, 543*a*
 v. Woods, 540*a*, 753*a*, 755
 v. Yopst, 104, 538, 540*a*, 546, 554, 555
 v. Young, 540*a*, 753*a*, 756
 Westinghouse v. Callaghan, 224
 Elec., etc. Co. v. Heinrich, 195
 Westlake v. Murphy, 238
 Westman v. Wind River Lbr. Co., 192, 208, 219
 Weston v. Alden, 729
 v. N. Y. Elevated R. Co., 87, 92, 501, 506, 704, 705
 v. Tailors of Potter-row, 723
 v. Troy, 363, 375
 Paper Co. v. Pope, 734
 Wetherby v. Twin State, etc. Co., 698
 Wetmore v. Atl. Lead Co., 333
 v. Little Miami R. Co., 154
 v. Tracy, 365
 Wexler v. Salisbury, 221
 Weyant v. Harlem R. Co., 144
 Weyerhauser v. Dun, 582, 587*a*
 Weyl v. Chicago, etc. R. Co., 476
 Weymire v. Wolfe, 65
 Weymouth v. Broadway, etc. R. Co., 522
 v. New Orleans, 341
 Whaalen v. Mad River, etc. R. Co., 180, 235, 239, 241
 Whalen v. Chicago, etc. R. Co., 471
 v. Citizens' Gas Co., 107, 376
 v. Gloucester, 709*a*
 v. Illinois, etc. R. Co., 207, 216, 406
 v. N. Y. Central R. Co., 477
 v. Pa. Ry. Co., 248
 v. Rosnosky, 219
 v. St. Louis, etc. R. Co., 114
 Whaley v. Bartlett, 222, 230
 v. Laing, 85
 v. Sloss-Sheffield, etc. Co., 689

[References are to sections.]

- Wharton v. Stevens, 735
 What Cheer Coal Co. v. Johnson, 230
 Whatley v. Zenida, etc. Co. (App. 2119, 2120)
 Whatman v. Pearson, 155
 Wheatley v. Baugh, 729
 v. Chrisman, 734
 v. Mercer, 256
 Wheaton v. Hadley, 369
 v. Warner Ice Co., 195
 Wheelan v. Chicago, etc. R. Co., 775
 Wheeler v. Brant, 626, 628, 629, 632, 643
 v. Berry, 207i
 v. Cincinnati, 265
 v. Erie R. Co., 425
 v. Nesbitt, 303
 v. N. Y. Cent. R. Co., 673, 674, 675, 676
 v. Oregon R., etc. Co., 52, 56, 85a, 467, 468, 469, 472, 476, 477
 v. Patterson, 310
 v. Plymouth, 263, 358
 v. Rowell, 657
 v. St. Joseph Stock-Yards Co., 705
 v. San Francisco, etc. R. Co., 503
 v. Siken County, etc. Bank, 589
 v. South Orange, etc. Co., 516
 v. Thomas, 618
 v. Townshend, 751
 v. Troy, 338
 v. Wasson Mfg. Co., 203
 v. Westport, 87, 89, 258
 v. Worcester, 735
 etc. Co. v. Boyce, 749
 Wheeling, etc. Co. v. Harvey, 705
 etc. Ry. Co. v. Suhrwiar, 66
 Wheelock v. Boston, etc. R. Co., 89
 v. Postal Tel., etc. Co., 547, 553, 554, 555, 754
 Wheelson v. Hardisty, 56
 Wheelwright v. Boston, etc. R. Co., 473
 Whelan v. N. Y., Lake Erie, etc. R. Co., 758, 760
 v. Washington Lbr. Co., 223a
 Whelden v. Chappel, 104
 Wherry v. Duluth, etc. R. Co., 479
 Whiffen v. Stone, 206
 Whilsett v. Wellington Starch Co., 221
 Whilt v. Public Service Corp., 518
 Whilton v. Richmond, etc. R. Co., 470
 Whipple v. Fair Haven, 368
 Whirley v. Whitman, 73, 86
- Whisonant v. Atlanta, etc. Ry. Co. (App. 2183)
 Whissler v. Walsh, 647
 Whitaker v. Eighth Ave. R. Co., 518
 v. Staten Island, etc. Ry. Co., 520
 v. West Boylston, 376
 Whitbeck v. Dubuque, etc. R. Co., 419, 432
 v. N. Y. Cent. R. Co., 750
 Whitcomb v. Barre, 115
 v. Detroit Elec. Ry. Co., 184a
 v. Gilman, 104
 v. Louisville, etc. R. Co., 481a
 v. McNulty, 207
 v. Standard Oil Co. (App. 2136)
 White v. Atlanta R. Co., 520
 v. Augusta, etc. R. Co., 480
 v. Bond Co., 256
 v. Boston, etc. R. Co., 516
 v. Buffalo, 262
 v. Central R. Co., 480 (App. 2131)
 v. Chapin, 735
 v. Charleston, 256
 v. Chicago, etc. R. Co., 672, 750
 v. Chowan Co., 256
 v. Concord R. Co., 57, 108, 432, 433, 441
 v. Crisp, 738
 v. Evansville, etc. Ry. Co., 493
 v. Fitchburg R. Co., 463, 495
 v. France, 705
 v. Grand Rapids, etc. R. Co., 493
 v. Hindley Local Board, 328
 v. Hoyt, 179
 v. Kennon, 238
 v. Lang, 104
 v. Lewiston, etc. Ry. Co., 209a
 v. Louisville, etc. R. Co., 202, 207b, 223 (App. 2072, 2158)
 v. Milwaukee R. Co., 743
 v. Missouri Pac. R. Co., 678
 v. Montgomery, 708, 709, 713, 723
 v. Morse, 302
 v. Nellis, 115
 v. N. Y. Central R. Co., 459c, 472, 483, 672, 673, 675
 v. N. Y., Chicago, etc. R. Co., 673, 675
 v. Newbury, 193
 v. Norfolk, etc. R. Co., 513
 v. People's Ry. Co., 174, 176
 v. Phillips, 725, 726
 v. Quincy, 392
 v. Reagan, 574

[References are to sections.]

- White v. Road District, 256
 v. Roydhouse, 1
 v. St. Louis, etc. Ry. Co., 491
 v. San Antonio, 258
 v. South Shore R. Co., 733
 v. The Governor, 249
 v. Vicksburg, etc. R. Co., 472
 v. Webb, 119
 v. West End R. Co., 520
 v. Western U. Tel. Co., 553, 555, 556
 v. Whittemann Lithographic Co., 219a
 v. Wilcox, 616
 v. Winnisimmet Co., 487
 v. Yazoo City, 262, 274, 737
 River Log Co. v. Nelson, 731
 Water R. Co. v. Butler, 509
 etc. R. Co. v. Quick, 434
 Whitefield v. Louisville, etc. Co., 56, 114, 180 (App. 2132)
 Whitehead v. Cape Henry Syndicate, 744
 v. Greetham, 562, 575
 v. Missouri, etc. Ry. Co., 426
 v. St. Louis, etc. R. Co., 513a
 v. Wisconsin, etc. Ry. Co., 198a
 Whitehouse v. Birmingham Canal Co., 402, 728
 v. Edwards, 54
 v. Fellows, 359
 Whitelaw v. Memphis, etc. R. Co., 219a
 Whitelegge v. De Witt, 569
 Whiteley v. McLaughlin, 708
 v. Pepper, 141, 176
 Whitesell v. Hill, 603, 608
 Whitesides v. St. Louis, etc. R. Co., 433
 v. Southern Ry. Co., 481b (App. 2085)
 Whitfield v. Carrollton, 285, 367
 v. Dispenser, 319, 321
 v. Louisville, etc. Ry. Co., 56, 236
 v. Meridian, 289, 368, 374
 v. Paris, 291
 Whitford v. Panama R. Co., 124, 131, 139
 v. Southbridge, 376
 Whitlock v. Comes, 520
 v. Northern Pacific Ry. Co., 516
 Whiting v. New York, etc. Ry. Co., 516
 Whitman v. Consol. Coal & Ice Co., 135a
 v. Muskegon Lifting, etc. Co., 333
 Whitmore v. Boston, etc. R. Co., 207
 Whitney v. Abbott, 559, 568, 753
 v. Atlantic, etc. R. Co., 120a, 444, 445
 v. Chicago, etc. R. Co., 727a
 v. Clifford, 58, 174
 v. Essex, 334
 v. Hitchcock, 763
 v. Leominster, 60b
 v. Lynn, 368
 v. Maine Cent. R. Co., 410, 451
 v. Merchants' Exp. Co., 569, 587a
 v. Milwaukee, 350
 v. New York, etc. Ry. Co., 488, 518
 v. Ticonderoga, 338
 etc. Co. v. O'Rourke, 163
 Whiton v. Chicago, etc. R. Co., 133
 Whittaker v. Coombs, 221
 v. Delaware, etc. R. Co., 99, 114, 190, 202, 203a
 v. Harlem R. Co., 13
 v. Helena, 66
 v. West Boylston, 376
 Whittemore v. Thomas, 635
 v. Western U. Tel. Co., 540a, 546
 Whitten v. Hartin, 686
 Whittier v. Chicago, etc. R. Co., 437, 451a
 v. Cocheco Mfg. Co., 729
 Whitstone v. Hill, 334
 Whitworth v. South, etc. Co., 197
 Whyte v. Nashville, 343
 Wichita v. Coggs Hall, 374
 Gas, etc. Co. v. Wright, 693
 etc. R. Co. v. Davis, 102, 476
 v. Gibbs, 159
 Wickenburg v. Minneapolis, etc. Ry. Co., 8, 25
 Wickham v. Chicago, etc. Ry. Co., 460, 485
 v. Detroit, etc. Ry. Co., 187, 193
 v. Louisville, etc. Ry. Co., 207
 Wicks v. Boston, etc. Ry. Co., 523
 v. De Witts, 262, 274
 Wickware v. Bryan, 303
 Wickwire v. Angola, 384
 Widener v. Philadelphia R. Tr. Co., 500, 516
 Widing v. Penn Mutual Ins. Co., 708a
 Wiedmer v. N. Y. Elev. R. Co., 60
 Wiel v. Wright, 654
 Wienhart v. New Orleans, 367, 368
 Wier v. Roundtree, 503
 Wiese v. Remme, 140a (App. 2075)
 Wiest v. Elec. Tr. Co. (App. 2091)

[References are to sections.]

- Wiest v. Philadelphia, etc. Ry. Co., 122, 769
- Wiggett v. Fox, 225
- Wiggins v. Boddington, 371
- v. Hathaway, 321
- v. St. Louis, etc. Ry. Co., 750
- v. Tallmadge, 333
- v. E. Z. Waist Co., 218
- Wight v. Michigan, etc. Ry. Co., 94, 207
- Wigmore v. Jay, 65, 180, 227
- Wiita v. Interstate Iron Co., 193, 206
- Wikstrom v. Preston Mill Co., 219
- Wilber v. Wisconsin Cent. R. Co., 207
- Wilberding v. Dubuque, 369
- Wilbert v. Zurheide Brick Co., 698
- Wilbrand v. Eighth Ave. R. Co., 480
- Wilbur v. Hubbard, 636, 638
- v. Southwest, etc. Elec. Co., 494, 516
- Wilcox v. Brown, 619
- v. Chicago, 265
- v. Hausch, 729
- v. Hebert, 187, 195
- v. Hines, 708*a*, 709
- v. Plummer, 567, 753
- v. Rome, etc. R. Co., 476, 482
- v. Wilmington City Ry. Co., 770
- Wild v. Oregon, etc. R. Co., 203
- v. Paterson, 265
- Wilde v. Lynn, etc. R. Co., 523
- Wilder v. Maine, etc. R. Co., 413, 419, 422, 451*a*
- v. St. Paul, 334
- v. Speer, 641
- v. Stanley, 31
- Wilds v. Brunswick, etc. R. Co., 472
- v. Hudson River R. Co., 61, 64, 65, 90, 94*a*, 96, 102, 111, 463, 475
- Wiley v. Slater, 643
- v. Smith, 407*a*
- v. Strickland, 303
- Wilhite v. Billings, etc. Co., 732
- Wilkens v. New York Trans. Co., 653*c*
- Wilkerson v. Metropolitan Ry. Co., 743
- v. St. Louis, etc. Ry. Co., 99
- Wilkes v. Dinsman, 317
- v. Hungerford Market Co., 371
- Wilkie v. Bolster, 516
- v. Raleigh, etc. Ry. Co., 760
- Wilkins v. Brock, 609
- v. Ferrell, 245
- v. McCue, 729
- v. Rutland, 286, 338
- Wilkins v. St. Louis, etc. R. Co., 1, 468
- v. W. U. Tel. Co., 531, 757
- Wilkinsburg v. Home for Aged Women, 343
- Wilkinson v. Detroit Steel Works, 176
- v. Evans, 195
- v. Fairrie, 704
- v. Oregon Short Line R. Co., 1, 49, 476, 483
- v. Parrott, 635
- v. State, 104
- etc. Co. v. Dickinson, 190 (App. 2137)
- Will v. Mendon, 60*a*, 334*a*
- v. Postal Cable Co., 546, 554
- Willard v. Cambridge, 370, 371
- v. Killingworth, 254
- v. Newbury, 358, 389
- v. Norcross, 606
- v. Pinard, 114, 242
- v. Sherborne, 338, 373
- v. Spartansburg, etc. Ry. Co., 120*a*, 413
- Willet v. Johnson, 762
- v. Michigan, etc. Ry. Co., 476
- Willetts v. Buffalo, etc. R. Co., 84
- v. Chicago, etc. C. R. Co., 750
- Willey v. Allegheny, 725
- v. Belfast, 346
- v. Ellsworth, 351, 356
- v. Gatling, 256
- v. Norfolk, etc. R. Co., 735
- v. Portsmouth, 351, 356
- William Cameron & Co. v. Realmuti, 168
- Grace Co. v. Gallagher, 193
- Graves Tank Works v. McGee, 56*b*
- Lowery Co. v. McCullough, 683
- Williams v. Anniston Elec. Co., 184*a*, 187, 193
- v. Atlantic Coast Line Ry. Co., 25, 672, 673
- v. Barber, 729
- v. Belmont, etc. Co., 218
- v. Birmingham Battery, etc. Co., 214
- v. Bower, 303
- v. Bridges, 619
- v. Cameron, 121
- v. Central R. Co., 207
- v. Chicago, etc. R. Co., 88*a*, 114, 463, 470, 476, 482
- v. Churchill, 223
- v. Citizens Steamboat Co., 192 (App. 2171)
- v. Coast Line Ry. Co., 672
- v. Clinton, 87, 377

[References are to sections.]

- Williams v. Clough**, 197
 v. **Cumington**, 334
 v. **Delaware**, etc. R. Co., 25, 199, 207*e*
 v. **Detroit Oil Co.**, 748
 v. **East India Co.**, 690
 v. **Edmunds**, 94
 v. **Fresno Canal Co.**, 175
 v. **Gale**, 729, 736
 v. **Gardiner**, 74
 v. **Garbutt Lbr. Co.**, 193
 v. **Gibbs**, 567
 v. **Gilman**, 613
 v. **Grand Rapids**, 262, 289
 v. **Grealy**, 654
 v. **Great Western R. Co.**, 57, 417
 v. **Greenville**, 287
 v. **Groucutt**, 704
 v. **Hart**, 592
 v. **Hays**, 121, 413
 v. **Hingham Turnp. Co.**, 387
 v. **Iowa Central Ry. Co.** (App. 2141)
 v. **Kansas City**, etc. R. Co., 484 (App. 2075)
 v. **Kimberly**, 214*a*, 215
 v. **Koehler**, 147*a*
 v. **Ladew**, 733
 v. **Louisville**, etc. R. Co., 525
 v. **McDonald**, 589
 v. **Mayesville Tel. Co.**, 556*c*
 v. **Mich. Cent. R. Co.**, 61, 64, 418, 430
 v. **Missouri Pac. R. Co.**, 190, 217
 v. **Mobile**, etc. R. Co., 489
 v. **Moray**, 639
 v. **Morris**, 207*g*
 v. **Mostyn**, 619
 v. **New Orleans**, 261
 v. **New York**, etc. Ry. Co., 184*a*
 v. **Norfolk**, etc. R. Co., 207*b*, 465
 v. **Northern Lbr. Co.** (App. 2154)
 v. **North Wisconsin Lbr. Co.**, 49
 v. **Norton**, etc. Coal Co., 207*b*
 v. **O'Keefe**, 56, 646
 v. **Oregon Short Line R. Co.**, 188, 488, 505
 v. **Parks**, 585, 597
 v. **Pickering Lbr. Co.**, 237
 v. **Pullman Car Co.**, 151, 492, 513, 526
 v. **Reed**, 572
 v. **Richards**, 644, 646, 654
- Williams v. St. Louis**, etc. R. Co., 187, 193, 221
 v. **Sheldon**, 122, 123
 v. **Sleepy Hollow Min. Co.**, 206
 v. **South**, etc. R. Co., 129
 v. **Southern Ry. Co.**, 56 (App. 2173)
 v. **Spartanburg**, etc. Ry. Co., 459
 v. **Spokane**, etc. Ry. Co., 495
 v. **Stillwell**, 256
 v. **S. F. & N. W. R. Co.**, 29
 v. **Thacker Coal Co.**, 232
 v. **Tilt**, 75
 v. **Tripp**, 338
 v. **Underhill**, 761
 v. **Vanderbilt**, 503
 v. **West Bay**, 758
 v. **Yoe**, 741
 Cooperage Co. v. Headrick, 206
Williamson v. Barrett, 744
 v. **Lacy**, 303
 v. **Louisville Reform School**, 331
 v. **Newport News**, etc. Co., 209
 v. **Oleson**, 735
 v. **Postal Tel.**, etc. Co., 547, 754
 v. **Price**, 172
 v. **Sheldon Marble Co.**, 218
 v. **Southern**, etc. Ry. Co., 464, 480, 484
 v. **Wadsworth**, 160
Williamsport v. Lycoming Co., 392
Williford v. Southern Ry. Co., 520
Willingham v. Western U. Tel. Co., 538
Willis v. Atlanta, etc. Ry. Co., 194
 v. **Atlantic Ry. Co.** (App. 2085)
 v. **Channing**, 57
 v. **Long Isl. R. Co.**, 516, 519, 522, 523
 v. **Maysville**, etc. Ry. Co., 481*a*
 v. **Missouri Pac. R. Co.**, 131
 v. **Oregon R.**, etc. Co., 180
 v. **Perry**, 107, 733
 v. **Plymouth**, etc. Tel. Co., 202
 v. **Providence Tel. Pub. Co.**, 35
 v. **Railway Co.**, 162
 v. **Second Ave. Tr. Co.**, 519
 v. **Vicksburg**, etc. Ry. Co., 457
 v. **Walters**, 657
 v. **Western U. Tel. Co.**, 756
 etc. Co. v. **Grizzell**, 135
Wills v. Atchison, etc. Ry. Co., 196
Willson v. Boise City, 285
 v. **Faxon**, 690
Willy v. Mulledy, 702*a*

[References are to sections.]

- Wilmette v. Brachle, 375
 Wilmington v. Vandegrift, 262
 City Ry. Co. v. Truman, 476
 Star Min. Co. v. Fulton, 122
 Wilmot v. McPadden, 73
 Wilmott v. Corrigan R. Co., 523
 Willoughby v. Chicago, etc. R. Co., 472
 Wilson v. Amer. Bridge Co., 705
 v. Atlanta, 272, 289
 v. Atlanta, etc. R. Co., 674
 v. Atlantic, etc. Ry. Co., 408 (App. 2085)
 v. Baltimore, etc. R. Co., 526
 v. Barnstead, 392
 v. Blackbird Creek M. Co., 283, 333
 v. Brett, 49
 v. Burr, 557
 v. Carlinville National Bank, 583
 v. Charleston, 376
 v. Chesapeake, etc. Ry. Co., 476
 v. Chippewa, etc. Ry. Co., 1
 v. Coffin, 566
 v. Cunningham, 46, 461
 v. Dumreath Red Stone Co., 232
 v. Gamble, 56b
 v. Granby, 749a
 v. Hillhouse, 617
 v. Idaho Falls, 363
 v. Illinois Cent. Ry. Co., 56
 v. Jefferson Co., 257, 337
 v. Kansas City, etc. R. Co., 633
 v. Louisville, etc. R. Co., 113, 207 (App. 2120)
 v. Lowry, 625a
 v. Marsh, 310
 v. Manes, 313
 v. Merry, 180, 189, 224, 227, 228, 231
 v. Michigan Cent. R. Co., 207
 v. New Bedford, 286, 701a, 728
 v. New Orleans, etc. R. Co., 408
 v. New York, 262, 274, 275
 v. New York, etc. Ry. Co., 203, 208
 v. N. Y. Central, etc. R. Co., 178, 209a
 v. N. Y., New Haven, etc. R. Co., 466, 476
 v. Norfolk, etc. R. Co., 432
 v. Northern R. Co., 449
 v. Northern Pac. R. Co., 89, 516, 519, 675
 v. Olano, 704
 Wilson v. Ontario, etc. R. Co., 438
 v. Owens, 142
 v. Pennsylvania, etc. Ry. Co., 732
 v. Peverly, 146
 v. Phoenix Powder Co., 689
 v. Puget Sound Ry. Co., 65a, 66a
 v. Railroad Co., 113
 v. Rochester, etc. R. Co., 468
 v. Russ, 559
 v. Seattle Ry. Co., 752
 v. Southern Pac. Co., 207b, 475, 759
 v. Southern Ry. Co., 207b
 v. Spafford, 355
 v. Steel Edge Stamping Co., 207, 219
 v. Strobach, 619
 v. Susquehanna Turnpike Co., 272, 279, 386
 v. Syracuse, 376
 v. Trafalgar, etc. Road, 376
 v. Treadwell, 708
 v. Tremont Mills, 207h
 v. Troy, 286, 291, 367
 v. Tucker, 574
 v. Virginia, etc. Chemical Co., 232
 v. Virginia, etc. Co., 224, 235, 236
 v. Wabash, etc. R. Co., 436
 v. Waddell, 736
 v. Wadell, 717
 v. Western U. Tel. Co., 753a, 754
 v. Wheeling, 176, 289, 298
 v. White, 169
 v. Williams, 719a
 v. Willimantic Linen Co., 192, 197, 205
 v. Wilmington, etc. R. Co., 424, 432
 v. Winona, etc. R. Co., 215
 v. Wright, 623
 v. York, etc. R. Co., 20
 Wilters v. May, 625a
 Wiltse v. State Bridge Co., 148
 Wiltsie v. Tilden, 289, 363
 Wilton v. Middlesex R. Co., 489, 491, 492
 Wiltie v. Vulgamore, 732
 Winans v. Randolph, 686
 Winbigler v. Los Angeles, 258, 289
 Winch v. Conservators of the Thames, 254, 327
 Winchell v. Abbott, 54, 476
 Windsor v. Hannibal, etc. R. Co., 453
 Wineberg v. Du Bois, 758
 Winegarner v. Edison, etc. Co., 698

[References are to sections.]

- Wines v. Rio Grande R. Co., 432
 Winey v. Chicago, etc. R. Co., 476
 Wing v. London Fen'l Omnibus Co., 653e
 Wingate v. Mechanics' Bank, 581, 582
 Wink v. Weiler, 188
 Winkle v. Peck Dry Goods Co., 518
 Winkler v. Carolina, etc. Ry. Co., 702
 Winn Case, 62
 v. Lowell, 88, 368, 481
 v. Ry. Co., 476
 v. Rutland, 281
 Winnegar v. Central, etc. R. Co., 513
 Winner v. Oakland, 67, 376
 Winnt v. International, etc. R. Co., 127
 Winona v. Botzet, 65a, 253, 258, 262, 285, 286, 339, 355
 C. Co. v. Holmquist, 51c
 etc. Ry. Co. v. Rousseau, 522
 Winpenny v. Philadelphia, 262, 285
 Winship v. Boston, 367, 376
 v. Enfield, 61, 110, 346, 350, 355, 374, 378
 Winslow v. Boston, etc. R. Co., 525
 v. Com. Bldg. Co., 193
 v. Mt. Pleasant, 340
 v. Pleasant Prairie, 430
 Winsmore v. Greenbank, 709a
 Winstanley v. Chicago, etc. R. Co., 466, 467
 Winston v. Raleigh, etc. R. Co., 429
 Winter v. Central Iowa R. Co., 741
 v. Federal St. R. Co., 485c
 v. Harris, 649
 v. Interurban St. Ry. Co., 516
 v. Kansas City Ry. Co., 72
 v. Ry. Co., 497
 Winterbottom v. Wright, 8, 116, 690
 v. Derby, 8
 Winters v. Baltimore, etc. Ry. Co., 87, 94
 v. Hannibal, etc. R. Co., 519
 v. Jacobs, 658
 v. Kansas City, etc. R. Co., 73a, 78, 485a, 485bc
 v. New York, 286
 Wintuska v. Louisville, etc. R. Co., 223
 Wirds v. Vierkandt, 735
 Wirtz v. Galveston, etc. Co., 207g
 Wischam v. Rickards, 183
 Wisconsin Cent. R. Co. v. Ross, 120a, 413
 Wise v. Ackerman, 60b, 197, 719a
 v. Brooklyn, etc. Ry. Co., 520
 v. Covington, etc. R. Co., 54
 v. Freshly, 751
 Wise v. Morgan, 27a, 73a
 v. So. Covington, 513
 v. Wabash, etc. Ry. Co., 741
 v. Withers, 303
 Wiseman v. Booker, 418
 Wiskie v. Montello Granite Co., 195, 209a
 Wistover v. Hoover, 164
 Wiswall v. Brinson, 173, 699
 v. Doyle, 72, 73a
 Witham v. Portland, 367
 Withee v. Somerset Trac. Co., 201
 Witherell v. Milwaukee, etc. R. Co., 429
 v. St. Paul, etc. R. Co., 418
 Witherly v. Regent's Canal Co., 61, 65, 99, 401
 Withers v. Brooklyn, etc. Exch., 704, 705, 706
 v. North Kent R. Co., 16, 407
 Witowski v. Brennan, 619
 Witsell v. West Ashville, etc. Ry. Co., 495
 Witt v. Latimer, 374
 Witte v. Dieffenbach, 361
 v. Hague, 244
 v. Stifel, 718
 Wittenberg v. Tietz, 702
 Wittkowsky v. Wasson, 56
 Wittleder v. Citizens Elec. Co., 698
 Wiwirowski v. Lake Shore, etc. R. Co., 112
 Wixon v. Bear River, etc. Co., 734
 v. Newport, 258, 267
 Wixco v. Wilmington City Ry. Co., 769
 Wixon v. Bruce, 712
 Woas v. St. Louis Tr. Co., 497
 Woburn v. Boston, etc. R. Co., 384
 Woelflen v. Lewiston, etc. Co., 203, 207
 Wofford v. Clinton Cotton Mills, 1
 Wohlfahrt v. Beckert, 117, 690
 Wohlwend v. Case Thresh. Mach. Co., 119
 Wolcho v. Rosenbluth & Co., 688
 Wolcott v. New York, etc. Ry. Co., 464
 Wolcott v. Erie Coal, etc. Co. (App. 2181)
 Wold v. South Dakota, etc. Ry. Co., 421
 Wolf, Matter of, 561
 v. Amer. Trac. Co., 60, 60a
 v. Brooklyn F. Co., 501
 v. Chicago, etc. Tr. Co., 516
 v. City, etc. Ry. Co., 485c
 v. Des Moines Elevator Co., 11
 v. East Tennessee, etc. R. Co., 201

[References are to sections.]

- Wolf v. Hemrich, etc. Co., 644
 v. Holton, 340
 v. Kilpatrick, 144, 705, 708
 v. Lake Erie, etc. Co., 140a
 (App. 2089)
 v. New Bedford, etc. Co., 192
 v. St. Louis, etc. Water Co.,
 16
 v. Third Ave. Ry. Co., 176
 v. Western U. Tel. Co., 531
 Wolfe v. Dorr, 619
 v. Erie Tel. Co., 359
 v. Georgia, etc. Ry. Co., 513
 v. Mersereau, 153
 Wolff Mfg. Co. v. Wilson, 645
 Wolford v. Lyon, etc. Min. Co.
 (App. 2055)
 Wolfskehl v. Western U. Tel. Co.,
 543
 Wolfshehl v. Western U. Tel. Co., 542
 Wolfskill v. Los Angeles Ry. Co., 644
 Wolpers v. N. Y., etc. Elec. Co., 110
 Wolsey v. Lake Shore, etc. R. Co.,
 207b
 Wolski v. Knapp Co., 219
 Wolven v. Springfield Tr. Co., 516
 Womack v. Central R. Co., 124
 v. Western U. Tel. Co., 556
 Womble v. Merchants' Grocery Co.,
 195
 Wonder v. Baltimore, etc. R. Co.,
 195, 204
 Woo Dan v. Seattle R. Co., 520
 Wood v. Bangs, 573
 v. Bodine, 621
 v. Bridgeport, 375
 v. Brooklyn R. Co., 522, 523
 v. Chicago, etc. R. Co., 58
 v. Clapp, 606, 607
 v. Edes, 729
 v. Farnell, 303
 v. Gilboa, 272
 v. Heiges, 195, 207e
 v. Hinton, 262
 v. Hopkins, 562
 v. Kansas City, etc. R. Co.,
 436
 v. Lake Shore, etc. R. Co., 521
 v. Larue, 640
 v. Locke, 413
 v. Louisville, etc. Ry. Co., 201,
 512
 v. Lusecomb, 651
 v. McCabe, 203
 v. Maine, etc. Ry. Co., 464
 v. Mears, 359
 v. New York, 573
 v. N. Y. Central R. Co., 485,
 758
 v. New York, etc. Ry. Co., 742
 Wood v. Philadelphia, etc. Ry. Co.,
 516, 773
 v. St. Louis, etc. R. Co., 421
 v. School District, 168, 298
 v. Watertown, 291, 367, 760
 v. Waterville, 105, 340, 375
 v. Wand, 733
 v. Western U. Tel. Co., 531
 v. Wilmington City Ry. Co.,
 59
 River Bank v. First National
 Bank, 581, 585
 Woodall v. Boston Elev. Ry. Co.,
 485ba
 Woodard v. Boscobel, 343, 742
 v. Michigan, etc. R. Co., 131,
 132
 v. N. Y., Lake Erie, etc. R.
 Co., 476
 Woodbridge v. Delaware, etc. R. Co.,
 472
 v. Marks, 626
 Woodbury v. Owosso, 368, 380, 744,
 760
 v. Tampa W. W. Co., 29a
 Woodcock v. Calais, 299
 Woodell v. West Virginia Imp. Co.,
 201
 Wooden v. Mt. Pleasant Lumber, etc.
 Co., 729
 v. Western, etc. R. Co., 132,
 133
 Woodhead v. Gartness Mineral Co.,
 245
 Woodhouse v. Powles, 748 (App.
 2103)
 Woodhull v. New York, 291
 Woodman v. Hubbard, 104
 v. Metropolitan R. Co., 58,
 175, 359
 v. Nottingham, 115, 393
 v. Tufts, 709a, 731
 Woodring v. Forks Township, 365
 Woodroffe v. Roxborough, etc. Ry.
 Co., 523
 Woodruff v. Bowen, 702, 705
 v. Erie R. Co., 120a
 v. North Bloomfield Gravel
 Co., 283
 v. Northern Pac. R. Co., 484
 Sleeping Coach Co. v. Diehl,
 526
 Woodrum v. Clay, 633
 Woods v. Boston, 375
 v. Colfax County, 256
 v. Groton, 356, 393
 v. Jones, 61
 v. Kansas City, 262, 287
 v. Lindvall, 192, 230
 v. Lloyd, 705

[References are to sections.]

- Woods v. Long Island R. Co., 192
 v. Missouri, etc. R. Co., 60c
 v. Miller, 704
 v. Naumkeag, 709
 v. Southern Pac. R. Co., 519
 v. Trinity Parish, 702
 v. Western U. Tel. Co., 537
 Woodson v. Johnson, 230
 v. Metropolitan St. Ry. Co.,
 29a, 375
 v. Prescott, etc. Ry. Co., 85a,
 187, 193
 Woodstock Iron Works v. Kline, 219
 Woodward v. Aborn, 39, 734
 v. Griffith, 662
 v. Hancock, 609
 v. Miller, 690
 v. Washburn, 115
 v. West Side R. Co., 99
 Iron, etc. Co. v. Cook, 204
 Iron Co. v. Curl, 189 (App.
 2119)
 Woodworth v. Kalamazoo, 373
 Woodyard v. Kentucky Cent. R. Co.,
 464
 Woolen v. New York, etc. Bank, 584a
 Wooley v. Grand St. R. Co., 60b, 376,
 408, 410
 Woolsey v. Ry. Co., 27b
 Woolf v. Chalker, 97, 628, 629, 632,
 639
 v. Washington, etc. Ry. Co.,
 475
 Woolfolk v. Macon, etc. R. Co., 437
 Woolisroft v. Norton, 443
 Woolley v. Baldwin, 313
 Woolery v. Louisville, etc. R. Co., 89
 Woolsey v. Chicago, etc. R. Co., 489
 Wooster v. Broadway, etc. Co., 110
 v. Chicago, etc. R. Co., 99
 Woolwine v. Chesapeake, etc. R. Co.,
 56, 705
 Woolworth, etc. Co. v. Conboy, 704,
 706
 Wooten v. Mobile, etc. Ry. Co., 520
 (App. 2073)
 v. United Irrigation, etc. Co.,
 769
 Wooton v. Dawkins, 97, 720
 Woram v. Noble, 119, 709a
 Worcester v. Canal Bridge Co., 356
 etc. St. Ry. Co. v. Travelers'
 Ins. Co. (App. 2068)
 Word v. District of Columbia, 85a
 Worden v. Gore-Meehan Co., 207e
 v. Humeston, etc. R. Co., 139,
 206, 209a, 214
 v. New Bedford, 259, 291
 v. New York, 258
 v. Witt, 340
 Wordsworth v. Willan, 649, 651, 654
 Work v. Chicago, etc. Ry. Co., 476
 v. Hoofnagle, 592
 Workman v. Great Northern R. Co.,
 33, 750
 v. New York, 24a, 253a, 295
 Works v. Junction R. Co., 395
 Worlds v. Ga. Ry. Co., 211a
 Worley v. St. Louis, etc. Ry. Co.,
 749
 Wormell v. Maine Cent. R. Co., 184a,
 185
 Wormley v. Gregg, 629
 Wormwood v. Waltham, 373
 Worsham v. Votgsberger, 313
 Worsley v. Scarborough, 69
 Worster v. Forty-second St., etc. R.
 Co., 359, 407, 408, 417
 Worth v. Edmonds, 95
 v. Gilling, 632
 Bros. v. Kallas, 114
 Worthen v. Grand Trunk R. Co., 520
 v. Love, 626
 Worthington v. Central Vt. R. Co.,
 523
 v. Mencer, 88
 v. Parker, 709
 v. Wade, 658, 702
 Wragge v. South Carolina, etc. R.
 Co., 27
 Wray v. Evans, 160, 169
 Wren v. Louisville, etc. R. Co., 485
 Wright v. Boston, etc. R. Co., 64
 v. Big Rapids, etc. Co., 164
 v. Briggs, 254
 v. Brown, 61, 99
 v. California Cent. R. Co., 493
 v. Chicago, etc. R. Co., 512,
 665
 v. Child, 622
 v. Cincinnati, etc. R. Co., 477
 v. Clark, 49
 v. Commonwealth, 56b
 v. Compton, 244, 248, 688a
 v. Crawfordsville, 110
 v. Defrees, 249
 v. Detroit, etc. R. Co., 73,
 644a
 v. Fleischman, 649
 v. Hazen, 303
 v. Holbrook, 285
 v. Illinois, etc. R. Co., 93, 95,
 741
 v. Illinois, etc. Tel. Co., 61
 v. Indianapolis, etc. R. Co.,
 418
 v. Kansas City, 376
 v. Lancaster, 274
 v. Malden, etc. R. Co., 71, 74,
 467, 468

[References are to sections.]

- Wright v. Midland R. Co., 459, 502
 v. Minneapolis, etc. Ry. Co., 432
 v. N. Y. Central R. Co., 190, 192, 215, 231, 241
 v. Northampton, etc. Ry. Co., 488
 v. Northwestern R. Co., 183
 v. Pacific Coast Oil Co., 217
 v. Pearson, 628
 v. Perry, 712
 v. Rawson, 190
 v. St. Cloud, 376
 v. Shindler, 730
 v. Southern Pac. Co., 202
 v. Wheeler, 591
 v. Wilcox, 244, 248
 v. Williams, 734
 v. Wilmington, 271, 287, 367
 v. Woodcock, 283
 v. Wright, 657
 Steam Engine Works v. Lawrence Cement Co., 162
 Wrightsville, etc. Ry. Co. v. Gornto, 769
 Wrinn v. Jones, 652
 Wrought Iron Range Co. v. Martin, 192
 Wuotilla v. Duluth Lumber Co., 214
 Wust v. Erie Iron Works, 215
 Wurster v. Seattle, 373
 Wurtenberger v. Metropolitan St. Ry. Co., 207*h*
 Wyandotte v. White, 85, 289
 Wyant v. Crouse, 739
 Wyatt v. Arnot, 303
 v. Citizens' R. Co., 53, 87, 520
 v. Great Western R. Co., 89, 92, 479
 v. Harrison, 701
 v. Williams, 124
 Wychoff v. Queen Ferry Co., 487
 Wyckoff v. Pajaro Valley, etc. Ry. Co., 201
 Wyld v. Pickford, 49
 Wylde v. Northern R. Co., 520
 Wylie v. Birch, 619
 Wyllie v. Palmer, 117, 148
 Wyman v. Berry, 73*a*
 v. Leavitt, 761
 v. Levitt, 756
 v. Northern Pac. R. Co., 493
 v. Penobscot, etc. R. Co., 444, 445
 v. Philadelphia, 363
 v. State, 334
 Wymore v. Mahaska Co., 73*a*, 78
 Wynn v. Allard, 110, 114, 644
 v. Central Park, etc. R. Co., 473, 495, 497
 Wynn v. City, etc. R. Co., 73*a*, 99
 Wynne v. Atlantic Ave. Ry. Co., 758
 v. Conklin, 218
 Wysocki v. Wisconsin, etc. Co., 206
 Yahn v. Ottumwa, 67
 Yale v. Hampden Turnp. Co., 387
 Yancey v. Wabash, etc. R. Co., 476
 Yankton Fire Ins. Co. v. Fremont, etc. R. Co., 666
 Yarmouth v. France, 211*a*, 214
 Yarnall v. St. Louis, etc. R. Co., 86, 93
 Yarnell v. Kansas City R. Co., 492*a*, 508, 510, 516
 Yarnold v. Bowers, 66
 Yates v. Brown, 172
 v. Covington, 367
 v. Judd, 287
 v. Lansing, 303
 v. McCullough Iron Co., 216, 233*a*
 v. Squires, 148
 Yazoo, etc. Ry. Co. v. Baldwin, 526
 v. Beattie, 520
 v. Brumfield, 429
 v. Davis, 412
 v. Georgia Home Ins. Co., 526
 v. Grant, 491
 v. Kern, 182
 v. Schraag (App. 2158)
 v. Scott (App. 2157)
 v. Shelby, 512
 v. Washington (App. 2157)
 v. Whittington, 429
 v. Woodruff, 208
 Yeager v. Atchison, etc. R. Co., 476
 v. Burlington, etc. R. Co., 219*a*
 v. Spirit Lake, 88*a*, 367
 v. Tippecanoe, 256
 Yeaman v. Noblesville Foundry Co., 219*a*
 Yearance v. Salt Lake City, 353
 Yearsley v. Sunset Telephone Co., 207
 Yeaton v. Boston, etc. R. Co., 207*e*
 Yeats v. Ill. Cent. Ry. Co., 143, 237, 459
 Yeaw v. Williams, 53, 346, 350
 Yeazel v. Alexander, 633
 Yelton v. Evansville, etc. R. Co., 140
 Yeomans v. Contra Costa, Nav. Co., 180, 488, 492
 Yerex v. Eineder, 735
 Yeran v. Linkletter, 748, 749
 Yerkes v. Keokuk, etc. R. Co., 516
 Yezick v. Chicago Brass Co., 209*a*
 Yoakum v. Mettasch, 99
 Yockey v. Smith, 617
 Yonge v. Kinney, 516

[References are to sections.]

- Yongue v. St. Louis, etc. Ry. Co., 26,
 202, 207b
 Yonoski v. State, 104
 Yordy v. Marshall Co., 380
 York v. Canada Atl. S. S. Co., 725
 v. Chicago, etc. R. Co., 605
 v. Davis, 658, 664
 v. Maine Cent. R. Co., 458,
 461
 v. St. Louis, etc. Ry. Co., 197
 Youll v. Sioux City, etc. R. Co., 221
 Youmans v. Wabash Ry. Co., 513a
 Young v. Burlington Mattress Co.,
 195
 v. Charleston, 258, 289
 v. Citizens' St. Ry. Co., 485c
 v. Clark, 480, 481a
 v. Cowden, 647
 v. Fosburg Lbr. Co., 164, 168
 v. Gentis, 750
 v. Hannibal, etc. R. Co., 460
 v. Harvey, 343, 703
 v. Herbert, 303
 v. Hosmer, 624
 v. Humphrey & Trapp, 175
 v. Illinois Central Ry., 427
 v. Kansas City, etc. R. Co.,
 449
 v. Macomb, 338, 374
 v. Madison County, 65a
 v. Mason, 195
 v. Mason Stable Co., 187
 v. Milwaukee Gas L. Co., 190
 v. Missouri, etc. Ry. Co., 508,
 513a
 v. Murray, 630
 v. New Haven, 355
 v. N. Y., Lake Erie, etc. R.
 Co., 476, 477
 v. New York, etc. Ry. Co., 501,
 525
 v. O'Brien, 208
 v. Old Colony R. Co., 464, 475
 v. People's Gas Co., 705a
 v. Pennsylvania Co., 503
 v. Randall, 208
 v. Road Commissioners, 256
 v. Rohrbough, 708a, 709
 v. Small, 73
 v. South Boston Ice Co., 649
 v. Spencer, 119
 v. Syracuse, etc. Ry. Co., 213
 v. Texas, etc. Ry. Co., 493
 v. Waters-Pierce Oil Co., 92
 v. Waterville, 289, 333, 334a,
 543
 v. W. U. Tel. Co., 553, 756
 v. Yarmouth, 351, 358
 Youngblood v. Sexton, 254
 v. South Carolina, etc. Ry.
 Co. (App. 2093)
- Youngquist v. Minneapolis, etc. Ry.
 Co. (App. 2071)
 Youngstown v. Moore, 274
 Ysleta v. Babbitt, 286
 Yule v. New Orleans, 265

 Zagelmeyer v. Cincinnati, etc. R.
 Co., 493
 Zalotuchin v. Metropolitan St. Ry.
 Co., 66
 Zambelli v. Johnson & Co., 645
 Zanesville v. Fanan, 358
 Zarembski v. Cincinnati, etc. Ry. Co.
 (App. 2178)
 Zearfoss v. Norway Iron, etc. Co.,
 219
 Zeccardi v. Yonkers Ry. Co., 490, 513
 Zehren v. Milwaukee Elec. Ry. Co.,
 485
 Zeigler v. Danbury, etc. R. Co., 160,
 177, 225
 v. Iron Works, 73
 v. Northeastern R. Co., 463,
 475
 v. Pennsylvania Ry. Co., 134a
 v. Railroad Co., 90
 v. South, etc. R. Co., 422
 Zeimann v. Kieckhefer Elec. Co.,
 117a
 Zelzer v. Cook, 708
 Zemlock v. United States, 251
 Zemp v. Wilmington, etc. R. Co.,
 60a, 516
 Zenner v. Blessing, 625
 Zettler v. Atlanta, 56, 90, 375
 Zibbill v. Southern Pac. Co., 758, 760
 Ziegler v. Commonwealth, 592
 Ziehr v. Maumee, 214a
 Ziemann v. Kieckhefer, 117a
 Ziemann v. Kieckhefer Elevator Mfg.
 Co., 719a
 Zienke v. Northern Pac. Ry. Co., 180
 Zilver v. Robert Graves Co., 235
 Zimmerman v. Denver Consol. Tr.
 Co., 772
 v. Denver, etc. Tramway Co.,
 485ba
 v. Gritzmacher, 359
 v. Hannibal, etc. R. Co., 61,
 88, 464, 481
 v. Long Isl. R. Co., 497
 v. Union R. Co., 66, 485a
 Zintek v. Stimson Mill Co., 217, 232,
 233
 Zirkle v. Missouri Pac. Ry. Co., 480
 Zoebisch v. Tarbell, 97, 705
 Zuccarello v. Nashville, etc. R. Co.,
 386, 414
 Zurn v. Tetlow, 218
 Zwack v. N. Y., Lake Erie, etc. R.
 Co., 467

PART I.

GENERAL PRINCIPLES.

- CHAPTER
- I. NEGLIGENCE IN GENERAL.
 - II. PROXIMATE CAUSE.
 - III. DEGREES OF NEGLIGENCE.
 - IV. QUESTIONS OF FACT AND LAW.
 - V. EVIDENCE.
 - VI. CONTRIBUTORY NEGLIGENCE.
 - VIa. ASSUMED RISK AS A DEFENCE TO ACTIONS
FOR NEGLIGENCE GENERALLY.
 - VII. PARTIES.
 - VIII. DECEASED PERSONS.
-

CHAPTER I.

NEGLIGENCE GENERALLY.

- | | |
|--|--|
| <p>§ 1. Negligence variously defined.</p> <p>1a. Negligence in law.</p> <p>2. Difficulty of exact definition.</p> <p>2a. Different senses in which the term is used.</p> <p>3. Definition of actionable negligence.</p> <p>4. Negligence and concurring damage distinguished.</p> <p>5. Analysis of cause of action on negligence.</p> <p>6. Dr. Wharton's definition reviewed.</p> <p>7. Election between intended and unintended injury.</p> | <p>§ 8. Duty an essential element of negligence.</p> <p>9. The duty must be to use care.</p> <p>9a. Right limited by duty.</p> <p>9b. Standard test.</p> <p>10. Duty must be legal, not merely moral.</p> <p>10a. Generally a duty not knowingly to injure others exists.</p> <p>10b. Negligence not a specific tort, but an imputed mental quality.</p> <p>11. No unreasonable duty required.</p> |
|--|--|

- | | |
|---|---|
| <p>§ 12. In determining duty, regard to be had to era.</p> <p>12a. Customary acts or customary manner of their performance.</p> <p>13. Violation of duty imposed by statute or ordinance.</p> <p>13a. Regulation, whether for public benefit only, or for the benefit of individuals as well.</p> <p>14. A personal duty cannot be delegated.</p> <p>15. No negligence where there is no breach of duty.</p> <p>16. Inevitable accident.</p> <p>16a. <i>Casus</i>.</p> <p>16b. Negligence of defendant where accident or act of God concurring cause.</p> | <p>§ 17. Apparent exceptions to rule as to inevitable accident.</p> <p>18. What is not inevitable accident.</p> <p>19. Absence of intent to produce damage necessary element.</p> <p>20. Distinction between negligence and fraud.</p> <p>21. Defendant's anticipation of injury not essential.</p> <p>21a. Actual anticipation of injury excluded by definition.</p> <p>22. Election between contract and tort.</p> <p>23. Damage an essential element of negligence.</p> <p>24. The damage must be special to plaintiff.</p> <p>24a. Right to recover over.</p> <p>24b. Recovery over, continued.</p> |
|---|---|

§ 1. Negligence variously defined. — Many definitions of negligence have been attempted, none of which appears to us to be quite satisfactory, as no one of them has proved to be satisfactory to the framer of any other.¹ The truth is that a strictly correct definition is always difficult to

¹“Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property” (Brett, M. R., *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 507). “Negligence is the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do — *not intentionally*,” (Per Alderson, B., in *Blyth v. Birmingham Water Co.*, 11 Exch. 781). “Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done” (*Railroad Co. v. Jones*, 95 U. S. 442; to same effect, *Galloway v. Chicago, etc. R. Co.*, 87 Iowa, 458; 54 N. W. 447; *Wilkins v. St. Louis, etc. R. Co.*, 101 Mo. 93; 13 S. W. 893). “Negligence is the failure to observe for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such person suffers injury.” (*Cooley on Torts*, 630; to same effect, *Brown v. Congress St., etc. R. Co.*, 49 Mich. 153; *Barrett v. Southern Pac. R. Co.*, 91 Cal. 296; 27 Pac. 666). “Negligence, even when gross, is but an

give, and absolutely correct definitions of legal rights are often utterly impossible. The number of words, in any language, runs far short of the number of distinct conceptions; and the attempt to reduce abstract ideas into a precise form of words must generally fail. In attempting to add a definition of our own to the number which have already been submitted by judges and scholars, we do not hope to cover all the ground, but seek only to add one

omission of duty" (Tonawanda R. Co. v. Munger, 5 Den. 255, 267; Thomas v. Missouri Pac. R. Co., 109 Mo. 187; 18 S. W. 980). For a collation and discussion of decisions, in which negligence has been defined, see 11 Am. St. Rep. 548, note; 12 Id. 700, note.

Alabama: Alabama, etc. Ry. Co. v. Bullard, 157 Ala. 618, 47 So. 578 (1908), ("The failure to do what an ordinarily prudent person would have done under the circumstances, or the doing of that which an ordinarily prudent person would not have done;" adopted from Words and Phrases, Vol. V, p. 4744). *Arkansas:* St. Louis, etc. Ry. Co. v. Lewis, 60 Ark. 409, 31 S. W. 765, 1135 (1895); St. Louis, etc. Ry. Co. v. Rhoden, 123 S. W. 798 (1909); ("Negligence arises from a duty to protect from injury and a failure to perform it, with resulting injury"). *California:* Barrett v. Southern Pacific Ry. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186 (1891), (adopts Judge Cooley's definition); Bacon v. Kearney Vineyard Syndicate, 1 Cap. App. 275, 82 Pac. 84 (1905), ("want of ordinary care"); Antonian v. Southern Pacific Co., 100 Pac. 877 (1909), ("ordinary care is such as reasonable and prudent men would use under similar circumstances"). *Connecticut:* Riley v. Consolidated Ry. Co., 82 Conn. 105, 72 Atl. 562, 21 L. R. A. (N. S.) 880 (1909), ("Negligence consists in the failure to use ordinary care and prudence under the circumstances"); Stedman v. O'Neill, 82 Conn. 199, 77 Atl. 923, 22 L. R. A. (N. S.) 1229 (1909). *Delaware:* American Bridge Co. v. Valente, 6 Pennw. 556, 73 Atl. 395 (1909), ("Negligence, in a legal sense, has been defined to be the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury"); Louft v. Pyle Co., 75 Atl. 618 (1910), ("Negligence, in legal contemplation, is the want of ordinary care; that is, the want of such care as an ordinarily prudent and careful man would use under similar circumstances. It has been defined to be the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand whereby such other suffers injury"); Tobias v. Peoples Ry. Co., 80 Atl. 358 (1911). *Florida:* Florida Ry. Co. v. Sturkey, 56 Fla. 196, 48 So. 34 (1909), ("Negligence is the failure to observe for the protection of another's interest such care, precaution and vigilance as the circumstances justly demand"). *Georgia:* West-

more to the list of imperfect definitions from which, eventually, something more complete may be developed.

§ 1a. Negligence in law.—Negligence in law in its widest aspect, having relation to the non-fulfillment of duties, involves the presentation of the entire body of substantive law, excepting only wrongs intentionally inflicted. And even this exception must be understood with the qualification that in a civil action for damages

ern, etc. Ry. Co. v. Bussey, 95 Ga. 584, 23 S. E. 207 (1894), ("The want of ordinary care"); Southern Ry. Co. v. Horine, 121 Ga. 386, 49 S. E. 285 (1904), (The words "carelessly" and "negligently" are synonymous); Harden v. Georgia, Ry. Co., 3 Ga. App. 344, 59 S. E. 1122 (1908), (There must be a duty by the defendant to the plaintiff, a failure to perform it, with resulting injury). *Illinois*: Wolff Mfg. Co. v. Wilson, 152 Ill. 915, 38 N. E. 694, 26 L. R. A. 229 (1894), ("Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do"); Pease v. Trac. Co., 158 Ill. 446; Chicago, etc. Tr. Co. v. Giese, 229 Ill. 260, 82 N. E. 232 (1907). *Indiana*: Van Camp Hardware, etc. Co. v. O'Brien, 28 Ind. App. 152, 62 N. E. 464 (1901), ("Negligence, whether on the part of the defendant or plaintiff, may be briefly defined to be the doing or failing to do of some act or thing which, under the circumstances, it is the duty of the party to do, or to leave undone"); Pittsburgh, etc. R. Co. v. Carlson, 24 Ind. App. 559, 56 N. E. 251 (1900); Evansville, etc. Ry. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608 (1906); Pittsburgh, etc. Ry. Co. v. Hall, 90 N. E. 498, rehearing denied, 91 N. E. 743 (1910). *Iowa*: Upp v. Darnier, 130 N. W. 409 (1911), ("Actionable negligence is the breach of a duty owed by defendant to plaintiff, and where there is no duty there is no negligence"); German Ins. Co. v. Chicago, etc. Ry. Co., 128 Ia. 386, 104 N. W. 361 (1906); Jerolman v. Chicago Great Western R. Co., 108 Ia. 177, 78 N. W. 855 (1899). *Kansas*: Weir v. Herbert, 6 Kans. App. 596, 51 Pac. 582 (1897), ("Want of due care or the failure to do that which under the law and circumstances is required"); United States Express Co. v. Everest, 72 Kans. 517, 83 Pac. 817 (1906), ("Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie," quoting from Shearman & Redfield on Negligence, 4th ed., § 8, "If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie," citing Williams v. Chicago, etc. Ry. Co., 135 Ill. 491, 26 N. E. 661, 11 L. R. A. 352, 25 Am. St. Rep. 397). *Kentucky*: Cincinnati, etc. Ry. Co. v. Evans, 129 Ky. 152, 110 S. W. 844 (1908),

it generally rests with the person injured by intentional wrongdoing to elect to treat the injury as negligently inflicted. In such case he is said to waive the intent and rely on the neglect. Which, indeed, is the common practice where liability arises from the doctrine invoked by the term *respondeat superior*, for the principal or master is not ordinarily responsible for the malice of his subordinate agents or servants where the act or omission is

("Ordinary care is such care as a person of ordinary prudence usually exercises under like circumstances. Negligence is the want of such care"); *Adkisson's Admr. v. Louisville, etc. Ry. Co.*, 33 Ky. 204, 110 S. W. 284 (1908). *Louisiana*: *New Orleans, etc. Ry. Co. v. McEwen*, 49 La. Ann. 1184, 22 So. 675, 38 L. R. A. 134 (1897), ("Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that provision made is insufficient as against an event such as may happen once in a lifetime or perhaps twice in a century, does not, in my opinion, make it a case of negligence upon which an action of damages will lie"). *Maine*: *Bowden v. Derby*, 97 Me. 536, 55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223 (1903), ("There can be no negligence where there is no duty"); *Raymond v. Portland R. Co.*, 100 Me. 529, 62 Atl. 603, 3 L. R. A. (N. S.) 94 (1905), ("It is usual to express the duty owed in positive terms by stating what constitutes 'due care,' rather than in negative terms by stating what constitutes 'negligence,' which is the unintentional failure to perform a duty implied by law. 'Negligence' is the opposite of 'due care,' where due care is found there is no negligence; if there is want of due care there is negligence"); *Leighton v. Wheeler*, 76 Atl. 916 (1910). *Maryland*: *Sheridan v. Baltimore, etc. Ry. Co.*, 101 Md. 50, 60 Atl. 280 (1905), ("Negligence is essentially relative and comparative, not absolute. It is not even an object of simple apprehension apart from the circumstances out of which it grows. As these circumstances necessarily vary in their relations to each other, under different surroundings, they inevitably change their original signification and import. * * * The existence of negligence is therefore to be sought from the facts and surroundings of each particular case * * * Whether the nature and attributes of the act relied on show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as matter of law"). *Massachusetts*: *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122, ("Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation"). *Michigan*: *Ashman v. Flint, etc. Ry. Co.*, 90 Mich. 567, 51 N. W. 645 (1892), (quoting from *Railroad Co. v. Coleman*, 28 Mich. 449, "Negligence is neither more nor less than a failure of duty"); *Fraam v. Grand*

without his procurement, participation or ratification; though he is responsible for actual damages if the wrongful act or omission occurs in course of the servants' employment, irrespective of the fact whether malicious or inadvertent. But a treatise on Negligence in this broad aspect would require the presentation of a great variety of subjects having but a remote relation to each other, many of which could only be treated satisfactorily, to

Rapids, etc. Ry. Co., 126 N. W. 857 (1910). *Minnesota*: Lauristen v. American Bridge Co., 87 Minn. 518, 92 N. W. 475 (1902); ("Where an obligation of duty is imposed the care should depend on some recognized duty, and be commensurate with the risks and dangers of the situation under the same or similar circumstances, which seems to be as far as abstract definitions or illustrations ought to go, for in scriptural phrase, 'What is more than this cometh of evil'"); Campbell v. Duluth, etc. Ry. Co., 107 Minn. 358, 120 N. W. 375 (1909), ("Due care under the circumstances"). *Missouri*: Vaughn v. Lemp Brewing Co., 152 Mo. App. 48, 132 S. W. 293 (1910), ("Negligence is a breach of duty to exercise reasonable care under the circumstances"); Jarrell v. Blackbird, etc. Co., 154 Mo. App. 553, 136 S. W. 754 (1911), ("The failure to exercise reasonable care is negligence"); Felver v. Central Elec. Ry. Co., 216 Mo. App. 195, 115 S. W. 980 (1909). *Montana*: Harrington v. Butte, etc. Ry. Co., 37 Mont. 169, 95 Pac. 8, 16 L. R. A. (N. S.) 395 (1908), ("Broadly speaking, negligence may be said to be a breach of duty"); Flaherty v. Butte Elec. Ry. Co., 40 Mont. 454, 107 Pac. 416 (1910), ("Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing that which such a person under the existing circumstances would not have done"). *Nebraska*: Geist v. Missouri Pac. Ry. Co., 62 Neb. 309, 87 N. W. 43 (1900); ("Negligence is the failure to exercise such care, prudence * * * and forethought as, under the circumstances, duty requires should be given or exercised. It may consist in the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs may do." See Brotherton v. Manhattan, etc. Improvement Co., 48 Neb. 463, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598 (1895). *New Hampshire*: Goodale v. York, 74 N. H. 454, 69 Atl. 525 (1908), ("Negligence is doing what the ordinary man is not accustomed to do, not what he is in the habit of doing * * *"); Roberts v. Boston, etc. Ry. Co., 69 N. H. 354, 45 Atl. 94 (1898), ("Negligence is the failure to exercise such care and prudence as, under the circumstances, duty required should be exercised. It is the omission to do something which a reasonable man guided by considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do"). *New Jersey*: New

the common-law lawyer at least, according to the customary common-law division of legal topics, in works on Contracts and on Torts generally. By the term Negligence as used in this work, and as uniformly used by courts and text-writers, where actionable negligence is intended, is meant the action of tort for injury unintentionally inflicted on another, in his person or estate, by the failure to perform a legal duty owing to him. It is

Jersey Express Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722 (1867), ("Negligence is a relative term, depending upon circumstances under which the injury was received, and the obligation which rests on the party injured to care for his personal safety"). *New York*: Linick v. Nutting, 140 App. Div. 265, 125 N. Y. Supp. 93; Toppi v. McDonald, 128 App. Div. 443, 112 N. Y. Supp. 821, judgment affirmed, 199 N. Y. 585, 93 N. E. 1133 (1910); Birch v. New York, 121 App. Div. 393, 106 N. Y. Supp. 104; Davenport v. Oceanic Amusement Co., 132 App. Div. 368, 116 N. Y. Supp. 609 (1909), ("The test of actionable negligence is what a prudent and careful man would have done in the discharge of his duty under the circumstances"). *North Carolina*: Tudor v. Bowen, 152 N. C. 441, 67 S. E. 1015 (1910), ("Negligence is essentially relative and comparative. The legal duty we owe to others is the accepted standard, and that duty is measured by the exigencies of the occasion. And want of caution to avoid injury, where the duty to exercise caution is incumbent, and a reckless or heedless use of a dangerous agency in a locality where the peril from its use is obvious, constitute breaches of duty which may become, when causing injury, actionable negligence. As has been said, the term covers all those shades of inadvertence which range between deliberate intention on the one hand, and total absence of responsible consciousness on the other"); Fisher v. New Bern, 40 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. 542 (1906). *Ohio*: Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597 (1906), ("Negligence is the want of ordinary care according to the circumstances"); Elsteir v. City of Springfield, 49 Ohio St. 82, 30 N. E. 274 (1892), ("Negligence, we suppose, necessarily implies a legal duty to use care; that is, the complainant to demand care and this, too, as to must show that he had a legal right the particular matter complained of. Where there is no obligation of care or caution there can be no actionable negligence"). *Oregon*: Peterson v. Standard Oil Co., 55 Ore. 511, 106 Pac. 337, (1910), ("Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of the common law requiring the exercise of ordinary care not to injure another, or is imposed by statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence and renders the party liable for injuries resulting from it"). *Pennsylvania*: Matulys v Philadelphia, etc. Coal Co., 201 Pa. St. 70, 50 Atl. 823

§ 2. Difficulty of exact definition of negligence. — Negligence, in its technical legal sense, must obviously be so defined as to exclude all acts and omissions which do not violate any legal obligation, as well as many which do. It is extremely difficult to make such a definition as will include all cases of real negligence, while excluding all such breaches of duty as the failure to pay a debt or perform any other express contract, and especially the failure of a common carrier of goods to perform his common-law duty; all of which are outside of the strict law of negligence. Dr. Wharton's definition² is open to the objection that it includes all these breaches of duty, provided that they are inadvertent. But it is often the case that they are purely inadvertent; and still they do not fall within the scope of a proper definition of negligence; for, if they did, contributory negligence would be a bar to an action thereon. It will not suffice to say that this would only be the rule where the inadvertency was alleged by the plaintiff himself. It is an old form of pleading to allege that the defendant neglected to pay his note; but that does not enable the defendant to plead contributory negligence. Neither would it do so in an action against a common carrier of goods, having no special contract. But, if the complaint against a carrier should confine itself to an averment that the defendant had neglected to use ordinary care in the carriage or delivery of the goods, without alleging that he was a *common* carrier, or anything equivalent thereto, the plaintiff could not recover without proof of actual negligence.

§ 2a. Different senses in which the term is used. — The difficulty of exact definition is increased by difference of

consisting in a failure to respond agent, in the discharge of a legal to judgment or conscience according duty, as produces, in an ordinary to ordinary standards of conduct." and natural sequence, a damage to

² "Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human another" (Wharton on Negligence, § 3).

sense in which the term is sometimes used by courts and writers of the highest consideration; sometimes as meaning only the negligent act or omission, as in those jurisdictions where the violation of statutes and ordinances is negligence *per se*, and again as meaning actionable negligence, or a negligent act or omission inflicting injury with consequent damage.

§ 3. Definition of actionable negligence. — The definition which we offer is this: Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended damage to the latter.³

§ 4. Negligence and concurring damage distinguished. — It will be advantageous to carry the analysis a little further. The foregoing definition attempts to define the negligence which affords the ground of a civil action. But this includes two distinct elements — negligence and damage — both of which must concur, in order to form the ground of an action, just as fraud and damage must concur, to sustain an action on fraud. The two elements are, however, distinct; and the result of mingling them too closely has been to introduce that confusion of ideas, under which the same courts at one time hold that a clear violation of law is negligence *per se*, and at another time that it is only “evidence,” or even only “some evidence” of negligence; the truth being that every breach of duty to observe the degree of care required by law is negligence, and not merely evidence of it, but that,

³ Expressly approved in Louisville, Nat'l R. Co. v. Crum, 6 Tex. App. etc. Ry. Co. v. Bean, 9 Ind. App. 240, 702, 25 S. W. 1126 (1894). See also 36 N. E. 443 (1894); San Antonio, Bindbeutel v. Street Ry. Co., 43 Mo. etc. Ry. Co. v. Vaughn, 5 Tex. App. App. 463, and Galveston City Ry. 191, 23 S. W. 745 (1893); Mexican Co. v. Hewitt, 67 Tex. 473.

damage caused to the plaintiff being an indispensable element in his cause of action, the clearest proof of negligence, standing by itself, is only "some evidence" of his right to recover.

§ 5. Analysis of a cause of action on negligence. — A cause of action upon negligence, then, should be thus analyzed. Negligence in the defendant and damage to the plaintiff must concur. Negligence consists in:

1. A legal duty to use care;
2. A breach of that duty;
3. The absence of distinct intention to produce the precise damage, if any, which actually follows.

With this negligence, in order to sustain a civil action, there must concur:

1. Damage to the plaintiff;
2. A natural and continuous sequence, uninterruptedly connecting the breach of duty with the damage, as cause and effect.⁴

§ 6. Dr. Wharton's definition reviewed. — In this definition, we have purposely sought to include every element of that given by Dr. Francis Wharton, in his learned and able treatise, which our view of the law would justify. We gladly acknowledge our indebtedness to him, and were anxious to adopt his language, without change, so as to avoid further conflict of definitions. But we are unable to accept his definition in two important respects. Dr. Wharton defines negligence as always implying inadvertence in the act complained of. This is not necessary. The inadvertence, which marks the distinction between negligence and willful injuries, relates to the damage, rather than to the act which causes the damage. Thus, a railroad engineer may willfully shut his eyes

⁴While criticising the definition work on Negligence, p. 6, 3d ed., proposed in section 3, mainly because repeating the analysis in the text, the terms used, it is said, need themselves to be defined, Mr. Beven, in his

and go to sleep. If, while thus asleep, he runs over a man, the test which would determine whether his act was merely gross negligence or was a willful injury would be to ascertain whether, when he closed his eyes, he saw the man upon the track or believed that he would be there, or not. If he believed that he would inflict the injury, or if he intended to do it, his act would cease to be mere negligence, but not otherwise. Doubtless, it would be a fair question for the jury; but it could not be ruled upon as a point of law. So, if a mischievous boy should strike a horse, for the very purpose of making it run away, his act would be one of willful injury, as to the owner of the horse, but only of negligent injury, as to a child run over by the horse, in a distant street. Again, Dr. Wharton seems to exclude an entire *omission* from his definition. It may be true that in most cases the negligence complained of consists in the imperfect performance of a duty; but this is hardly sufficient reason for excluding the idea of total omission from the definition of negligence.

§ 7. Election between intended and unintended injury.

— In applying any definition of negligence to the facts of a special case, it must be borne in mind that the injured party has the right to treat some acts as negligent, although, in fact, they were willful and malicious. The plaintiff is not to be turned out of court, simply because he has understated his case. Leaving out of view those cases in which the common law, forbidding private actions upon felonies until after they had been criminally prosecuted, may remain in force, it is clear that the plaintiff may elect between suing on a charge of willful injury or on a mere charge of negligence, wherever the facts are susceptible of a double construction. It does not lie with the defendant to insist that he has been criminal, instead of merely careless. In making his election, however, the plaintiff must remember that he will be bound by it. If the complaint sets up a case of willful injury, it cannot

be sustained by evidence of mere negligence, however gross,⁵ while, on the other hand, if it charges negligence only, the plaintiff cannot put in evidence facts, the only relevancy of which consists in proving intentional injury, such as would sustain an entirely different action.⁶ Any degree of negligence, however gross, may be proved under a general averment of negligence; but nothing more.⁷

§ 8. Duty, an essential element of negligence.—The first element of our definition is a duty. If there is no duty, there can be no negligence.⁸ If the defendant owed

⁵Highland Ave., etc. R. Co. v. Winn, 93 Ala. 306, 9 So. 509; Louisville, etc. v. Hurt, 101 Ala. 34, 13 So. 130; Chicago, etc. R. Co. v. Rayburn, 153 Ill. 290, 38 N. E. 558; s. p., Indiana, etc. R. Co. v. Overton, 117 Ind. 253, 20 N. E. 147 [engineer willfully ran over cow]; Lake Erie, etc. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842 [conductor assaulted and ejected passenger]. Under a complaint, alleging that the injury was caused in a "willful, reckless, careless and unlawful manner," held, that plaintiff could not recover, without showing a willful injury (Indiana, etc. R. Co. v. Burdge, 94 Ind. 46). We doubt very much, however, the correctness of this particular application of the principle. A "willful manner" does not usually imply a willful injury. (Wilson v. Chipewa, etc. Ry. Co., 120 Wis. 639, 98 N. W. 536, 66 L. R. A. 912 (1904); Robinson v. Helena, etc. Ry. Co., 38 Mont. 222, 242, 99 Pac. 837 (1909). *Contra*: Western Union Tel. Co. v. Harris, 6 Ga. App. 260, 64 S. E. 1123 (1909); Hollinshed v. Yazoo, etc. Ry. Co., 55 So. (Miss.) 40 (1911). But a charge that an act was wantonly, recklessly or grossly negligent

is not equivalent to charging that the injury was willfully or intentionally inflicted (Denver, etc. Ry. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582 (1902). Nor to charge a mere intentional omission or violation of duty (Memphis, etc. Ry. Co. v. Martin, 117 Ala. 367, 23 So. 231 (1898)).

⁶Where plaintiff charges negligence, and not willful injury, he cannot prove the latter (Pennsylvania R. Co. v. Smith, 98 Ind. 42; Great-house v. Croan, 4 Ind. Terr. 668, 76 S. W. 273 (1903); Western Union Tel. Co. v. Catlett, 177 Fed. 71, 100 C. C. A. 489 (1910)).

⁷Keating v. Detroit, etc. R. Co., 104 Mich. 418, 62 N. W. 575. See § 20, *post*; Cincinnati, etc. Ry. Co. v. Cook's Admr., 113 Ky. 161, 67 S. W. 383 (1902); Denny v. Chicago, etc. Ry. Co., 130 N. W. (Mich.) 363 (1911).

⁸Heaven v. Pender, L. R. 11 Q. B. Div. 503, 507; Cotton v. Wood, 8 C. B. N. S. 568; Carpenter v. Cohoes, 81 N. Y. 21; Sutton v. N. Y. Central, etc. R. Co., 66 Id. 243; Cusick v. Adams, 115 Id. 55; 21 N. E. 673; Larmore v. Crown Point Co., 101 N. Y. 391; Splittorf v. State, 108 Id. 205; Donohue v. State, 112 Id. 142;

a duty, but did not owe it to the plaintiff, the action will not lie.⁹ And there can be no duty to do any act which one has no legal right to do.¹⁰ The plaintiff must state and prove facts sufficient to show what the duty is,¹¹ and

Allen v. Willard, 57 Pa. St. 374; Tourtellot v. Rosebrook, 11 Metc. 460; Severy v. Nickerson, 120 Mass. 306; Parker v. Portland Pub. Co., 69 Me. 173; Lawton v. Little Rock, etc. R. Co., 55 Ark. 428; 18 S. W. 543; Hargreaves v. Deacon, 25 Mich. 1; Atlanta, etc. Ry. Co. v. West, 121 Ga. 641, 49 S. E. 711, 104 Am. St. Rep. 179, 67 L. R. A. 701 (1905); Cleveland, etc. Ry. Co. v. Cline, 111 Ill. App. 416 (1903); Prosser v. West Jersey, etc. Ry. Co., 72 N. J. L. 342, 63 Atl. 494, 75 N. J. L. 614 (1907); Baltimore, etc. Ry. Co. v. Cox, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583 (1902), (where there is neither willfulness nor a relation from which a duty arises, no action will lie). See note 1, *ante*.

⁹ Savings Bank v. Ward, 100 U. S. 195; Losee v. Clute, 51 N. Y. 494; Houseman v. Girard, etc. Asso., 81 Pa. St. 256; Marvin Safe Co. v. Ward, 46 N. J. Law, 19; Nickerson v. Bridgeport Hydr. Co., 46 Conn. 24; Winterbottom v. Wright, 10 Mees. & W. 109; Heaven v. Pender, L. R. 9 Q. B. Div. 302, reversed on other grounds but approved as to this, 11 Id. 503. See Hofnagle v. N. Y. Central R. Co., 55 N. Y. 608, where defendant owed a duty to a workman's employer, but not to the workman. *s. p.*, Morris v. Brown, 111 N. Y. 318, 18 N. E. 722; Sawyer v. Minneapolis, etc. R. Co., 38 Minn. 103; 35 N. W. 671 [defect in freight car appliance injuring servant of a connecting company then using car in its own business on its own line]. Mortgagees advanced money to a

builder upon the faith of certain certificates given by a surveyor, which contained untrue statements, the result of the negligence of the surveyor, but there was no fraud on his part, and no contractual relation between him and the mortgagees. Held, that he was not liable to them in an action for negligence (Le Lievre v. Gould, 4 Reports, 274; 1 Q. B. [1893] 491; Norfolk, etc. Ry. Co. v. Wood, 99 Va. 156, 37 S. E. 846 (1901) ("An action for negligence only lies where there has been a failure to discharge a legal duty. If there is no duty, there can be no negligence; and, although the defendant owed a duty to the person, yet, if he did not owe it to the plaintiff, his action will not lie. The duty must be due to the party injured, and the declaration must show this," citing Shearman & Redfield on Negligence, § 8); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350 (1899). See note 1, *ante*.

¹⁰ Carpenter v. Cohoes, 81 N. Y. 21; Veeder v. Little Falls, 100 Id. 343 [a city not responsible for not fencing a bridge approach belonging to the state]. See § 284, *post*.

¹¹ Hayes v. Michigan Central R. Co., 111 U. S. 228; Philadelphia, etc. R. Co. v. Stebbing, 62 Md. 504; Daniel v. Metropolitan R. Co., L. R. 5 H. L. 45, 3 C. P. 216, 591; Chicago, etc. Ry. Co. v. Gardanier, 116 Ill. App. 619 (1904) (the duty must appear from the averment of facts from which it follows as a matter of law). To the same effect, Pitts-

that the defendant owes it to him.”¹² If the duty is owed to the public at large, no action can be maintained by a private individual, without showing that it was for some reason specially owing to him.¹³ Thus, where the defendant wrongfully stopped up a public way, and persons having occasion to pass thereby, being thus prevented from passing, trespassed upon adjoining land of the plaintiff, in order to find a convenient path, the defendant was held not liable to the plaintiff.¹⁴

§ 9. The duty must be to use care. — Not without some hesitation, we have concluded to adhere to the old doctrine, that the duty upon which alone an action for negligence will lie is a duty to use *care*, including, in that word, such skill and diligence as due care would require

burg, etc. Ry. Co. v. Simons, 168 Ind. 333, 79 N. E. 911, affirming 76 N. E. 883 (1907); Muncie Pulp Co. v. Davis, 162 Ind. 558, 70 N. E. 875 (1904) (“the characterization of an act or omission as negligent causes that word to take on a technical significance, but such a charge will not supply averments of fact from which the existence of a duty to exercise care is shown to have existed”).

¹² Hence in every action against a public corporation for negligence in omitting to repair a bridge, the plaintiff must show that the corporation owed a duty to the plaintiff, as one of the general public, to repair the bridge (Peck v. Batavia, 32 Barb. 634; Albany v. Cunliff, 2 N. Y. 165). See Cusick v. Adams, 115 Id. 55 [private bridge] and cases *supra*. Western Union Tel. Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678 (1905); Atlanta, etc. R. Co. v. West, 121 Ga. 641, 49 S. E. 711, 104 Am. St. Rep. 179, 67 L. R. A. 701 (1905); Wick- enburg v. Minneapolis, etc. Ry. Co.,

94 Minn. 276, 102 N. W. 715 (1905); Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165 (1906); Prosser v. West Jersey, etc. Ry. Co., 72 N. J. L. 342, 63 Atl. 494; s. c., 75 N. J. L. 614, 68 Atl. 58 (1906); Pittsburg, etc. Ry. Co. v. Simons, 168 Ind. 333, 79 N. E. 911 (1906); Uthermohlen v. Boggs, etc. Co., 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 911 (1901); Peters v. Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428 (1902).

¹³ Thompson, Negl. 341, 754, citing Winterbottom v. Derby, L. R. 2 Ex. 316; Houck v. Wachter, 34 Md. 265; Baxter v. Winooski Co., 22 Vt. 114; Lansing v. Smith, 8 Cow. 153; Tisdale v. Norton, 8 Mete. 388; Adams v. Carlisle, 21 Pick. 146; Griffin v. Sanborn, 44 N. H. 246; Tomlinson v. Derby, 43 Conn. 562; Farrelly v. Cincinnati, 2 Disney, 516. See §§ 118, 332, *post*.

¹⁴ Blagrove v. Bristol Water Co., 1 Hurlst. & N. 369.

in each case. This is undoubtedly true with regard to all actions for negligence in matters of contract; and, upon the whole, it seems better to exclude from the definition of negligence all actions upon duties imposed by law, requiring more than the exercise of care, skill and diligence. Wherever an absolute duty to do a certain thing is imposed, the question ceases to be one of negligence.¹⁵

§ 9a. Right limited by duty. — Everyone is entitled to act or refuse to act at his pleasure, except where his doing so interferes with the like freedom of others. When this is the case a conflict of interest arises which the law seeks to regulate. What one is entitled to do or have done by another in his intercourse with others is called a right, what he is obliged by law to do or refrain from doing is called a duty. “Duty, then, as a legal term, indicates the obligation to limit freedom of action and to conform to a prescribed course of conduct.”¹⁶ .

§ 9b. Standard test. — The standard by which to test the question of negligence *vel non* is undoubtedly the common experience of mankind; its existence implying the want of that care and diligence which ordinarily prudent men would use under the circumstances of the particular case.¹⁷ The standard is universal,¹⁸ unless in those cases where the law imposes an absolute liability,

¹⁵ See *Pennsylvania, etc. Canal Co. v. Graham*, 63 Pa. St. 290; *Hay v. Cohoes Co.*, 2 N. Y. 159; *McAndrews v. Collerd*, 42 N. J. Law, 189; *Fletcher v. Rylands*, L. R. 3 H. L. 330; *Couch v. Steel*, 3 El. & Bl. 402 [failure to keep a proper supply of medicines on board ship as required by statute]; *Blamires v. Lancashire, etc. R. Co.*, L. R. 8 Ex. 283 [non-compliance with statutory requirement to maintain means of communication between passengers and guards]; *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130 [neglecting statutory duty to fence fly wheel]. See *Hayes v. Michigan Central R. Co.*, 111 U. S. 228 and cases cited under §§ 268, 279, *post*. The correctness of the decision in *Couch v. Steel* was doubted in *Atkinson v. Newcastle Water Co.*, L. R. 2 Ex. Div. 441.

¹⁶ Beven on Negligence, p. 10 (3d ed.).

¹⁷ *Cotton Press Co. v. Bradley*, 52 Tex. 587.

¹⁸ *Townes on Torts*, 266.

which, as stated in the preceding section, are not within the purview of this work or of other works generally on the same subject.

§ 10. **Duty must be legal, not merely moral.**—The amount or degree of care which it is the duty of any person to exercise, in a particular case, will be considered; first, under the head of *degrees of care*, and next, under the various titles into which the practical application of these general principles is divided. But it may be well to state here the universal principle that, as the duty, the breach of which constitutes negligence, must be a legal duty, all duties of imperfect obligation, imposed only by generosity, kindness, charity or even abstract justice, but not by the law of the land, are necessarily excluded. Morally speaking, it would be gross negligence for a man of ordinary strength to let a little child lie helpless when it had fallen down, and he could easily raise it and show it the way home; but human law cannot impose such a duty, because it would do more harm than good to attempt to enforce such a duty by an action for damages. Negligence, therefore, as the term is used in law, is confined to a neglect of that kind and degree of care which the *law* demands. There are many cases in which it might be desirable that a greater degree of care should be used than the law requires; but it is only the lack of such care or diligence as the law demands, *in the particular case*, which constitutes negligence.¹⁹

¹⁹ *Dyert v. Bradley*, 8 Wend. 469. Thus, where a stone was thrown which hit plaintiff's daughter in the eye, but it did not appear to have been done negligently, the defendant was held not liable. Yet it was obvious that there must have been some negligence (*Harvey v. Dunlop*, Hill & D. Supp. 193). So, where one driving a wagon on the highway

with all due care, ran over a child whom he did not see, and could not reasonably be expected to see (*Hartfield v. Roper*, 21 Wend. 615). Cul-
pable negligence is the omission to do that which a reasonable, prudent and honest man would do, or doing that which such a man would not do in the circumstances of a particular case (*Kay v. Pennsylvania R. Co.*,

§ 10a. Generally a duty not knowingly to injure others exists. — But it must be remembered there are few relations or situations in life in which the law does not impose the duty on everyone not to injure another by his acts or omissions, wanting in due, reasonable or ordinary care when harm is observable and preventable.²⁰ It does not, however, ordinarily impose on the owner or occupier of land a duty to provide against trespassers injuring themselves. But, generally, if one violates the common standard of care in the situation in which he is placed towards another, who is thereby injured, having thus deprived himself of the defense of what might otherwise have been the exercise of his legal right, he must respond. Legal and moral duty do not correspond, but moral duty is often the source of legal duty.²¹

§ 10b. Negligence not a specific tort, but an imputed mental quality. — Like malice and fraud, negligence is not a specific tort, but denotes a quality attributed to acts or omissions in particular relations or under particular circumstances where harm has resulted. In the case of negligence such acts or omissions, except where violative of positive law, are ordinarily innocent or indifferent, except that they are breaches of duty to the plaintiff, to all persons in like situation or relation or to the public generally, and have resulted in damage to him. Notwithstanding the absence of any actual intention to harm is of the essence of negligence, yet it is only by imputing an intention to harm from the absence of

65 Pa. St. 269). Negligence is "the absence of care according to the circumstances" (Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, 5 Hurlst. & N. 679; adopted by Paxson, J., in *Philadelphia, etc. R. Co. v. Stinger*, 78 Pa. St. 225). *s. p.*, *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24; 3 Atl. 533.

²⁰ The duty of care commensurate

with the danger is due by everyone when in a position where it is apparent that if he does not exercise due care he will cause injury to another (*Depue v. Flatson*, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 495 (1907)).

²¹ Cp. Beven on Negligence (3d ed.), 10.

care that the act or omission becomes negligent. The intention imputed is such as a reasonably prudent man in the defendant's position at the time would have foreseen as consequent. Public policy requires that the actor or passivist from whom harm proceeds should be conceived as a man of reasonable prudence and as intending the harm that naturally and proximately flows from his act or failure to act. Negligence, in last analysis, is a constructive mental attitude, direct evidence of which is always difficult, often impossible, and generally quite unreliable. Hence manifestations by conduct are relied on, and are, in truth, far more reliable than direct evidence itself. The mind of the average man thus becomes of necessity the standard. By average man in this connection, when applied to one engaged in a dangerous service, requiring skill and expertness, is always meant one possessing the requisite competency and skill and responding to judgment or conscience according to ordinary standards.²²

§ 11. No unreasonable duty required. — The law makes no unreasonable demands. It does not require from any man superhuman wisdom or foresight. Therefore no one is guilty of negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances. If one uses every precaution which the then existing state of science affords,²³ and which one of ordinary prudence would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable,²⁴ even though,

²² Cp. Foundations of Legal Liability (Street, T. A.), chaps. VI, VII; Bigelow on Torts (8th ed.), 108-110. circumstance of time, place or perability (Needham v. San Francisco, etc. R. Co., 37 Cal. 410; Smith v. Whittier, 95 Id. 279, 30 Pac. 529; Elster

²³ See Readhead v. Midland R. Co., L. R. 4 Q. B. 379; McPadden v. N. Y. Central, etc. R. Co., 44 N. Y. 478. v. Springfield, 49 Ohio St. 82, 30 N. E. 274).

²⁴ A railroad company is not liable for injuries caused by sparks from its locomotives, when it has used all

if he had used them, the injury would certainly have been avoided.²⁵ If he uses all the skill and diligence which can be attained by reasonable means, he is not responsible for failure.³⁶ The mere fact that the precautions neces-

the means known to science to extinguish them, and kept a reasonable watch upon the track, even though it might have prevented the mischief by keeping an army of men to watch the track and put out the sparks (*Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80; *Vaughan v. Taff Vale R. Co.*, 5 Hurlst. & N. 679, reversing s. c. 3 Id. 743; *Philadelphia R. Co. v. Yeiser*, 8 Pa. St. 366). For other cases of duty to prevent spread of fires from locomotives, see §§ 672, 673, *post*. The mere fact that a better method might have been provided for putting a machine in and out of gear does not prove negligence in not providing it (*Jacobsen v. Cornelius*, 52 Hun, 377, 5 N. Y. Supp. 306). In *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391, 51 N. W. 125, an electric railway company was held not liable for accidents resulting from its non-use of a device the practical utility of which had not then been demonstrated, though six months after the accident such device was provided on all its cars. Use of improvement not obligatory until its actual utility or superiority is demonstrated by use (*Alabama, etc. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238). It is held in some jurisdictions it is sufficient if the defendant used such precautions as were generally used at the time by men of ordinary prudence, in the same business and under the same circumstances (*Rylander v. Laursen*, 124 Wis. 2, 102 N. W. 341 (1905); *Wolf v. Des Moines Elevator Co.*, 126 Ia. 659, 98 N. W. 301, 102 N. W. 517 (1905). But see *McNally v. Colwell*,

91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494 (1892).

²⁵The text thus far is cited and approved in *Parrott v. Wells*, 15 Wall. 524 [the nitro-glycerine case]. A water-supplying company which had constructed its works upon the best known system, and kept them in good order for twenty-five years, at the end of which time a frost of unprecedented severity caused the pipes to burst, held not liable for injuries caused thereby (*Blyth v. Birmingham Water Co.* 11 Exch. 781). s. p. as to a dam (*Cottrell v. Marshall Infirmary*, 70 Hun, 495, 24 N. Y. Supp. 381). Instructions that a carrier was liable for the fall of a passenger "if the fall could have been averted by the skill or care of the defendant," were held erroneous (*Chicago, etc. R. Co. v. Trotter*, 61 Miss. 417). Instructions that a horse car company was bound, "as far as human foresight and care would enable it, to carry the plaintiff with safety," held, erroneous (*Louisville R. Co. v. Weams*, 80 Ky. 420). s. p., *East Tennessee, etc. R. Co. v. Aiken*, 89 Tenn. 245, 14 S. W. 1082 [protection against contact with machinery].

³⁶*Taylor v. Atlantic Ins. Co.*, 9 Bosw. 369; *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183 [furnishing supply of new rope to foreman, for derrick, if old one proved insufficient]. Not bound to adopt new devices until they have been tested and approved (*Breig v. Chicago, etc. Ry. Co.*, 98 Mich. 222, 57 N. W. 118 (1893), (injury from bursting of emery-wheel, held that the manu-

sary to avoid injury to others are so expensive as to consume all the profits of the business, is not enough to show that such precautions are unreasonable.²⁷ Where a statute imposes a duty for the public benefit, it is to be presumed, in the absence of very clear language to the contrary, that it was only intended to require the use of care and diligence, and not to make any one, and especially not a public body, absolutely responsible for the performance of the act prescribed, when no practicable degree of care and diligence would have called for such performance.²⁸

§ 12. In determining duty, regard to be had to era. —

In determining what is the duty, the failure in which constitutes negligence, regard is to be had to the growth of science, and the improvement in the arts, which take place from generation to generation;²⁹ and many acts or

facturer using such wheel was not negligent because he failed to use an effective device adopted by another manufacturer). But one is bound to adopt such improved appliances as are in common use by others engaged in like business, under similar circumstances (*Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, 13 L. R. A. 374 (1891); *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36 N. E. 813 (1894); *Moren v. New Orleans, etc. Ry. Co.*, 125 La. 944, 52 So. 106 (1910); *Minat v. Suavely*, 189 Fed. 725 (1911)).

²⁷ Where plaintiff, passing along a road, was injured by defendant's negligently blasting without covering the mine, the defendant cannot answer that the profits of the business do not warrant the expense of such precautions. The question of necessity is for the jury (*Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163).

²⁸ Hence, a public body, charged by statute with a duty, absolute in terms, to cleanse its sewers, is not to be held liable for not keeping its sewers cleansed at all events and under all circumstances (*Hammond v. St. Pancras*, L. R. 9 C. P. 316). The defendant's charter required it to maintain booms "sufficiently strong to secure all the lumber contained therein." Held, not to require the performance of what in the nature of the case cannot be performed; that if the defendant's boom broke from inevitable accident, the defendant was not responsible (*Brown v. Susquehanna Boom Co.*, 109 Pa. St. 57, 1 Atl. 156). To same effect is *Murray v. N. Y. Central R. Co.*, 3 Abb. Ct. App. 339 [railroad fence blown down in night time]. See § 282, *post*.

²⁹ See *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225 and cases *supra*.

omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence. Thus, the introduction of the steam engine has made it necessary that more care should often be used in the management of horses than was formerly necessary; the invention of the safety lamp made it a careless act to enter a bituminous coal mine with an open candle; and the invention of improved tools, machinery, and modes of working, has made it negligent to use old-fashioned and more dangerous ones.³⁰

§ 12a. Customary acts or customary manner of their performance.—The custom of others engaged in the same pursuit, though generally admissible in evidence by either party as tending to show negligence or the contrary, is not conclusive.³¹ “What usually is done may

³⁰ Defendant's servant was drilling the train; and whether dangerous, a hole in a gas-main, in a thoroughfare, using for the purpose a “diamond point” chisel, which caused particles of iron to fly off, and injured plaintiff's eye. Held, that the accident would have been avoided by drilling or screening, and defendant was liable (*Cleveland v. Spier*, 16 C. B. N. S. 399, § 673, *post*). The fact that shafts having projecting bolts were in common use in mines without being covered will not relieve a mining company from liability for injuries caused by unguarded bolts (*Homestake Min. Co. v. Fululerton*, 16 C. C. A. 545, 64 Fed. 923.)

³¹ When a servant of the company was injured by timber carried for personal accommodation of other employees, held, it was for the jury to say whether custom was proved and acquiesced in by those in charge of the train; and whether dangerous, and, if so, whether the company exercised reasonable care to prohibit it (*Walton v. New York, etc. Co.*, 139 Mass. 556; *Walker v. Hannibal, etc. Co.*, 121 Mo. 575; *Snow v. Fitchburg R. Co.*, 136 Mass. 552, distinguished). If the act was dangerous in its nature, a custom no defense. A railroad company owes a duty to those using the streets to use reasonable care to prevent acts dangerous to them by those on its trains (*Fletcher v. Baltimore, etc. R. Co.*, 168 U. S. 135 (1897)). “It is practically the universal rule that custom or usage will not justify a negligent act” (*Hamilton v. Chicago, etc. Ry. Co.*, 124 N. W. (Ia. Sup. Ct.) 363). Controlling test is not what others have done, but what a prudent man would do (*Chicago, etc. R. Co. v. Moore*, 166 Fed. 663, 93 C. C. A. 357 (1909)). *Contra:*

be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”³² And it has been held that evidence of the usual method of doing the particular business may be received without such evidence as is in general necessary to establish a custom.³³

§ 13. Violation of duty imposed by statute or ordinance. — The violation of any statutory or valid municipal regulation, established for the benefit of private persons, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, brought by a person belonging to the protected class, if the other elements of actionable negligence concur.³⁴ Thus, the

Bandekow v. Chicago, etc. Ry. Co., 136 Wis. 341, 117 N. W. 812 (1908.) (Hansell, etc. Foundry v. Clark, 214 Ill. 399, 73 N. E. 787 (1905). Negligent, but customary manner of doing work cannot transfer the master's obligation to the servant (*Houston, etc. Ry. Co. v. Turner*, 99 Tex. 547, 91 S. W. 562 (1906); but see *Gulf, etc. Ry. Co. v. Huyett*, 99 Tex. 631, 92 S. W. 454 (1906), and *St. Louis, etc. Ry. Co. v. Brisco*, 100 Tex. 354, 99 S. W. 1020 (1907). customary method not admissible building at the time, inadmissible

³² *Texas, etc. Ry. Co. v. Behymer*, 189 U. S. 468, 47 L. Ed. 905, 23 Sup. Ct. Rep. 622 (1902).

³³ *Fritz v. Western Union Tel. Co.*, 25 Utah, 263, 71 Pac. 209 (1903).

Note. Custody of collaterals, such care as banks of common prudence exercise (*Baltimore Third Nat'l Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35 (1876). Traveler injured by unfinished sidewalk, the test of negligence is the ordinary usage of business (*Beck v. Hood*, 185 Pa. St. 32, 39 Atl. 842 (1898). Thawing dynamite, test is usage of persons of ordinary prudence (*Bertha Zinc Co. v. Martin's Admr.*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999 (1896). Construction of building, evidence of

³⁴ So held, as to statutes (*Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 S. Ct. 619; *Queen v. Dayton Coal, etc. Co.*, 95 Tenn. 458, 32 S. W. 460 [child employed in mining, contrary to statute, can recover therefor]). So held, as to city ordinances (*Jetter v. Harlem R. Co.*, 2 Abb. Ct. App. 458 [running train at greater speed than allowed by city ordinance]; *Massoth v. Delaware, etc. Canal Co.*, 64 N. Y. 524 [violation of ordinance as to rate of speed at street crossing]; *McGrath v. N. Y. Central R. Co.*, 63 Id. 522; *Lane v. Atlantic Works*, 111 Mass. 136; *Toledo, etc. R. Co. v. Deacon*, 63 Ill. 91; *Devlin v. Gallagher*, 6 Daly, 494; *Langhoff v. Milwaukee, etc. R. Co.*,

violation of a statute or ordinance regulating the speed of vehicles, horses, or trains,³⁵ or requiring special

19 Wis. 515; *Mueller v. Milwaukee R. Co.*, 86 Id. 340, 56 N. W. 914). On this point, *Brown v. Buffalo, etc. R. Co.*, 22 N. Y. 191, is completely overruled (*Massoth v. Delaware, etc. Canal Co.*, *supra*). Violation of city ordinance does not, however, necessarily make injury willful (*Illinois, etc. R. Co. v. Hetherington*, 83 Ill. 510). There are cases in which it was decided that this principle applied to city ordinances (*Heeney v. Sprague*, 11 R. I. 456; *Phila., etc. R. Co. v. Ervin*, 89 Pa. St. 71). But such ruling was not necessary to a decision, and the overwhelming weight of authority is against them. They are well reviewed in *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237. A mere request of village authorities to a railroad company, to erect gates at street crossings, imposed no duty upon the latter to do so (*Daniels v. Staten Island, etc. R. Co.*, 125 N. Y. 407, 26 N. E. 466. Compare *Merrigan v. Boston, etc. R. Co.*, 154 Mass. 189, 28 N. E. 149; *Williams v. Chicago, etc. Ry. Co.*, 135 Ill. 491, 26 N. E. 661, 25 Am. St. Rep. 397, 11 L. R. A. 352 (1891), (statute requiring signals on approaching a public crossing are for the protection of those using the crossing, and action cannot be maintained by a farmer ploughing in his field, injured by the fright of his team, caused by the sudden appearance of the train, no preliminary signal having been given); *Hamilton v. Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350 (1899), (where the plaintiff, a member of the fire department, while endeavoring to extinguish a fire in a building under defendant's control,

fell through an unguarded elevator shaft, held that the act requiring such open shafts to be guarded, though expressed in general terms, was restrained by its title to the protection of employees; "In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed on him by statute for the benefit of somebody else, and that such person would not have been injured if the duty had been performed, but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection").

³⁵ *Beisiegel v. N. Y. Central R. Co.*, 14 Abb. N. S. 29; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Baltimore R. Co. v. McDonnell*, 43 Md. 552; *Liddy v. St. Louis, etc. R. Co.*, 40 Mo. 506; *Langhoff v. Milwaukee, etc. R. Co.*, 19 Wis. 515; *Hoppe v. Chicago, etc. R. Co.*, 61 Id. 357, 21 N. W. 227; *St. Louis, etc. R. Co. v. Mathias*, 50 Ind. 65; *Pennsylvania Co. v. Hensil*, 70 Id. 569; *Cleveland, etc. R. Co. v. Harrington*, 131 Id. 426, 30 N. E. 37; *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. 1103; *Dahlstrom v. St. Louis, etc. R. Co.*, 108 Mo. 525, 18 S. W. 919; *South, etc. Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142, and cases *supra*; *Seaboard Air Line Ry. Co. v. Smith*, 53 Fla. 375, 43 So. 235 (1907); *O'Brien v. Wisconsin, etc. Ry. Co.*, 119 Wis. 7, 96 N. W. 424 (1903); *Rowe v. Southern Ry. Co.*, 71 S. E. (S. C.) 833 (1911) [city ordinance limiting rate of speed to 10 miles an hour].

signals or warnings to be given upon their approach,³⁶ or lights to be shown,³⁷ or requiring buildings to have fire escapes,³⁸ trap doors,³⁹ or requiring "splices" on electric wires to be perfectly insulated,⁴⁰ is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby. The violation of such a statute of the United States may be made the basis of an action for negligence in a State court.⁴¹ These principles apply, not only where the statute or ordinance declares that persons violating it shall be liable for any damage sustained by reason of its breach,⁴² but also where it contains no such provisions, and simply imposes a penalty by way of fine or otherwise, for disobedience.⁴³ Nor is the plaintiff, in such a case, bound to prove that the act required by

³⁶ Such as sounding bell or whistle (McGrath v. N. Pacific R. Co., 63 N. Y. 522; Jetter v. Harlem R. Co., 2 Abb. Ct. App. 458; Lane v. Atlantic Works, 111 Mass. 136; Howenstein v. Pacific R. Co., 55 Mo. 33; Chicago, etc. R. Co. v. Boggs, 101 Ind. 522; Baltimore, etc. R. Co. v. Walborn, 127 Ind. 142, 26 N. E. 207; Evans v. Concord R. Co. (N. H.) 21 Atl. 105; Kenney v. Hannibal, etc. R. Co., 105 Mo. 270, 16 S. W. 837; Western Railway v. Sistrunk, 85 Ala. 352, 5 So. 79; Denver, etc. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79; San Antonio, etc. R. Co. v. Bowles, 88 Tex. 634, 32 S. W. 880; East Tennessee, etc. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790 [a peculiar statute]; Houston, etc. Ry. Co. v. O'Neal, 91 Tex. 671, 47 S. W. 95 (1898); Spiller v. St. Louis, etc. Ry. Co., 112 Mo. App. 491, 87 S. W. 43 (1905); Louisville, etc. Ry. Co. v. Malloy, 28 Ky. L. Rep. 1113, 91 S. W. 685 (1906); Swisher v. Interurban Ry. Co., 130 N. W. (Ia.) 404 (1911).

³⁷ Whittaker v. Harlem R. Co., 51 N. Y. Sup. 287.

³⁸ Pauley v. Steam Gauge, etc. Co., 131 N. Y. 90, 29 N. E. 999, 30 Id. 865; McLaughlin v. Armfield, 58 Hun, 376, 12 N. Y. Supp. 164; Gorman v. McArdle, 67 Hun, 484, 22 N. Y. Supp. 479; The Frank P. Lee, 34 Fed. 480, affirming 30 Id. 277. But compare Maker v. Slater Mill Co., 15 R. I. 112, 23 Atl. 63.

³⁹ McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153; Freeman v. Glens Falls Mill Co., 61 Hun, 125, 15 N. Y. Supp. 657.

⁴⁰ Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51.

⁴¹ Carroll v. Staten Island R. Co., 58 N. Y. 126; Van Norden v. Robinson, 45 Hun, 567 [steamboat not inspected].

⁴² This was the case in Carroll v. Staten Island R. Co., *supra*.

⁴³ Most of the cases already cited belong to this class, especially under note 34 of this chapter.

the law was one which, by its nature, was essential to the exercise of due care by the defendant.⁴⁴ It is held in New York,⁴⁵ and Pennsylvania,⁴⁶ that the violation of a statute or ordinance of this kind is not negligence as matter of law, but only "some evidence of negligence." In other States, such as Georgia, Indiana, Missouri, Wisconsin, Minnesota and Colorado, such violation is "negligence *per se*."⁴⁷ It seems to us that the true rule is, in all such cases, that the violation of such a statute or ordinance should always be deemed presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive. But, if it appears upon the whole evidence that the circumstances were such as would convince a prudent man that the real object which the legislators had in view would be much better served by the breach of a

⁴⁴ *Jetter v. N. Y. & Harlem R. Co.*, 1041; *Keim v. Union R. Co.*, 90 Mo. 2 Abb. Ct. App. 458; *Sluder v. St.* 314, 2 S. W. 427; *Platte, etc. Canal Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186. Violation of statutes and ordinances with monographic note (1905). See *Mills v. Missouri, etc. Ry. Co.*, 94 Tex. 242, 59 S. W. 874 (1901).

⁴⁵ *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488, applied to statutes; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153. See the first case criticised and disapproved (*Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237) but reaffirmed (*Moore v. Gadsden*, 93 N. Y. 12; *Rochester v. Campbell*, 123 Id. 405; *Chrystal v. Troy, etc. R. Co.*, 124 Id. 519).

⁴⁶ *Connor v. Electric Traction Co.*, 173 Pa. St. 602, 34 Atl. 238.

⁴⁷ *Western, etc. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912; *Central Railroad, etc. Co. v. Curtis*, 87 Ga. 416, 13 S. E. 757; *Indiana, etc. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237; *Smith v. Milwaukee Builders', etc. Exch.*, 91 Wis. 360, 64 N. W.

Co. v. Dowell, 17 Colo. 376, 30 Pac. 68. Violation of statutes and ordinances have also been held negligence *per se* in Texas, *Houston, etc. Ry. Co. v. Wilson*, 60 Tex. 142 (1883); *Gossett v. Citizens' Ry. Co.*, 96 Tex. 1, 69 S. W. 976 (1902); in California, *Finn v. Clark*, 103 Pac. 944 (1909); in South Carolina, *Lindler v. Railroad Co.*, 84 S. C. 536, 66 S. E. 995 (1910); in Alabama, *Smith v. Wolf*, 49 So. 395 (1909); and in Nebraska, *Vandever v. Moran*, 112 N. W. (1907). Negligence cannot be predicated on violation of statute or ordinance alone when act prohibited is itself indifferent, and no duty exists independently (*Field v. Gowdy*, 199 Mass. 568, 85 N. E. 884 (1908); *prima facie* evidence of negligence (*Shields v. Pugh*, 107 N. Y. Supp. 604, 122 App. Div. 586 (1907); *O'Donnell v. Riter Conly Co.*, 124 Ill. App. 544 (1906).

technical rule than by its strict observance, the defendant should not be held guilty of negligence in such a breach. And such negligence may not necessarily warrant recovery of damages; for it must be a cause of the injury.⁴⁸ It is certainly wrong to instruct a jury that mere proof of such negligence entitles the plaintiff to recover.⁴⁹ It is said, under special circumstances, the jury might excuse an omission to give signals, required by a statute, as prudent under those circumstances.⁵⁰

§ 13a. Regulations, whether for the public benefit only, or for the benefit of individuals as well.—The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed in whole or in part for their especial benefit.⁵¹ If the duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons,

⁴⁸ *Christner v. Cumberland, etc. Coal Co.*, 146 Pa. St. 67, 23 Atl. 221; *Bott v. Pratt, supra*.

⁴⁹ *Van Raden v. N. Y., New Haven, etc. R. Co.*, 56 Hun, 96, 8 N. Y. Supp. 914.

⁵⁰ *Wakefield v. Connecticut, etc. R. Co.*, 37 Vt. 330; recognized in *Bott v. Pratt, supra*; and see *Central Railroad, etc. Co. v. Brunswick, etc. R. Co.*, 87 Ga. 386, 13 S. E. 520; and see § 27, *post*.

⁵¹ But the court, in *Taylor v. Lake Shore, etc. Ry. Co.*, 45 Mich. 74, having announced this clear doctrine, says, upon looking at the entire general act of Michigan, adopted in 1873, for the incorporation of cities, of which the section in question, requiring the removal by abutting owners of snow and ice from sidewalks, is a part, that it was intended for the benefit of the public

only; restricting the effect of the sanctionary provision that "he shall be liable to the city for the amount of all damages which shall be recovered against the city for any accident or injury occurring by reason of such neglect," to a recovery over by the city. No authority is cited, but the court seems appalled by the extent and variety of the liability that would be imposed by a different construction. To the same effect, *Kirby v. Boylston Mkt. Assn.*, 14 Gray, 259; *Flynn v. Canton Co.*, 40 Md. 312; *Gardner v. Rhodes*, 114 Ga. 929, 41 S. E. 63, 57 L. R. A. 749 (1902). Held, that ordinance requiring fire-proof shutters created no duty to individuals to whose premises fire was, due to their absence, communicated (*Moore v. Godsden*, 93 N. Y. 12; *Heery v. Sprague*, 11 R. I. 456;

each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery.⁵² And in such case, for damages paid, the municipality has its action over against the property owner.⁵³

§ 14. A personal duty cannot be delegated. — One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another person. Therefore, the fact that he may have used the utmost care in selecting an agent to perform this duty,⁵⁴ or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it.⁵⁵

Rochester v. Campbell, 123 N. Y. 405; Hartford v. Talcott, 48 Conn. 525).

⁵² Hayes v. Michigan Cent. Ry. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. See also Sluder v. St. Louis Tr. Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186 (1905), with monographic note (1900).

⁵³ City of San Antonio v. Talerico, 98 Tex. 151, 81 S. W. 518 (1904); Same v. Smith, 94 Tex. 266, 59 S. W. 1109 (1901).

⁵⁴ Rochester White Lead Co. v. Rochester, 3 N. Y. 463 [constructing street sewer]; Grote v. Chester, etc. R. Co., 2 Exch. 251. But see Sutton v. Clarke, 6 Taunt. 29; Hall v. Smith, 2 Bing. 156.

⁵⁵ Hole v. Sittingbourne R. Co., 6 Hurlst. & N. 488; Pickard v. Smith, 10 C. B. N. S. 480. In the latter case the distinction is clearly pointed out between the responsibility of a person who causes something to be done which is wrongful, or fails to perform

something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work. Williams, J., said: "If the performance of the duty be omitted, the fact of his having intrusted it to a person who also neglected it, furnishes no excuse, either in good sense or in good law." See *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, where many cases on this point are reviewed; *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48 [carrier's failure to deliver freight, caused by servants' strike]; *Weed v. Panama R. Co.*, 17 N. Y. 362 [detention of passenger train by company's servants]. See § 176, *post*. One contracting to do an unlawful thing, such as making excavations in a highway, or cutting into a party-wall and the like, cannot relieve himself from liability by having the contractor stipulate to guard against accidents (*Dygert v. Schenck*, 23 Wend. 446; *Congreve*

Thus, a municipal corporation, bound to repair its streets, is not relieved from liability for non-repair by the fact that it has made a contract for such repairs with a responsible and competent person;⁵⁶ and a railroad company cannot defend itself against the claims of passengers for injuries, by showing that it has employed the best servants that it could possibly obtain,⁵⁷ or purchased its locomotives and cars at the best factories.⁵⁸

v. Smith, 18 N. Y. 79; Creed v. Hartmann, 29 Id. 591; Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049; Waller v. Lasher, 37 Ill. App. 609.

⁵⁶ Storrs v. Utica, 17 N. Y. 104; Grote v. Chester, etc. R. Co., 2 Exch. 251; Allen v. Hayward, 7 Q. B. 960. It is no excuse for a city, leaving a street unlighted at night, that the city had contracted with another to light the street (Hayes v. West Bay City, 91 Mich. 418, 15 N. W. 1067). For other cases see § 297, *post*.

⁵⁷ Thus, if by reason of work done by a railroad company in the neighborhood of their track, a stone rolls on the track and obstructs it, that work being such that any negligence in its performance would be likely to cause such an obstruction, they are liable to a passenger for an accident caused by the obstruction, although they employed a skilled contractor to perform the work (Virginia, etc. R. Co. v. Sanger, 15 Gratt. 230).

⁵⁸ Hegeman v. Western R. Co., 13 N. Y. 9. The proposition that duties can never be shifted has not been thought in some jurisdictions to forbid agreements, express or implied, by general rules or specific notice, of the servant to inspect the machinery, tools or apparatus with which he works, and his consequent waiver of liability by the master for

such defects as were discoverable by such reasonable inspection, notwithstanding the master's common-law responsibility (Pratt v. Lake Shore Ry. Co., 63 Hun, 616, 18 N. Y. Supp. 682; LaCroy v. New York, etc. Ry., 132 N. Y. 570, 30 N. E. 391; Richmond, etc. Ry. Co. v. Dudley, 90 Va. 304, 18 S. E. 274. But it has been wisely said: "As a general rule, the servant is not required to inspect the tools or other instrumentalities furnished by the master for the performance of his duties. We think he does assume the risk of such defects as fall under his observation and of such patent defects as a man of ordinary capacity and prudence would necessarily observe in them in using them to do their work. Can the master by a mere notice or contract absolve himself from the primary duty of furnishing safe instrumentalities in the first instance? We doubt it. We think, however, that it is not unreasonable to require his servants to examine instrumentalities already in use in order to ascertain whether they are in good order. Hence we think a rule to require servants to inspect their tools, etc., ought to be construed as applying only to those already in use. But in any event, in order to make a rule binding upon a servant, it should be brought to his knowledge." Adams v. Gulf, etc. Ry. Co., 101 Tex. 5, 102 S. W. 96 (1907).

§ 15. No negligence where there is no breach of duty.

—As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it. If, therefore, the accident complained of was inevitable, it is not a case of negligence.

§ 16. Inevitable accident.—Inevitable accident is a broader term than “the act of God.” That implies the intervention of some cause not of human origin and not controllable by human power.⁵⁹ An accident is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another.⁶⁰ In such a case, the essential element of a legal duty is wanting; and it cannot, therefore, be a case of negligence. Therefore, no one can be made responsible for damage caused to another by an act which is strictly lawful under all the circumstances, unless he has been negligent in the manner of doing the act.⁶¹ Thus, a carrier, who had unwittingly received a

⁵⁹ *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Forward v. Pittard*, 1 T. R. 27; *Merritt v. Earle*, 29 N. Y. 115; *Hays v. Kennedy*, 41 Pa. St. 378. See *Blythe v. Denver, etc. R. Co.*, 15 Colo. 333, 25 Pac. 702.

⁶⁰ See *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Blyth v. Birmingham Water*

Co., 11 Exch. 781; *Losee v. Buchanan*, 51 N. Y. 476 [boiler explosion]; *Dobbins v. Brown*, 119 Id. 188, 23 N. E. 537 [stopping of hoisting apparatus]; *Reiss v. N. Y. Steam Co.*, 128 N. Y. 103, 28 N. E. 24 [escape of steam from heating apparatus]; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259 [explosion of oil, communicating fire to plaintiff's property]. An accident is unavoidable if the person in connection with whom it occurs neither has, nor is

legally bound to have sufficient power to avoid it or prevent its injuring another; and in such case, the essential element of legal duty being wanting, the person cannot be held negligent (*Roanoke Ry., etc. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385 (1908)).

⁶¹ *Parrot v. Wells*, 15 Wall. 524; *Losee v. Buchanan*, 51 N. Y. 476; *Searles v. Manhattan R. Co.*, 101 Id. 661; *Brown v. Collins*, 53 N. H. 442; *Vaughan v. Taff Vale R. Co.*, 5 Hurlst. & N. 678. The doctrine of the text was applied in *Ohio, etc. R. Co. v. Lackey*, 78 Ill. 55, notwithstanding a statute which made railroad companies chargeable for all funeral expenses in case of persons dying or killed by accident upon their cars.

parcel of nitro-glycerine, which exploded on the way, was held not liable for damage done thereby.⁶² So, one who, in self-defense, justifiably fires a pistol at an assailant, and in so doing accidentally shoots an innocent person, is not liable for the damage thus done.⁶³ Many other instances might be cited.⁶⁴ Much less can any one be held guilty of negligence, when the injury of which he is the alleged cause is caused solely by the "act of God"⁶⁵ or a public enemy, within the legal meaning of those terms.

⁶² *Parrot v. Wells*, 15 Wall. 524.

⁶³ *Morris v. Platt*, 32 Conn. 75; s. p., *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615. The burden is on defendant to prove that the gun was not either intentionally or negligently aimed at the person shot (*Atchison v. Dullam*, 16 Ill. App. 42). See also *Moebus v. Becker*, 46 N. J. Law, 41; *Bradley v. Andrews*, 51 Vt. 530; *Hankins v. Watkins*, 77 Hun, 360; 28 N. Y. Supp. 867 [hunting accident]. Where the defendant, in endeavoring to separate his dog from another with which it was fighting, accidentally struck the owner of the latter dog, it was held that he was not liable for his accidental blow (*Brown v. Kendall*, 6 Cush. 292).

⁶⁴ *Dygart v. Bradley*, 8 Wend. 473 [canal boats' collision]; *Harvey v. Dunlop, Hill & D. Supp.* 193 [throwing stone]; *Calkins v. Barger*, 44 Barb. 424 [fire]; *Aldridge v. Great Western R. Co.*, 3 Man. & G. 515; *McGrew v. Stone*, 53 Pa. St. 436; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Garris v. Portsmouth, etc. R. Co.*, 2 Ired. Law, 324; *Harding v. Fahey*, 1 Greene, 377; *Wabash, etc. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *O'Connor v. Illinois Cent. R. Co.*, 83 Iowa, 105, 48 N. W. 1002; *Brown v. Collins*, 53 N. H. 442 [frightened horse]. In the last case

the question of inevitable accident is fully stated and discussed, with reference to leading cases, by Doe, J. See §§ 626, 647, *post*.

⁶⁵ *Nugent v. Smith*, L. R. 1 C. P. Div. 444 (per James, L. J.); *Nichols v. Marsland*, L. R. 10 Ex. 255; affirmed 2 Ex. Div. 1; *Nitrophosphate Co. v. London, etc. Dock Co.* L. R. 9 Ch. Div. 303; *River Wear Co. v. Adamson*, L. R. 2 App. Cas. 743; *Blyth v. Birmingham Water Works Co.*, 11 Exch. 781. A storm may be of such unusual violence as properly to be the "act of God" (*Nichols v. Marsland*, L. R. 10 Ex. 255, per Bramwell, B.). A railroad embankment which had been standing five years in a country subject to floods, was undermined by an extraordinary flood, and sank in the night-time, by reason of which an express train left the line and a passenger was injured. Held, "the company was not bound to have constructed their embankment so as to meet such extraordinary floods" (*Withers v. North Kent R. Co.*, 3 Hurlst. & N. 969). The same rule prevails generally in this country (*International, etc. R. Co. v. Halloran*, 53 Tex. 46; s. c., 37 Am. Rep. 744; *Gillespie v. St. Louis, etc. R. Co.*, 6 Mo. App. 554). The following were cases of extraordinary floods or other causes attributed to the act of God, and not

§ 16a. **Casus.**—If the misfortune that occurs is without the fault of the person sought to be charged it is not very material whether it be called “inevitable accident,” “unavoidable casualty,” or “act of God.” Except for the indisposition to speak of an act of God as accidental there would be no dissent from the statement in the preceding section that the latter really included the former. The term unavoidable misfortune, embracing both, would probably be unobjectionable. For an occurrence causing damage, without the fault of the person sought to be charged, no action will lie, “the thing amiss—the *injuria*—is wanting.”⁶⁶ No one is responsible for unforeseen injuries caused in the proper prosecution of a lawful business.⁶⁷ In such case the loss rests where it falls. But if the act is itself unlawful, or, it is believed, wrongful or blameworthy in respect of a duty owing to the plaintiff, then the defendant becomes liable for all the consequences, irrespective of the question of the care, skill, or diligence used.⁶⁸

§ 16b. **Negligence of defendant, where accident or Act of God is a concurring cause.**—The rule is the same

ordinarily foreseen and preventable, R., etc. Co. v. Kent, 87 Ga. 402, 13 and for which there was no liability: S. E. 502 [water spout washing out China v. Southwick, 12 Me. 238; culvert]; Black v. Chicago, etc. R. Lapham v. Curtis, 5 Vt. 371; Shrewsbury v. Smith, 12 Cush. 177; Oakham v. Holbrook, 11 Id. 299; Wendell v. Pratt, 12 Allen, 464; Bell v. McClintock, 9 Watts, 119; Lehigh Bridge Co. v. Lehigh Coal, etc. Co., 4 Rawle, 9; Higgins v. Chesapeake, etc. Canal Co., 3 Harr. 411; Morris Canal Co. v. Ryerson, 27 N. J. Law, 457; Richardson v. Kier, 34 Cal. 64; Everett v. Hydraulic Flume Co., 23 Id. 225; Campbell v. Bear River Co., 35 Id. 679; Hoffman v. Tuolumne Water Co., 10 Id. 413; Wolf v. St. Louis, etc. Water Co., 10 Id. 541; Piedmont, etc. R. Co. v. McKenzie, 75 Md. 458, 24 Atl. 157; Central R., etc. Co. v. Kent, 87 Ga. 402, 13 S. E. 502 [water spout washing out culvert]; Black v. Chicago, etc. R. Co., 30 Neb. 197, 46 N. W. 428 [snow storm preventing moving of trains]; Smith v. Western R. of Ala., 91 Ala. 455, 8 So. 754 [sudden and unprecedented overflow of river]; Slater v. South Carolina R. Co., 29 S. C. 96, 6 S. E. 936 [earthquake]; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325 [sudden freezing and thawing]. See other cases cited under §§ 665, 668, 686, 728, 732, *post*.
⁶⁶ Cooley on Torts, 2d ed., 91-2.
⁶⁷ Parrott v. Wells, *supra*.
⁶⁸ Sexton v. Zett, 44 N. Y. 430; Illinois Cent. Ry. Co. v. Siler, 229 Ill. 390, 15 L. R. A. (N. S.) 819 (1907).

where act of God or accident combines or concurs with the negligence of the defendant to produce the injury as when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his own wrongful act or omission.⁶⁹

§ 17. Apparent exceptions to rule as to inevitable accident. — In the nature of things, there can be no exception to this rule. But there has been such conflict in its ap-

⁶⁹ Where the walls of defendant's building destroyed by fire were left standing in a dangerous condition for several days and were blown down by a storm (*Nordheimer v. Alexander*, 19 Can. Sup. Ct. 248; *Chideater v. Cons. Ditch Co.*, 59 Col. 597). Lineman killed by electric shock combined with inevitable accident (*Com. Elec. Co. v. Rose*, 214 Ill. 585, 73 N. E. 780 (1905)). Injury by being thrown from buggy caused by defective street together with breaking of harness by runaway horse (*Joliet v. Schufeldt*, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 458, 18 L. R. A. 750 (1893)). Defective bridge combined with fright of horse (*Board of Comrs. of Parke Co. v. Sappenfield*, 6 Ind. App. 577, 33 N. E. 1012 (1893)). Sign hung over street with due care, but in violation of city ordinance blown down (*Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. St. Rep. 354 (1871)). Excavation negligently left open and without protection by masonry, from collection of water undermining adjacent building (*Ulrick v. Dakota Light, etc. Co.*, 3 S. D. 44, 51 N. W. 1023 (1892)). Excavation unfenced, adjoining street combined with unavoidable accident (*Clay Center v. Jones*, 2 Kans. App. 568, 44 Pac. 745 (1896)). Pure accident combined with negligence in construction of railway track will not exonerate the company (*Patton v. Southern Ry. Co.*, 82 Fed. 979, 27 C. C. A. 287 (1897)). Negligence not excused because uniting with act of God where such negligence was a proximate cause (*Quincy Gas, etc. Co. v. Schmitt*, 123 Ill. App. 647 (1906)). Where injuries received in attempting to extinguish fire communicated to her premises, having been negligently set by railway to combustible material negligently left on its right of way, combining with unavoidable accident, the company is liable (*Illinois Cent. R. Co. v. Siler*, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819 (1907)). "Where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, but if the accident would not have resulted in the injury except for the negligent act, the negligence is the proximate cause of the injury for which damages may be recovered" (*Goe v. Northern Pac. Ry. Co.*, 30 Wash. 654, 71 Pac. 182 (1903); *Lundeen v. Livingston Elec. Co.*, 17 Mont. 32, 41 Pac. 995 (1895); *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130 (1904); *Birsch v. Citizens' Elec. Co.*, 36 Mont. 574, 93 Pac. 940 (1908)). Where negligence in storing dynamite combines with the act of God in producing explosion

plication as to create some seeming exceptions. These relate chiefly to the keeping of dangerous things. Thus, in England it was long adjudged that every man was bound, at his own peril, to keep his own fire on his own land, and that, if he kindled a fire, whether purposely or by accident, he was liable for its spread upon adjoining land, quite irrespective of any negligence on his part.⁷⁰ This doctrine was relaxed by statute.⁷¹ At a very recent date, it was also adjudged that one who collects a vast mass of water on his land, which, in its nature, must be destructive if it escapes, is bound absolutely to keep it safely there, and is liable for its escape, even though he may be entirely free from the faintest shade of negligence.⁷² And it has generally been held that one who keeps wild and savage animals must keep them at his own peril, and is liable for all injuries done by them if they escape, although such escape was caused by inevitable accident.⁷³ But all these decisions, if correct, simply take these cases out of the realm of negligence and put them in the same class with the liability of common carriers of goods. No question of care, diligence,

causing injury, defendant is liable purely accidental fires (*Filliter v. Brown v. West Riverside Coal Co. Phippard*, 11 Q. B. 347). (*Iowa*), 120 N. W. 732 (1909). See ⁷² *Fletcher v. Rylands*, L. R. 3 H. also *Schmidt v. St. Louis Tr. Co.* L. 330. This rule has been applied (*Mo.*), 120 S. W. 96 (1909); *Bogart v. Delaware, etc. Ry. Co.*, 145 N. Y. 283, 40 N. E. 17; *Greeley v. State*, 94 N. Y. App. 605, 88 N. Y. Supp. 498). Injury by driver of wagon, struck from rear by defendant's street car, noise from railway trains preventing the hearing of the gong (*Fleddermann v. St. Louis Tr. Co.*, 134 Mo. App. 199, 113 S. W. 1143 (1908)).

⁷⁰ *Beaulieu v. Finglam*, 2 H. IV, fol. 18, pl. 6; cited, 22 N. Y. 366. No negligence was pleaded in that case.

⁷¹ These statutes related only to

purely accidental fires (*Filliter v. Phippard*, 11 Q. B. 347). ⁷² *Fletcher v. Rylands*, L. R. 3 H. L. 330. This rule has been applied to the growing of a poisonous tree. If its branches extended over a neighbor's land, the owner of the tree is held liable for all injuries done thereby to animals eating the leaves (*Crowhurst v. Amersham Board*, L. R. 4 Ex. Div. 5).

⁷³ *May v. Burdett*, 9 Q. B. 101. This rule as to wild and savage animals, was approved in *Van Leuven v. Lyke*, 1 N. Y. 515, but that was only a *dictum*, and may well stand upon the ground that they are a nuisance. The law of negligence does not apply to nuisances (*Heeg v. Licht*, 80 N. Y. 579).

or skill is involved, and therefore no negligence. The mere act of keeping a savage and dangerous animal may indeed be well deemed an act of negligence. The old English rule as to fire is universally considered never to have been law in this country;⁷⁴ and the modern extension of this rule to accumulations of water is rejected in New York,⁷⁵ New Hampshire,⁷⁶ Vermont,⁷⁷ New Jersey,⁷⁸ California,⁷⁹ though accepted in Massachusetts⁸⁰ and Minnesota,⁸¹ where the principle is applied to other cases.

§ 18. What is not inevitable accident. — But in order to prove that an accident was inevitable, it is not always enough to show that, under the circumstances existing at the time, it could not have been then avoided. It must also be the fact that the defendant was not guilty of any negligence which brought about any of those circumstances.⁸² For if, by previous negligence, he brought

⁷⁴ *Ryan v. N. Y. Central R. Co.*, falling on adjoining land]. *Shrewsbury v. Smith*, 12 Cush. (Mass.) 177. 35 N. Y. 210; *Losee v. Buchanan*, 51 N. Y. 476. See §§ 665, 728, *post*.

⁷⁵ See *Losee v. Buchanan*, *supra*.

⁷⁶ *Brown v. Collins*, 53 N. H. 442; *Garland v. Towne*, 55 Id. 57.

⁷⁷ See *Lapham v. Curtis*, 5 Vt. 371.

⁷⁸ *Marshall v. Welwood*, 38 N. J. Law, 339.

⁷⁹ *Everett v. Hydraulic Flume Co.*, 23 Cal. 225. To the same effect, *China v. Southwick*, 12 Me. 238; *Bell v. McClintock*, 9 Watts (Pa.) 119; *Lehigh Bridge Co. v. Lehigh Coal Co.*, 4 Rawle (Pa.) 9; *Higgins v. Chesapeake, etc. Canal Co.*, 3 Harr. (Del.) 411; *Gulf, etc. Ry. Co. v. Oakes*, 94 Tex. 155, 58 S. W. 999, 86 Am. St. Rep. 835 (1900); *Galveston, etc. Ry. Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367, with monographic note (1907).

⁸⁰ *Shipley v. Fifty Asso.*, 101 Mass. 251 [snow falling from roof; *Gorham v. Gross*, 125 Mass. 238 [wall

bury v. Smith, 12 Cush. (Mass.) 177.

⁸¹ *Cahill v. Eastman*, 18 Minn. 324.

⁸² *The Clarita*, 23 Wall. 1; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75; *Romney v. Trinity House*,

L. R. 5 Ex. 204, 7 Id. 247. If there is any fault, there is liability, as where one, getting on the wrong side of the road in a dark night, drives against another (*Leame v. Bray*, 3 East, 593), or pulls the wrong rein (*Wakeman v. Robinson*, 1 Bing. 213). See *Shawhan v. Clarke*, 24 La. Ann. 390; *Western U. Tel. Co. v. Quinn*, 56 Ill. 319; *Sullivan v. Scripture*, 3 Allen, 564; *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453; *Haney v. Kansas City*, 94 Mo. 334; 7 S. W. 417; *Nordheimer v. Alexander*, 19 Can. S. C. R. 248 [fall of house-wall during high wind after a fire]; and cases cited under §§ 645-653, *post*).

Where the unintentional shooting of one hunter by another might have been avoided, if he had previously

himself or his property into circumstances of such difficulty or peril as to make it impossible for him to escape from them without injuring his neighbor, he cannot excuse himself by showing that he would have done more injury, if he had not attempted to escape. His original fault deprives him of the right to plead inevitable accident.⁸³ And one who, by inevitable accident, causes an injury, must use due care to prevent the consequences of the accident from extending further than is inevitable.⁸⁴

§ 19. Absence of intent to produce damage necessary element.—The last element of negligence, and that which distinguishes it from fraud or other willful injury, is the absence of any distinct intention to produce the precise damage to the plaintiff, which actually follows as a result of the negligence.⁸⁵ If such an intention is alleged in a complaint, the action is based upon willful injury, and can only be sustained upon that ground.⁸⁶ If it is not so alleged, evidence of an actual intent to cause the damage which is the basis of the action is inadmissible.⁸⁷ But it often happens that evidence comes out at the trial, in a perfectly proper way, from which a jury might fairly infer actual malice, and occasionally, of such a nature that no sensible men could infer anything less. In such cases, no malice being pleaded, the plaintiff's counsel ought not to be allowed to argue to the jury that

looked to see what was within the range of his gun the accident was not inevitable (*Hankins v. Watkins*, 77 Hun, 360, 28 N. Y. Supp. 867). See § 686, *post*.

⁸³ All the doctrines of the text are sustained in *The Clarita*, 23 Wall. 1. See *Case v. Perew*, 46 Hun, 57 [running a barge into canal boat when use of steam tug might have prevented collision].

⁸⁴ *The Clara Killam*, L. R. 3 Adm. 161. The fact that the accident was so unusual and extraordinary that

it could not reasonably have been expected to happen does not relieve defendant from the effect of his negligence (*Doyle v. Chicago, etc. R. Co.*, 77 Iowa, 607, 42 N. W. 555 [plaintiff struck by iron coupling-pin thrown by the wheel of a passing car]).

⁸⁵ *Ante*, § 6; *Wharton*, Negl. § 11; *Gardner v. Heartt*, 3 Denio, 232, 236; *Blyth v. Birmingham Water Co.*, 11 Exch. 781.

⁸⁶ *Indiana, etc. R. Co. v. Burdge*, 94 Ind. 46.

⁸⁷ *Pennsylvania R. Co. v. Smyth*,

it was a case of real malice; and the court should carefully instruct the jury that they cannot award damages upon any theory more severe than that the defendant had been so grossly negligent as to be indifferent whether he injured the defendant or not. All this, however, is, of course, subject to the power of the court to amend the pleadings and to allow a change of the original issue.

§ 20. Distinction between negligence and fraud.—There is, necessarily, a marked distinction between negligence and fraud. Sir William Jones, in his celebrated treatise on Bailments, somewhat confounded the two, speaking of gross negligence as equivalent to fraud. But this is a misuse of terms. If it is meant that the effects of such negligence are as prejudicial as those of positive fraud, that is a point of no importance, since the most trivial negligence may be attended with the same results. If it is meant that the motive is as bad, that is an assertion which cannot be sustained without confining the remedy for gross negligence to a very limited class of cases; since, if it is once fully understood that the proof required to support an allegation of gross negligence is equal to that required to establish fraud, juries will hesitate long before affixing such a stigma upon men who have evidently meant no wrong, although exceedingly careless. Gross negligence may be evidence from which fraud might be inferred; but is not the same thing. In this view all of the latest authorities concur.⁸⁸

98 Ind. 42; *Vandenburgh v. Truax*, 4 Den. 464; *Hankins v. Watkins*, 77 Hun, 360. *v. Lardner*, 2 Wall. 110; *Goodman v. Simonds*, 20 How. U. S. 452). In cases arising upon other questions,

⁸⁸ Thus, in the decisions arising upon negotiable paper, it is settled that although gross negligence may be evidence of bad faith, it is not the same thing (*Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 Id. 784; *Carlton v. Ireland*, 5 El. & B. 765; *Chapman v. Rose*, 56 N. Y. 137; *Welch v. Sage*, 47 Id. 143; *Murray v. Lardner*, 2 Wall. 110; *Goodman v. Simonds*, 20 How. U. S. 452). In cases arising upon other questions, the same rule is adhered to (*Gardner v. Heartt*, 3 Den. 232; *Lincoln v. Buckmaster* 32 Vt. 652; *Wilson v. York, etc. R. Co.*, 11 Gill & J. 58, 79; see *Tonawanda R. Co. v. Munger*, 5 Den. 255). In *St. Louis, etc. R. Co. v. Todd* (36 Ill. 409), the court defined gross negligence as "amounting to willful injury."

§ 21. Defendant's anticipation of injury not essential.

— It is not an essential element of negligence that the defendant should have anticipated, or have had reason to anticipate, that his carelessness would injure another person.⁸⁹ The improbability of injury to another is a circumstance that might be taken into account, but which is not conclusive of the question. If, however, no reasonable person could have anticipated that injury to another *might* ensue, we think that there could be no negligence. It is certainly not essential that the negligent person should have anticipated injury to the particular person who was in fact injured, or the particular kind of injury produced.

But numerous decisions of the same court establish in effect the opposite doctrine. See *Gardner v. Heartt*, 3 Den. 236, and cases under §§ 1 and 2, *ante*. It is held in *Indiana (Terre Haute, etc. R. Co. v. Graham*, 95 Ind. 286) that gross negligence is not, as matter of law, "willfulness," and even if the defendant was guilty of gross negligence, recklessness, or wantonness, he could plead contributory negligence on the part of plaintiff. The negligence of a passenger-carrier may be gross, without being willful or intentional (*Jacksonville, etc. R. Co. v. Southworth*, 32 Ill. App. 307; *aff'd* 135 Ill. 250, 25 N. E. 1093. *s. p.*, *Richmond, etc. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86). No degree of negligence can be so great as to become willfulness (*Cleveland, etc. Ry. Co. v. Starks*, 92 N. E. (Ind.) 54 (1909); *Devine v. New York, etc. Ry. Co.*, 205 Mass. 416, 91 N. E. 522 (1910). A degree of negligence not amounting to wanton injury, but characterized by an utter want of regard for the rights or safety of another (*Sullivan v. Boston Elec. Light Co.*, 181. Mass. 294, 63 N. E. 904 (1902). See *Strong v. Western Union Tel. Co.*, 109 Pac. (Ida.) 910 (1910).

⁸⁹ The defendant's ship in drawing up her anchor, injured the plaintiff's submarine telegraph. It was held that the defendant was liable, if he used the anchor or ship without availing himself of the means of knowledge at his command, even though he was not aware of the position of the cable; but not otherwise (*Submarine Tel. Co. v. Dickson*, 15 C. B. N. S. 759). A moored barges in the middle of a stream in such position that if any of them should sink it would probably injure the barges of others. One of them sank by an accident which did not involve negligence in A. and injured barges of B. A. was held liable to B. (*McGrew v. Stone*, 53 Pa. St. 436). One who negligently sets and keeps fire on his own land is liable for injuries done by its direct communication to the property of another, though he might not have anticipated the manner in which it was communicated (*Higgins v. Dewey*, 107 Mass. 494). One who unlawfully places or causes an obstruction in a public highway, will not be

§ 21a. **Actual anticipation of injury excluded by definition.** — While actual anticipation of injury is excluded by every definition of negligence worthy of attention, and would, indeed, be contradictory of its essence — which is inadvertency — it is nevertheless true that observability to harm is essential to render an act or omission negligent, unless it is made so by positive law. Not actual observance, but injury of some kind to some one must have been capable of being foreseen by one in the defendant's position and had he been acquainted with all the circumstances. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would probably result from his act or omission. *Ante*, §§ 28, 29. But it is not necessary that injury to a particular person or the particular kind of injury might have been foreseen by a reasonably prudent person; it is sufficient if injury of some kind to some one might reasonably have been anticipated. No doubt the actual injury is generally of the kind that might have been foreseen, but *non constat* that it must be so.⁹⁰

heard to say that he did not anticipate an injury resulting therefrom (Evansville, etc. R. Co. v. Carvener, 113 Ind. 51, 14 N. E. 738). See cases cited under § 365, *post*.

⁹⁰Said Channell, B., in *Smith v. London, etc. S. W. R. Co.*, L. R. 5, C. P. 98, in the Ex. Ch. L. R. 6 C. P. 14, "I quite agree that where there is no direct evidence of negligence, the question of what a reasonable person might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what is meant by Bromwell, B., in his judgment in *Blythe v. Birmingham Water Works*" (11 Ex. 781), "where he said, 'It would be monstrous to hold the company liable for negligence because they did not foresee an event that was so remote from probability

that for many months it could not be found out what was the cause of the injury to the plaintiff's premises;' but," says Channell, B., "where it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether they could have been foreseen or not." "An act is negligent if the doer of it, by thinking, might anticipate loss and injury as a natural and probable consequence to some third person with regard to whom or his property he had a duty not to be negligent. Further, the doer of a negligent act is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man the consequences that do flow seemed neither natural nor probable." Beven on Negligence (3d ed.), 85-6.

§ 22. **Election between contract and tort.** — The owner of property may recover directly from the wrongdoer for any tortious injury to the property, without noticing any contract which the wrongdoer may have made with respect to such property, of which the wrongful act is a violation.⁹¹ This is so, whether the contract was made with the owner himself⁹² or with any other person, and

⁹¹ "For tortious acts, independent of the contract, a man may be sued in tort, though one of the consequences is a breach of his contract" (Stock v. Boston, 149 Mass. 410, 21 N. E. 871; Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014; Ashley v. Root, 4 Allen, 504; Dungan v. Read, 167 Pa. St. 393, 31 Atl. 639 [injuries to horse hired by defendant]). In Fromm v. Ide, 68 Hun, 310, 23 N. Y. Supp. 56, defendant contracted with plaintiff to lower and extend two ditches in the highway so that they would drain plaintiff's land, but he did the work so carelessly that, instead of draining the land, they emptied the water upon it. Held, that plaintiff's right of action did not depend upon the contract, but upon defendant's duty not to injure plaintiff's property, and an action of tort would lie. See s. c. on a former trial, 60 Hun, 322, 14 N. Y. Supp. 802. Kansas, etc. Ry. Co. v. Becker, 67 Ark. 1, 53 S. W. 406, 77 Am. St. Rep. 78, 46 L. R. A. 814 (1899); Louisville Hotel Co. v. Kaltenbrun, 26 Ky. L. Rep. 208, 80 S. W. 1163 (1904). Shipper may elect to sue in contract or tort for injury to goods shipped (Eckert v. Pennsylvania, etc. Ry. Co., 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571 (1905); San Antonio, etc. Ry. Co. v. Graves, 49 S. W. (Tex. App.) 1103 (1899). Personal injuries, against passenger carrier (Pittsburg, etc. Ry. Co. v. Higgs, 165 Ind. 694, 76 N. W. 299, 4 L. R. A. (N. S.)

1081 (1905). Where the allegations are all appropriate to an action *ex contractu*, the action is on the contract notwithstanding the assault and battery set out (Busch v. Interborough, etc. Ry. Co., 110 App. Div. 705, 96 N. Y. Supp. 747, affirmed, 187 N. Y. 388, 80 N. E. 197 (1906). But see Atlantic, etc. Ry. Co. v. Laird, 58 Fed. 760, 7 C. C. A. 489, affirmed, 164 U. S. 393, 17 Sup. Ct. 120, 41 Law Ed. 85 (1896).

⁹² Green v. Clarke, 12 N. Y. 343 [carrier receiving goods from forwarder liable to owner for loss]. So a master can recover from a carrier (Grant v. Newton, 1 E. D. Smith, 95), or innkeeper (see Needles v. Howard, Id. 54; Piper v. Manny, 21 Wend. 282), for the loss of his property placed in the defendant's charge by a servant traveling with it as its ostensible owner. Such an action may be brought in the name of a firm where one of the partners, traveling alone, deposits baggage containing partnership property with a carrier or innkeeper, who negligently loses it (Needles v. Howard, *supra*). So a servant, whose master paid for tickets for both, may recover for his own baggage lost on the journey (Marshall v. York, etc. R. Co., 21 L. J. [C. P.] 34). But in all such cases the action must be founded upon the tort, and cannot be sustained at all upon the contract; because carriers of persons and innkeepers always deal with their cus-

even though the contract is under seal.⁹³ The contract, if made with any other person than the owner, does not give that person an exclusive right to sue for damage to the property;⁹⁴ and if made with the owner, it does not prevent him, or any person who afterwards acquires title to the property,⁹⁵ from enforcing his rights without relying upon the contract, except, of course, so far as those rights are waived by the contract.

§ 23. Damage, an essential element of negligence. — As already said (§ 4), neither negligence without damage,

tomers as principals, and the most important part of the contract being always made by the customers as principals, they cannot be allowed to divide it, and claim that the contract, in respect to their baggage, was made for the benefit of other persons, while retaining themselves the rights growing out of the contract in respect to their persons (see *Weed v. Saratoga, etc. R. Co.*, 19 Wend. 534; *Needles v. Howard, supra*).

⁹³ *Leslie v. Wilson*, 3 Brod. & B. 171.

⁹⁴ *Green v. Clarke*, 12 N. Y. 343; *New Jersey Steam Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Cumberland Valley R. Co. v. Hughes*, 11 Pa. St. 141; *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky. 340, 13 S. W. 249 [breach of contract between a city and a water company to keep the former supplied with certain quantity of water is ground for action by private person for loss by fire through insufficient supply of water]. See, also, *Owensboro Water Co. v. Duncan* (Ky.), 32 S. W. 478. In all or nearly all the States statutes have been adopted either authorizing or requiring all actions to be brought in the name of the real party in interest, *Summers v. Wabash, etc. Ry. Co.*, 114 Mo. App. 452, 79 S. W.

481 (1904), (the owner may sue for delay in transportation, though the shipment was made in the name of an agent; *Griffin v. Wabash, etc. Ry. Co.*, 115 Mo. App. 549, 91 S. W. 1015 (1906); *Fairbanks v. San Francisco, etc. Ry. Co.*, 115 Cal. 579, 47 Pac. 450 (1897), (where an insurance company has paid the loss it may join with the owner in an action to recover against one by whose negligence the property was set on fire); *St. Louis, etc. Ry. Co. v. Miller*, 27 Tex. App. 344, 66 S. W. 139 (1901); though it has been held in such case that the owner may sue alone, *Anderson v. Miller*, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604 (1896); *Connor v. Missouri Pac. Ry. Co.*, 181 Mo. 397, 81 S. W. 145 (1904), (the owner of a mill destroyed by the negligence of another may maintain an action in his own name without joining others who have an interest in the profits); *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 473, 15 N. Y. Ann. Cas. 331 (1904), (where a fireman is injured by falling through a trap door negligently open, the action must be in the name of the fire commissioners pursuant to the act conferring the right of action).

⁹⁵ *Dows v. Cobb*, 12 Barb. 310.

nor damage without negligence, will constitute any cause of action. The concurrence of the two elements is essential. Some damage must be inferable from the facts pleaded and proved; or no action will lie.⁹⁶ But nominal damage is enough to sustain the action.⁹⁷

§ 24. The damage must be special to plaintiff. — It is not only essential to the maintenance of an action for negligence that some damage should have been suffered, but that damage must have been suffered by the plaintiff, or he has no cause of action.⁹⁸ If, by reason of a breach of duty owed to the public, he has suffered no special damage, that is, no damage other than such as every other member of the community has suffered in equal measure, a private citizen has no right to sue.⁹⁹

§ 24a. Right to recover over. — It is not necessary that the plaintiff's damage should have resulted immediately from the defendant's negligence; it is enough if the plaintiff, being legally liable, though not personally in fault,

⁹⁶ *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775 [notary's failure to take proper acknowledgment of mortgage]; *Hinckley v. Krug* (Colo.) 34 Pac. 118 [negligence of attorney]; *Dwyer v. Woulfe*, 40 La. Ann. 46, 3 So. 360 [notary's failure to seasonably register a mortgage]; *s. p.*, *Clay v. Western Union Tel. Co.*, 81 Ga. 285; 6 S. E. 813 [delay in delivering telegraph message]; *State v. Davis*, 117 Ind. 307, 20 N. E. 159; *Merrill v. Western Union Tel. Co.*, 78 Me. 97, 2 Atl. 847. *Martin v. Columbia*, etc. R. Co., 32 S. C. 592, 10 S. E. 960, seems to us to have been a case for nominal damages.

⁹⁷ *Baker v. Manhattan R. Co.*, 118 N. Y. 533, 23 N. E. 885. In *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 S. Ct. 577, defendant telegraph company delayed delivery of a message instructing the addressee to buy for plaintiff 10,000 barrels of petroleum, the market price of which, when the message ought to have been delivered, was \$1.17 per barrel, but when received by addressee had advanced to \$1.35 per barrel. The addressee did not purchase. Held, that plaintiff could recover only nominal damages.

⁹⁸ No one has a right of action upon negligence who is not injured thereby (*Harter v. Morris*, 18 Ohio St. 492; *Illinois, etc. R. Co. v. Benton*, 69 Ill. 174; *Smith v. Leavenworth*, 15 Kans. 81; *Scott v. Nat. Bank of Chester Valley*, 72 Pa. St. 471; *Harlan v. St. Louis, etc. R. Co.*, 65 Mo. 22; *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278).

⁹⁹ See § 332, *post*.

for a third person's injuries, due to the defendant's negligence, has been compelled to answer therefor to the person injured. In such a case, the principal delinquent is bound to indemnify his codelinquent, their fault being unequal;¹⁰⁰ and this whether any contractual relation existed between them or not.¹⁰¹ Thus a servant is liable to his master for damages, which the latter has been required to pay to a stranger for the servant's negligence, in the master's work, without the master's fault.¹⁰² So a municipal corporation is entitled to recover, from one who has rendered a highway unsafe, damages which it

¹⁰⁰ *Oceanic Steam Nav. Co. v. Campania Transatl.*, 134 N. Y. 461; 31 N. E. 987; s. c., on second trial, 144 N. Y. 461 [lessee of public pier against sub-lessee]. "The liability grows out of the affirmative act of the defendant, and renders him liable not only to the party injured, but also mediately liable to any party who has been damnified by his neglect" (per Ruger, C. J., *Port Jervis v. First Nat. Bank*, 96 N. Y. 550 [defendant made excavation in street]; *Rochester v. Montgomery*, 72 N. Y. 65; *Lowell v. Boston*, etc. R. Co., 23 Pick. 24 [highway cases]). Plaintiff's horse took fright at defendant's engine and ran over a third person, who recovered damages against plaintiff. Held, the latter could recover the same from defendant on showing that he could not have prevented the accident and that defendant could (*Nashua Iron Co. v. Worcester*, etc. R. Co., 62 N. H. 159). The preceding part of this section quoted with approval in *Galveston*, etc. Ry. Co. v. *Pigott*, 116 S. W. (Tex. App.) 841, writ of error refused by Sup. Ct. (1909). See also *City of Seattle v. Northern Pac. Ry. Co.*, 47 Wash. 552, 92 Pac. 411 (1907); *Vogeman v. Amer. Dock*, etc. Co., 115

N. Y. S. 741, 131 App. Div. 216 (1909); *Fulton Gas*, etc. Co. v. *Hudson River Tel. Co.*, 114 N. Y. Supp. 642, 130 App. Div. 343 (1909); *Scott v. Curtis*, 195 N. Y. 424, 88 N. E. 794 (1909); *City of New York v. Corn*, 117 N. Y. Supp. 514, 133 App. Div. 1 (1909); *Lane v. Finn*, 120 N. Y. Supp. 237, 65 Misc. 339 (1909); *City of Grand Forks v. Paulsness*, 123 N. W. (N. D.) 878 (1909); *City of Georgetown v. Groff*, 124 S. W. (Ky.) 888 (1909). Railway company is entitled to judgment over against Pullman Company for damages which it was compelled to pay for wrongful ejection of passenger by Pullman conductor, without participation by railway employees (*Pullman Car Co. v. Hoyle*, 115 S. W. (Tex. App.) 841, writ of error refused (1909)).

¹⁰¹ *Lowell v. Boston*, etc. R. Co., 23 Pick. 24, and cases *supra*.

¹⁰² *Churchill v. Holt*, 127 Mass. 165; s. c., on new trial, 131 Id. 67; *Simpson v. Mercer*, 144 Mass. 413; *Smith v. Foran*, 43 Conn. 244; *Grand Trunk R. Co. v. Latham*, 63 Me. 177, and cases cited under § 242, *post*. *Costa v. Yochim*, 104 La. 170, 28 So. 992 (1900); *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859 (1905).

has been compelled to pay to traveler;¹⁰³ and on the same principle, an abutting owner against whom a recovery has been had for injuries suffered by a traveler on the street, from the fall of his chimney, may recover the amount paid, from a third person whose wrongful act caused the chimney to fall.¹⁰⁴ So a carrier is entitled to recover from one whose unnecessary obstruction of a station platform caused damage to a passenger, for which the carrier was compelled to pay.¹⁰⁵

§ 24b. Recovery over, continued. — The general rule of the common law that there can be no contribution between tortfeasors rests upon the maxim *ex turpi causa non oritur actio*. But to deny the right of recovery over the situation must be such that the party seeking redress knew, or is presumed to have known, that he was engaged in a wrongful act.¹⁰⁶ “One of several wrongdoers who had been compelled to pay damages caused by the wrong, has in general no remedy against the others. He cannot make his own misconduct the ground of an action in his favor. To this proposition * * * there are so many exceptions that it can hardly with propriety be called a general rule. * * * Its application is restricted to cases where the person seeking redress knew, or is presumed to know, that the act for which he was mulct in damages was unlawful.”¹⁰⁷ It is a sound and generally approved rule that one liable only on account of a duty of care owing the plaintiff, but without active participation in a tort committed by another, may, whether in the original suit or by an independent action, recover over

¹⁰³ *Chicago v. Robbins*, 2 Black, 418; 4 Wall. 679, and other cases cited under § 301, *post*. *Chicago v. Robbins*, *supra*, cited and approved in *Workman v. New York City*, 179 U. S. 552, 45 L. ed. 314, 21 S. C. 212 (1899).

¹⁰⁴ *Gray v. Boston Gas-light Co.*, 114 Mass. 149.

¹⁰⁵ *Old Colony R. Co. v. Stevens*, 148 Mass. 363, 19 N. E. 372.

¹⁰⁶ Street (T. A.) *Foundations of Legal Liability*, Vol. 1, p. 490; *Palmer v. Wick*, etc. S. S. Co., A. C. 324 (1894). See *Battersey's Case* (1623) Winch 48, gist of case quoted in Prof. Street's work, Vol. 2, p. 74.

¹⁰⁷ *Nashua I. & S. Co. v. W. & R. Ry.*, 22 N. H. 159.

against the active perpetrator of the wrong.¹⁰⁸ Where the master is liable by the operation of the doctrine of *respondeat superior* the servant is liable also, and they may be sued jointly or severally as the plaintiff elects. No action, however, would exist against the servant for an act or omission that only becomes actionable by reason of knowledge or information chargeable to the master alone; all cases, therefore, in which the servant may be held personally liable are normal and hence within the sound policy of the general rule against any claim on his part to indemnity. But where the master's responsibility results exclusively from the doctrine of *respondeat superior*, and the wrong is without his own participation, direction or approval, it may confidently be stated that he is entitled to his action over, and the general rule forbidding contribution between wrongdoers is held to be qualified to this extent. And if the illustrative cases are few, it is due to the economic proposition that generally renders such a recovery unprofitable. Where municipalities and abutting owners are liable for injuries caused by defective sidewalks, it is universally held that the liability of the abutting owner is primary, and the city is entitled to recover over such damages as it has been compelled to pay on that account, unless it has been an active participant in the wrongdoing.¹⁰⁹ The rationale of the rule allowing recovery over is that everyone is responsible for his own negligence and if another legally liable has been compelled to pay the damages, they may be recovered from him.¹¹⁰

¹⁰⁸ *City of San Antonio v. Talerico*, *San Antonio v. Talerico*, *supra*; *Ibid* 98 Tex. 151, 81 S. W. 518 (1904); *v. Smith*, *supra*; *McDaniel v. Logi*, *City of San Antonio v. Smith*, 94 Tex. 143 Ill. 487, 32 N. E. 423 (1892); 266, 59 S. W. 1109 (1901). *Brookville v. Arthurs*, 152 Pa., 25

¹⁰⁹ *City of Chicago v. Robbins*, 2 Atl. 551 (1892); *Rowe v. Baltimore*, Black (U. S.) 418, 17 L. ed. 298; etc. R. Co., 82 Md. 493, 33 Atl. 761 *Robbins v. Chicago*, 4 Wall. (U. S.) (1896).

¹¹⁰ *Oceanic S. S. N. Co. v. Compania* 10 Cush. 287; *Achison v. Miller*, 2 Trans. Co., 134 N. Y. 461, 31 N. E. Ohio St. 203; *Armstrong Co. v.* 987, 30 Am. St. Rep. 685 (1892). *Clarion Co.*, 66 Pa. St. 218; *City of*

CHAPTER II.

PROXIMATE CAUSE.

- | | |
|---|--|
| <p>§ 25. Breach of duty must cause the damage.</p> <p>25a. When an act or omission becomes a breach of duty.</p> <p>26. Breach of duty must be the proximate cause.</p> <p>26a. It is not requisite that the injury should be the necessary or even the usual result of the neglect.</p> <p>27. Breach of statutory duty.</p> <p>27a. Violation of statutes or ordinances considered as negligence <i>per se</i> or otherwise.</p> <p>27b. Breach of rules.</p> <p>28. Natural and continuous sequence defined.</p> <p>29. Foreseen and unforeseen consequences of negligence.</p> <p>29a. Doctrine of consequences foreseen applied as a limitation.</p> <p>30. Extraordinary consequences of negligence.</p> <p>31. Intervening cause, breaking connection.</p> <p>32. Intervening cause must be either a superseding or a responsible cause.</p> | <p>§ 33. Superseding cause and inevitable accident distinguished.</p> <p>34. Intervening responsible cause, not superseding.</p> <p>35. Intervening cause illustrated.</p> <p>36. Intervening cause must be culpable.</p> <p>36a. Who are responsible for intervening negligence.</p> <p>37. Intervening cause must be a free agent.</p> <p>38. Intervener not culpable, if ignorant of facts.</p> <p>38a. Same tests to be applied to intervener's acts or omission in determining whether they are a responsible cause as in case of original or primary negligence.</p> <p>39. Superior force concurring with defendant's negligence.</p> <p>39a. Acts of animals as an intervening cause.</p> <p>40. Superior force concurring with defendant's delay.</p> |
|---|--|

§ 25. The breach of duty must cause the damage. —

We now come to the most important and difficult part of the general definition of a right of action upon negligence — the connection between the negligent act or omission and the damage. No action can be maintained upon an act of negligence, unless the breach of duty has been the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that

was occasioned by the negligence. The connection of cause and effect must be established.¹ And the defendant's *breach of duty*, not merely his *act*, must be the cause of the plaintiff's damage.² The defendant's negligence may put a temptation in the way of another person to commit a wrongful act, by which the plaintiff is injured; and yet the defendant's negligence may be in no sense a cause of the injury.³

§ 25a. When an act or omission becomes a breach of duty.—An act or omission becomes a breach of duty

¹ Daniel v. Metropolitan R. Co., L. 276, 102 N. W. 713 (1905); Prosser R. 3 C. P. 216, 222; Holbrook v. v. West Jersey, etc. Ry. Co., 72 Utica, etc. R. Co., 12 N. Y. 236; N. J. L. 342, 63 Atl. 494; s. c., 75 Harlan v. St. Louis, etc. R. Co., 65 N. J. L. 614, 68 Atl. 58 (1907); Mo. 22; Crum v. Conover, 14 Ind. App. 264, 42 N. E. 1029, and cases *infra*.

² One suing for injuries must not only prove negligence, but that the injury resulted from the negligence (Kelsey v. Jewett, 28 Hun, 51; Williams v. Delaware, etc. R. Co., 39 Id. 430; Murtaugh v. N. Y. Central R. Co., 49 Id. 456, 3 N. Y. Supp. 483; State v. Baltimore, etc. R. Co., 58 Md. 482; Dickey v. Maine Telegraph Co., 43 Me. 492; Philadelphia, etc. R. Co. v. Boyer, 97 Pa. St. 91; Pennsylvania Co. v. Hensil, 70 Ind. 569; Lester v. Pittsford, 7 Vt. 158; Crandall v. Goodrich Transp. Co., 16 Fed. 75; Nashville, etc. R. Co. v. Hembree, 85 Ala. 481, 5 So. 173). See note on allegation and proof of negligence, 20 Abb. New Cas. 236; Western Union Tel. Co. v. Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678 (1905); Atlanta, etc. Ry. Co. v. West, 121 Ga. 641, 49 S. E. 711, 104 Am. St. Rep. 179, 67 L. R. A. 701 (1905); Cleveland, etc. Ry. Co. v. Cline, 111 Ill. App. 416 (1903); Wickenberg v. Minneapolis, etc. Ry. Co., 94 Minn. 276, 102 N. W. 713 (1905); Prosser v. West Jersey, etc. Ry. Co., 72 N. J. L. 342, 63 Atl. 494; s. c., 75 N. J. L. 614, 68 Atl. 58 (1907); Birch v. City of New York, 106 N. Y. Supp. 104, 121 App. 395, 83 N. E. 51, 190 N. Y. 397 (1907); Chambers v. Woodbury M. Co., 106 Md. 496, 68 Atl. 290 (1907); Wabash R. Co. v. Reynolds, 41 Ind. App. 678, 84 N. E. 992 (1908); Harrison v. Butte, etc. Ry. Co., 95 Pac. (Mont.) 8 (1908); Richmond v. Missouri Pac. Ry. Co., 133 Mo. App. 463, 113 S. W. 708 (1908); Toppi v. McDonald, 112 N. Y. Supp. 821, 128 App. Div. 443 (1908); Briscoe v. Henderson Light, etc. Co., 148 N. C. 396, 62 S. E. 600 (1908); New Orleans, etc. R. Co. v. Harrod's Admr., 115 S. W. (Ky.) 699 (1909); City of LaPorte v. Osborn, 86 S. W. (Ky.) 995 (1909); Cleveland, etc. Ry. Co. v. Morrey, 172 Ind. 513, 88 N. E. 932 (1909); St. Louis, etc. Ry. Co. v. Rhoden, 123 S. W. 798 (1909); Monroe v. Atlantic, etc. Ry. Co., 151 N. C. 374, 66 S. E. 315 (1909); Missouri, etc. Ry. Co. v. Byrd, 124 S. W. (Tex. App.) 738 (1910); Dalzell v. New York, etc. Ry. Co., 121 N. Y. Supp. 28, 136 App. Div. 325 (1910).

³ See §§ 8-13, *ante*.

when it is a violation of some contractual obligation or of some duty prescribed or implied by law, or it is observable that such act or omission will probably injure another and it is preventable. One is liable for all the injurious consequences naturally and proximately caused by his negligence. If he has committed a breach of duty, wrongfully put into operation a force likely to injure others, he is liable for its natural and proximate effects, which may be immediate and direct or through the media of natural forces or other innocent causes or conditions. Time, distance and the number and variety of the media are immaterial, except as they afford increased opportunity for the assertion of other intervening responsible causes. And it is because in actual experience, when injury is not immediate and direct, other agencies do so often intervene, that the study of the character and effect of intervening causes, whether discharging the original wrongdoer or jointly implicating their author, becomes both interesting and important.

§ 26. Breach of duty must be the proximate cause. — The breach of duty upon which an action is brought must be not only a cause, but a *proximate cause*, of the damage to the plaintiff.⁴ We adhere to this old form of words, because, while it may not have originally meant what is now intended, it is not immovably identified with any other meaning, and is the form which has been so long in use that its rejection would make unintelligible nearly all reported cases on the question involved.⁵ The

⁴Kistner v. Indianapolis, 100 Ind. (Cal.) 122 (1907); Miner *et al.* v. 210; Scheffer v. Railroad Co., 105 McNamara, 81 Conn. 690, 72 Atl. U. S. 249; Bell v. Rocheford, 113 138 (1909); Birmingham Ry., etc. N. W. (Sup. Ct. Neb.) 157 (1907); Co. v. Hinton, 48 So. (Ala.) 546 (1909); Seith v. Commonwealth Elec. Co., 241 Ill. 252, 89 N. E. 425 (1909).
⁵The use of the old words, "proximate cause," is approved by Earl, J., in Ehr Gott v. New York, 96 N. Y. 264, 281; Norwood v. Raleigh, etc.

proximate cause of an event must be understood to be that which, in a natural and continuous sequence,⁶ unbroken by any new, independent cause,⁷ produces that event, and without which that event would not have occurred.⁸ Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity

R. Co., 111 N. C. 236, 16 S. E. 4; Florida, etc. R. Co. v. Williams, 37 Fla. 406, 20 So. 558; Davis v. Chicago, etc. R. Co. [Wis.], 67 N. W. 167. For applications of the rule, see §§ 57-60, *post*.

⁶ Wharton Negl., § 3, modified.

⁷ Oil Creek R. Co. v. Keighron, 74 Pa. St. 320; Insurance Co. v. Tweed, 7 Wall. 52. As to what will be such an intervening cause, see Wharton Negl., §§ 134-143; Milwaukee, etc. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Lowery v. Manhattan R. Co., 99 N. Y. 158; Cuff v. Newark, etc. R. Co., 35 N. J. Law, 17; and § 31 *et seq.*, *post*. In his work on Torts, p. 69, Judge Cooley states the following propositions: "(1.) In the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence. (2.) When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom; this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission, as to appear to have

resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause. (3.) If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." Few cases have been so often cited, quoted from and approved as Milwaukee, etc. Ry. Co. v. Kellogg, *supra*. See case of The G. R. Booth, 171 U. S. 450, 43 L. Ed. 234, 19 S. C. 9 (1897).

⁸ Thomas v. Winchester, 6 N. Y. 397; and see §§ 31, 32, *post*. An accident "cannot be attributed to a cause, unless without its operation the accident would not have happened" (Ring v. Cohoes, 77 N. Y. 83; to the same effect, Ehr Gott v. New York, 96 Id. 283; Cone v. Delaware, etc. R. Co., 81 Id. 206; Seárlés v. Manhattan R. Co., 101 Id. 661; Taylor v. Yonkers, 105 Id. 203).

of causation, that is, the proximate cause which is nearest in the order of responsible causation.⁹

§ 26a. It is not requisite that the injury should be the necessary or even the usual result of the neglect. — It is uniformly held that to be actionable it is not requisite that the injury should be the necessary or the direct or immediate result of the wrongful act or omission.¹⁰ Nor is it requisite that it should be the “usual,” “ordinary,” or “probable” result. But it is often said, as an assignment of a reason, among others, for the particular decision that the injury is or is not the “usual,” “ordinary,” or “probable” consequence of the neglect, and hence such as could or could not have been reasonably foreseen. If the injury is a natural result of the neglect of duty it is sufficient. The injury where actionable generally is the “usual,” “ordinary,” or “probable” result, and when it is so it is also such as could have been foreseen by one of ordinary prudence in the defendant’s position at the time as probable, if he had known all the facts and had thought of it. Again, it cannot be success-

⁹ “The primary cause may be the proximate cause of a disaster, though it operate through successive instruments. The question always is, was there an unbroken connection between the wrongful act and the injury — a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole? Or was there some new and independent cause intervening between the wrong and the injury?” (Purcell v. St. Paul R. Co., 48 Minn. 134, 50 N. W. 1034).

¹⁰ “It is enough to constitute negligence if the result of the act is the natural, though not the necessary or inevitable, thing to be expected. If ordinary prudence would suggest that the act or omission would probably

result in injury, it is sufficient to support the charge of negligence” (Haase v. Morton, 138 Ia. 205, 115 N. W. 921 (1908)). To the same effect, Hollidge v. Duncan, 199 Mass. 121, 85 N. E. 186 (1908); Osborn v. Van Dyke, 113 Ia. 557, 85 N. W. 784, 15 L. R. A. 367 (1901). It is error to charge that if “the injury the plaintiff sustained was not the result of the wrong done by the defendant” he is not responsible and holding it is sufficient if it followed in natural sequence (Burk v. Creamery Pckg. Co., 126 Ia. 730, 102 N. W. 793, 106 Am. St. Rep. 395 (1905)). See also Brown Store Co. v. Chattahoochie L. Co., 121 Ga. 809, 49 S. E. 839 (1905); True v. Woda, 201 Ill. 315, 66 N. E. 369 (1903); Vandenburg v.

fully denied that there is a disposition shown in many decisions to make liability in cases of negligence correspond in some degree with the moral obliquity of the wrongful act, just as juries constantly diminish or increase the "compensating damages" in view of the same consideration: judges also are human. These considerations, combining with some looseness of statement, have given rise to expression in some decisions that would authorize the inference it was intended to hold that these relations must exist. Such, however, is not the law. The term natural as used in the general rule is not to be so interpreted, but rightly understood means according to the operations of natural laws, which, in the particular case, may be unusual and extraordinary in common experience. If it were otherwise, because one had often been guilty of the same breach of duty without entailing injurious consequences he must be held not responsible when it does occur. We are acquainted with no well-considered case holding that injurious consequences, otherwise the natural and proximate result of the defendant's negligence, are not so unless they are the usual, ordinary, or probable result and such as are capable of being foreseen. To so hold would be indeed to formulate a new rule by the substitution of these terms for natural and proximate.

§ 27. Breach of statutory duty. — All authorities agree that the plaintiff cannot recover upon mere proof of his injury, coincident with the defendant's breach of a statute or ordinance of the kind mentioned in § 13. In such a case, the action would fail for want of connection between the defendant's negligence and the plaintiff's damage. The plaintiff must prove that the breach of regulations was the proximate cause of his damage. That will not be presumed.¹¹ And therefore non-com-

Truax, 4 Den. (N. Y.) 464, 47 Am. ¹¹Hayes v. Michigan Central R. Dec. 268 (1847); Harold v. Watney, Co., 111 U. S. 228, 240; Pennsylv-
2 Q. B. 320, 67 L. J. Q. B. 771 (1898). vania Co. v. Hensil, 70 Ind. 569;

pliance with a statutory requirement, however stringent, affords no ground of action, if compliance therewith would not have prevented the injury.¹²

§ 27a. Violation of statutes and ordinances considered as negligence per se, or otherwise. — In all jurisdictions statutes and ordinances specifically declaring that the person injured by their violation shall have his action for damages, such liability is enforced by the courts without further evidence of the wrongfulness of the act; and it matters little, or not at all, whether in such case such violations are termed negligence *per se* or not.¹³ Some

Philadelphia, etc. R. Co. v. Stebbing, 62 Md. 504 [train running at greater rate of speed than that allowed by ordinance]. See the following among many other cases, to the same effect: Quincy, etc. R. Co. v. Wellhoener, 72 Ill. 60; Illinois, etc. R. Co. v. Gillis, 68 Id. 317; Great Western R. Co. v. Geddis, 33 Id. 305; Stoneman v. Atlantic, etc. R. Co., 58 Mo. 503; Holman v. Chicago, etc. R. Co., 62 Id. 562; Chicago, etc. R. Co. v. Hotz, 47 Kans. 627; 28 Pac. 695; Chicago, etc. R. Co. v. Chrisman, 19 Colo. 30, 34 Pac. 286; Cumuberland, etc. R. Co. v. State, 73 Md. 74, 20 Atl. 785; Morrissey v. Providence, etc. R. Co., 15 R. I. 271, 3 Atl. 10; Rainey v. N. Y. Central, etc. R. Co., 68 Hun, 495; 23 N. Y. Supp. 80. Under the South Carolina statute making railroad companies liable for a neglect to give signals, which "contributed to the injury," it is only necessary, for a recovery, to show that the neglect contributed to, not that it proximately caused, the injury (Wragge v. South Carolina, etc. R. Co., 47 S. C. 105; 25 S. E. 76).

¹² Flatles v. Chicago, etc. R. Co., 35 Iowa, 191; Illinois, etc. R. Co. v. Phelps, 29 Ill. 447; Gilman, etc. R. Co. v. Spencer, 76 Id. 192. See, also,

Edson v. Central R. Co., 40 Iowa 47; Delaware, etc. R. Co. v. Salmon, 39 N. J. Law, 299; Pennsylvania R. Co. v. Hope, 80 Pa. St. 373; Stanton v. Louisville, etc. R. Co., 91 Ala. 382; 8 So. 798. Where sounding a locomotive whistle is as likely to increase as to diminish danger to one on the track, failure to use it as required by statute will not constitute negligence (Galena, etc. R. Co. v. Loomis, 13 Ill. 548; Illinois Central R. Co. v. Phelps, 29 Id. 447; Pittsburgh, etc. R. Co. v. Karnes, 13 Ind. 87; Wakefield v. Connecticut, etc. R. Co., 37 Vt. 330). But the converse of the proposition, that is, that the defendant would be liable if but for his violation of the statute the injury would not have happened, is not true, it is but an example of the fallacy *post hoc ergo hoc*. If the train had not been running faster than allowed by the law the collision would not have occurred, but if the plaintiff undertook negligently to pass in front of the train, the violation of the statute or ordinance had nothing to do with the casualty. It is not a case of contributory negligence, but of plaintiff's own negligence.

¹³ Failure to confine flume or cover canal (Platte, etc. Canal Co. v.

courts have refused to adopt this term because negligence in law means more than a violation of duty owing the plaintiff, for it includes proximate injury as well. The main diversity of decision, however, arises from a difference of construction in regard to enactments having only a penal sanction. In many jurisdictions the violation of such statutes and of ordinances, where imposed by the police power specifically authorized by the charter

Dowell, 17 Colo. 376, 30 Pac. 68 R., etc. Co., 90 Mo. 314, 2 S. W. 426; (1892). Failure to guard sprocket wheel and chain (*Klatt v. Foster* Vandeveer v. Moran, 112 N. W. Lbr. Co., 97 Wis. 641, 73 N. W. (Neb.) 581 (1907); *Cragg v. Los Angeles Tr. Co.*, 154 Cal. 633, 98 Pac. 1063 (1908); *Smith v. Wolf*, 49 So. arkana, etc. Ry. Co. v. Parsons, (Ala.) 395 (1909); *Pittsburgh, etc. R. Co. v. Reed*, 88 N. E. (Ind. App.) 1080 (1909); *Lindler v. Southern Ry. Co.*, 84 S. C. 536, 66 S. E. 995 (1910). Speed ordinance (*Louisville, etc. R. Co. v. Davis*, 7 Ind. App. 222, 33 N. W. 451 (1890); *Schlereth v. Missouri Pac. Ry. Co.*, 96 Mo. 509, 10 S. W. 66 (1888). *Blasting powder* (*Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451). *Ringling Bell of locomotive in city* (*Texas, etc. Ry. Co. v. Brown*, 11 Tex. App. 503, 33 S. W. 146 (1895). *Failure to protect excavation as required* (137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504 (1897). "If a railroad company, which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate limits for the purpose of protection against injuries to persons, fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company" (*Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410). Negligence cannot be predicated solely on the violation of a valid ordinance when the act is itself indifferent, and no duty exists

or general law, is held negligence *per se*.¹⁴ By this expression nothing more is intended than that such violation is a breach of legal duty toward those intended to be thereby protected. The other elements of actionable negligence must concur, viz.: (1) that such violation is a breach of duty owing to the plaintiff, (2) that the injury complained of was the natural and proximate consequence of such violation. In other jurisdictions violations of such statutes and ordinances are said to be *prima facie* negligence, or competent evidence of negligence.¹⁵ But in all jurisdictions the operation of such statutes or ordinances is avowedly limited to the persons intended to be protected, however variant the actual application.

§ 27b. **Breach of rules.** — While not commonly spoken of, *eo nomine*, as negligence *per se*, it is obvious that the breach, by one for whose protection the defendant is under some duty, of a known valid and reasonable rule or regulation intended to guard against his injury, when without justification or excuse, where the rule or regulation applies, in consequence of which he is injured, is entitled to the same effect.¹⁶

§ 28. “**Natural and continuous sequence**” defined. — Very great difficulty has been found in determining what damages should be considered as flowing, in a “natural

apart from the ordinance (Fields v. Gowdy, 199 Mass. 568, 85 N. E. 884 (1908); Dahlin v. Walsh, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. (N. S.) 615 (1908). Violation of a statutory duty is evidence of negligence, and, when injury results gives a cause of action, and generally justifies a verdict (Shields v. Pugh & Co., 107 N. Y. Supp. 604, 122 App. Div. 586 (1908); Platt v. Southern Photo Mat. Co., 4 Ga. App. 159, 60 S. E. 1068 (1908).

¹⁴ See § 13 and notes, *ante*.

¹⁵ *Ib.*

¹⁶ When one violates a rule or regulation, duly promulgated, established for his protection, and is injured thereby, it is error for the trial court to submit as a question of fact such violation to the jury for the determination of the issue of negligence or contributory negligence (San Antonio, etc. Ry. Co. v. Wallace, 76 Tex. 636, 13 S. W. 565 (1890); Railway v. Whitcomb, 31 Am. & Eng. R.

and continuous sequence," from an act of negligence, especially when it is not a matter of contract liability. On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether they could have been anticipated or not.¹⁷ On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could, in the exercise of reasonable foresight, have foreseen as the probable consequences of his act.¹⁸ As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common experience to usually follow such a wrongful act.¹⁹ The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur;²⁰

Cases, 149; *Woolsey v. Railway*, 33 Ohio St. 235; *Gordy v. Railway*, 75 Md. 297, 23 Atl. 607 (1892).

¹⁷ *Ehrgott v. New York*, 96 N. Y. 264; *Smith v. Southwestern R. Co.*, L. R. 6 C. P. 14; aff'g s. c. 5 C. P. 98; *Henry v. So. Pacific R. Co.*, 50 Cal. 183, per McKinstry, J.; *Fairbanks v. Kerr*, 70 Pa. St. 86; *McGrew v. Stone*, 53 Id. 436; *Morrison v. Davis*, 20 Id. 171; *Scott v. Hunter*, 46 Id. 192; *Lake v. Milliken*, 62 Me. 240; *Atchison, etc. R. Co. v. Stanford*, 12 Kans. 354; *Proctor v. Jennings*, 6 Nev. 83; *Phillips v. Dickerson*, 85 Ill. 11; *Doggett v. Richmond, etc. R. Co.*, 78 N. C. 305; *State v. Manchester, etc. R. Co.*, 52 N. H. 528; *Stark v. Lancaster*, 57 Id. 88.

¹⁸ *Rigby v. Hewitt*, 5 Exch. 239; *Hoey v. Felton*, 11 C. B. N. S. 143; *Bovill, C. J., Sharp v. Powell*, L. R. 7 C. P. 253; *Sheridan v. Bigelow*, 93 Wis. 436, 67 N. W. 732.

¹⁹ *Gerhard v. Bates*, 2 El. & Bl. 490; *Selleck v. Langdon*, 55 Hun, 19, 8 N. Y. Supp. 573; *Whart. Neg.*, § 16, 74-77.

²⁰ *Kern v. DeCastro Sugar Co.*, 125 N. Y. 50, 25 N. E. 1071 [fall of elevator]; *Reiss v. N. Y. Steam Co.*, 128

the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer, as likely to flow from his act" (per Paxson, J., *Pittsburgh So. R. Co. v. Taylor*, 104 Pa. St. 306; s. p., *Hoag v. Lake Shore, etc. R. Co.*, 85 Id. 293). Or such as "a person of ordinary intelligence might have expected" (*McGowan v. Chicago, etc. R. Co.*, 91 Wis. 147, 64 N. W. 891; *Davis v. Chicago, etc. R. Co.*, 93 Wis. 470, 67 N. W. 16; *Motey v. Pickle Marble, etc. Co.*, 74 Fed. 155).

and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen.²¹ So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any

N. Y. 103; 28 N. E. 24 [steamer explosion]; *Cleveland v. N. J. Steamboat Co.*, 125 N. Y. 299, 26 N. E. 327 [steamboat passenger rush]; *Henry v. St. Louis, etc. R. Co.*, 76 Mo. 288 [passenger being ordered out of car stepped to a neighboring track, and while waiting there was injured by another train]; *S. P., Lewis v. Flint, etc. R. Co.*, 54 Mich. 55; *Briggs v. Minneapolis St. R. Co.*, 52 Minn. 36, 53 N. W. 1019; *Bellefontaine, etc. R. Co. v. Snyder*, 18 Ohio St. 399; *Connecticut Life Ins. Co. v. New Haven R. Co.*, 25 Conn. 265; *Harrison v. Berkley*, 1 Strobh. 525, 549; *Bennett v. Lockwood*, 20 Wend. 223; *Greenland v. Chaplin*, 5 Exch. 243; *Jacksonville, etc. R. Co. v. Peninsular Land, etc. Co.*, 27 Fla. 1, 9 So. 661. "The general rule is, that a man is answerable for the consequences of a fault which are not-
 ural and probable; but if this fault happen to occur with something extraordinary and unforeseen, he will not be liable" (*McGrew v. Stone*, 53 Pa. St. 436).

²¹ In *Ehrgott v. New York*, 96 N. Y. 264, the court emphatically refused to hold that the defendant was only liable for such damages as might reasonably be supposed to be in the contemplation of both parties as the probable result of the accident; and *Earl, J.*, commenting upon the various forms of stating the rule which are given in the text, said: "These various modes of stating the rule are all apt to be misleading and

in most cases are absolutely worthless as guides to the jury. * * * When a party commits a tort, resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. * * * Here, nothing short of omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be. * * * The best statement of this rule is, that a wrong-doer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury." In that case the plaintiff recovered \$25,000 for injuries suffered from a defect in a highway, resulting months afterwards in a permanent spinal disease; and this judgment, though set aside in the lower court, was reinstated and affirmed in the Court of Appeals. See cases cited under note 17, *supra*. *Green-Wheeler Shoe Co. v. Chicago, etc. Ry. Co.*, 130 Ia. 123, 106 N. W. 498 (1906), (goods negligently delayed in transit, destroyed by an act of God, a storm such as could not have been reasonably anticipated; but for such delay they would have reached their destination safely; carrier held liable). *Rodgers v. Missuri, etc. Ry. Co.*, 75 Kan. 222, 88 Pac. 885 (1907), (the facts were the same as in the preceding case, except that the goods were no longer in transit, having reached point of delivery; carrier held not liable).

fixed rule,²² and have indicated a disposition to leave all doubtful cases to the jury.²³

²² Page v. Bucksport, 64 Me. 53, per Peters, J. To some effect, Stover v. Bluehill, 51 Id. 441. Where logic and common sense cannot be reconciled, logic must give way (Willey v. Belfast, 61 Me. 575, per Barrows, J.). In Fleming v. Beck, 48 Pa. St. 309, Agnew, J., said: "In strict logic it may be said that he who is the cause of loss should be answerable for all the losses which flow from his causation. But in the practical workings of society, the law finds, in this as in a great variety of other matters, that the rule of logic is impracticable and unjust. The general conduct and the reflections of mankind are not founded upon a nice casuistry. Things are thought and acted upon rather in a general way, than upon long, laborious, extended and trained investigations. Among the mass of mankind, conclusions are generally the results of hasty and partial reflection. Their undertakings, therefore, must be construed in view of these facts; otherwise they would often be run into a chain of consequences wholly foreign to their intentions. In the ordinary callings and business of life, failures are frequent. Few, indeed, always come up to a proper standard of performance — whether in relation to time, quality, degree or kind. To visit upon them all the consequences of failure would set society upon edge and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses; and the law therefore aims at a just discrimination, which will impose upon the party causing them the proportion of them that a proper view of

his acts and the attending circumstances would dictate."

²³ See cases cited under § 55, *post*. "The question whether an item of loss is or is not a proximate consequence of the wrong is in each case a question of fact. Only general principles can be laid down, and in applying them much latitude must be left to the court and jury. If the case is a clear one, the court will direct the jury upon the question; but if the question is a doubtful one it will be left to the jury." "An entirely harmonious course of decision on such a question is not to be expected. As the determination is really one of fact, under proper directions, and ordinarily for the jury, the decision may simply be the result of the court's upholding the right of the jury to decide one way or another; and even if the court itself determine the question, as is not infrequent in practice, it is, nevertheless, natural to expect differences of opinion upon what are really close questions of fact" (1 Sedgwick on Damages (9th ed.), §§ 116-117; Smith v. Public Service Corporation, 78 N. J. L. 478, 75 Atl. 937 (1910), ("Whether an act or omission alleged to be negligence naturally and proximately caused an injury, is, as a rule, a question for the jury; but if there is no evidence connecting the alleged negligence with the injury, or if it is obvious that the act or omission was not the natural and proximate cause thereof, the question is for the court"). "It is unfortunate that no definite principle can be laid down by which to determine this question. It is always to be determined on the facts of each case

§ 29. Foreseen and unforeseen consequences of negligence. — The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind.²⁴ This definition covers all the fire cases elsewhere referred to; since one who knew all the facts (including the dry kindling matter on the line of connection, the exposure of property to injury, the force of the wind and the other circumstances which made it probable that the fire would spread, as it actually did) could have foreseen the result as not improbable. Yet, in several of those cases, it is probable that no one person did know all these facts; and certainly the defendants did not. So, in the Lowery case,²⁵ any one who knew that travelers

upon mixed considerations of logic, common sense, justice, policy and precedent. * * * The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other" (1 Street, T. A., Foundations of Legal Liability, 110).

²⁴ This seems to us to be the necessary result of the latest and best decisions; although nowhere stated in this exact language. See *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. 608, where defendant was held liable for a burning coal dropped on a horse, which, running against a traveler, caused him to injure plaintiff, in his own effort to escape. *Williams v. S. F. & N. W. R. Co.*, 93 Pac. (Col.) 122, rehearing denied by Supreme Court (1907); the court

quotes with approval section 26 of this work, and, referring to the preceding part of this section, says, "The formula is sensible and sound." Also quoted and approved in *Cokery v. Wabash R. Co.*, 81 Ill. App. 660; aff'd 183 Ill. 223, 55 N. E. 693 (1909). See "Legal Course in Actions of Tort," by Prof. Jeremiah Smith, *Harvard Law Review*, Dec. 1911, Jan. and Feb. 1912, where the author, referring to the rule he advocates, says, "The rule laid down by Shearman & Redfield, *Negligence* (5th ed.), 28, though not so bluntly stated, would seem to lead to similar results"—quoting the text. See also *Green-Wheeler Shoe Co. v. Chicago, etc. Ry. Co.*, 130 Ia. 123, 106 N. W. 498 (1906); *Rodgers v. Missouri Pac. Ry. Co.*, 75 Kans. 222, 88 Pac. 885 (1907).

²⁵ 99 N. Y. 158, 1 N. E. 608.

were in danger from such collisions would have deemed the ultimate event a not improbable one. On the other hand, hardly any one would have had such a result in his mind, at the time, as likely to occur. The test of probability, in that case, was evidently this, that any one, to whom the idea of such a result had been suggested, would have seen that it might naturally occur.

§ 29a. Doctrine of consequences foreseen applied as a limitation. — The affirmative of the rule of foreseen consequences is doubted by none, that is, that everyone guilty of the violation of legal duty to another is liable for all the consequences of such violation of duty as could have been foreseen by a person of ordinary prudence in the defendant's position at the time as probable; but it should never be applied as a rule of limitation or exclusion where the injury is otherwise the natural and proximate result.²⁸ If so applied it would not only exclude all

²⁸ "It is not true that to constitute negligence the act must be such as that persons of ordinary prudence would or should have apprehended or foreseen the accident. Our rule is, if the accident follows as the result of a wrong or the negligent act of another, that other is responsible, although no one would have reasonably apprehended such a disaster" (*Cutter v. City of Des Moines*, 113 N. W. (Ia.) 1081 (1907). See also *Evansville, etc. Co. v. Bailey*, 84 N. E. 549 (1908); *Woodbury v. Tampa W. W. Co.*, 49 So. (Fla.) 556, 21 L. R. A. (N. S.) 1034 (1909); *Buchner v. Stockyards, etc. Co.*, 211 Mo. 700, 120 S. W. 766 (1909). Deemed to be foreseen (*Missouri, etc. Ry. Co. v. Harrison*, 120 S. W. 254 (1909); *Beaning v. South Bend Elec. Co.*, 90 N. E. (Ind.) 786 (1910); *Woodson v. Metropolitan St. Ry. Co.*, 224 Mo. 685, 123 S. W. 820 (1909); *Ide v. Boston, etc. R. R.*, 83 Vt. 66, 74 Atl. 401 (1909). Where a stool had been negligently furnished a passenger to aid her in dismounting from the train, in response to the contention that though defendant may have been guilty of a violation of duty to the plaintiff, yet if the injury inflicted, death of the wife, could not have been foreseen as a probable result, it could not be held liable, the Court of Civil Appeals, by Associate Justice Pleasants, said, "But we do not concur in this proposition. It may be conceded that the death of Mrs. Southwick could not have been reasonably anticipated from the use of the stool; yet if the use of the stool was negligence on the part of the railroad company without negligence by the deceased, and the injury was the proximate result of that negligence, and such injury resulted in death without fault or neglect of the injured in the use of remedies, the defendant by the terms of the statute

extraordinary consequences, however natural and proximate, embracing that large class of cases for the aggravation of diseases not apparent, and also that smaller, but none the less well settled class where the person to whom the duty is owing in a natural attempt to escape the consequences of the defendant's negligence unwittingly inflicts damage upon another, for which the original wrongdoer is responsible; as where one leaps from a train and injures another by falling on him.²⁷

§ 30. Extraordinary consequences of negligence. — In one case in New York,²⁸ and two in Pennsylvania,²⁹ it has been held that negligence entails no liability for extraordinary consequences, although caused by ordinary means; and while these decisions have been overruled everywhere else, and are practically overruled in New York,³⁰ where

would be liable" (Gulf, etc., Ry. Co. v. Southwick, 30 S. W. (Tex. App. 592 (1895)). It is familiar that no action lies under the statute except where it would have existed at common law had the injury inflicted not resulted in death. The opinion in Milwaukee, etc. Ry. Co. v. Kellogg, replete with sound statements of the law on proximate cause, yet presents the unique paradox of declaring, "It is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances," and applying it in behalf of the owners of a sawmill to hold liable the owners of a steamboat that set fire by sparks to an elevator, that set fire to piles of lumber 388 feet from the elevator, that

set fire to defendant's mill 578 feet distant. It has been held in Texas that, though it was the duty of the defendant railway company to provide shippers with safe cattle pens, the failure to do so is not the proximate cause of injuries received by the owner from being run over by his cattle, frightened by a passing locomotive, while he was engaged in trying, without negligence, to secure the gate, because, it is said, though injury, as by the loss of the cattle, might have been foreseen, no such injury as that complained of could have been anticipated (Texas, etc. Ry. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162 (1896)). The decision is believed to be unsound.

²⁷ Jackson v. Galveston, etc. Ry. Co., 90 Tex. 373, 38 S. W. 745 (1897). See also 29 Cyc. 521-523.

²⁸ Ryan v. N. Y. Central R. Co., 35 N. Y. 210.

²⁹ Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353.

³⁰ In the Ryan case it was held that a railroad company, which negli-

they originated, their continued affirmance in Pennsylvania³¹ entitles them to consideration. The point decided in those cases was that a defendant, who had negligently kindled a fire, should not be held responsible for its spread over an unusually long distance, in consequence of an unusually high wind prevailing at the time. The defect in this reasoning is that, although the wind was extraordinary, and the actual consequences extraordinary, yet the extension of the fire itself was only the reasonable and natural consequence of the extraordinary wind which existed at the time of the negligent act. The true doctrine is that the defendant is liable for even ex-

gently set fire to wood in a shed on its own land, and the fire spread to and destroyed a dwelling on the lands of another immediately adjoining, was not liable to the owner, because the negligent act was not the proximate cause of the loss. The case has been much criticised, limited, distinguished, and to some extent, at least, overruled by the court by which it was rendered (*Webb v. Rome, etc. R. Co.*, 49 N. Y. 420; *Lowery v. Manhattan Railway Co.*, 99 N. Y. 158, 1 N. E. 608; *Read v. Nichols*, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130 (1890); *Frace v. New York, etc. Ry. Co.*, 143 N. Y. 182, 38 N. E. 102 (1894); *O'Neill v. New York, etc. Ry. Co.*, 116 N. Y. 579, 22 N. E. 217, 40 Am. & Eng. Ry. Cas. 240, 5 L. R. A. 591 and note (1898). The decision in *Ehrgott v. New York*, 96 N. Y. 264, is really more directly opposed to the principle of the *Ryan* case than most of the decisions in which that has been expressly overruled. But in *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401 (1900) it is practically reaffirmed and the same arbitrary exception extended to damage to woods and fields by the negligence of railways in setting fire to combustible material negligently allowed to accumulate on the right of way, whereby, over the intervening land of another, the plaintiff's fences and timber were destroyed. Dissenting opinion by Vann, J.; Parker, C. J., concurring in dissent. *McDonough v. New York, etc. Ry. Co.*, 124 App. Div. 38, 108 N. Y. Supp. 270 (1908), (applying the rule that recovery can only be had for injury to the next adjoining premises). But see *Phelps v. New York, etc. Ry. Co.*, 48 Misc. 27, 96 N. Y. Supp. 22 (1905), (holding that although it appeared from the complaint that plaintiff's land did not adjoin the right of way, yet where it alleged there was at the time an excessive drought, and that the fire spread to and upon the land of the plaintiff, which was the natural and probable result from defendant's wrongful act, it states a cause of action.)

³¹ *Hoag v. Lake Shore, etc. R. Co.*, 85 Pa. St. 293. Compare, however, *Elder v. Lykens Val. Coal Co.*, 157 Id. 490, 27 Atl. 545. And see *Pennsylvania Ry. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Lake Shore, etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519, 6 Atl. 545.

traordinary damage, if it is the result of his negligence, operating in a natural and continuous sequence. If the circumstances, in the presence of which he was negligent, were extraordinary, and so were likely to make the result of his negligence extraordinary, that is an additional reason why he should have been especially careful not to be negligent at such a time. Accordingly, one who negligently allows fire to escape on his neighbor's land, when a gale of unusual force is blowing, is all the more to blame for being negligent at so peculiarly dangerous a time, and should be held responsible for all the damage done by reason of the gale carrying the fire to a distance which it would not have reached under an ordinary wind. This latter view, in substance, is taken by the Supreme Court of the United States,³² and by the courts of

³² In *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469, the U. S. Supreme Court denied the authority of *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210, and *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353, and affirmed the ruling of the Circuit Court (*Miller and Dillon, JJ.*), which instructed the jury "to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected." The court then went on to say: "The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. * * * In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether

Ohio,³³ Massachusetts,³⁴ Connecticut,³⁵ New Jersey,³⁶ Indiana,³⁷ Illinois,³⁸ Michigan,³⁹ Wisconsin,⁴⁰ California,⁴¹ and practically all other States,⁴² as well as by the best

they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time." The effect of the decision in that case was to sustain a recovery under extraordinary circumstances, on the ground that nevertheless the damage done was in fact the natural and probable sequence of the wrongful act. But in *Scheffer v. Railroad Co.*, 105 U. S. 249, while thoroughly approving the former decision, the court held that where a railroad collision, caused by the negligence of the defendant, produced such severe bodily injuries to the deceased as eventually to produce insanity, under the influence of which he committed suicide, the negligence of the defendant was too remote in the chain of causes to be considered a proximate cause of the death.

³³ *Adams v. Young*, 44 Ohio St. 1.

³⁴ *Higgins v. Dewey*, 107 Mass. 494.

³⁵ *Martin v. New England R. Co.*, 62 Conn. 331, 25 Atl. 239.

³⁶ *Kuhn v. Jewett*, 32 N. J. Eq. 647.

³⁷ *Billman v. Indianapolis, etc. R. Co.*, 76 Ind. 164; *Louisville, etc. R. Co. v. Krimming*, 87 Id. 351; but compare *Pennsylvania Co. v. Whitlock*, 99 Id. 16.

³⁸ *Fent v. Toledo, etc. R. Co.*, 59 Ill. 349.

³⁹ *Hoyt v. Jeffers*, 30 Mich. 181; *Webster v. Symes* [Mich.], 66 N. W. 580.

⁴⁰ *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141.

⁴¹ *Henry v. Southern Pacific R. Co.*, 50 Cal. 183.

⁴² See the cases collected under § 666, *post*. See Beven on Negligence (3d ed.), (1908), on causal connection, pp. 82-105, where the views of this section are maintained, and § 172 cited with approval. Street (T. A.) on *The Foundations of Legal Liability* (1908), Vol. 1, 90, 101; *Texas, etc. Ry. Co. v. Carlin*, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462, *aff'd* in 23 S. Ct. 585, 189 U. S. 354, 49 Ed. 849 (1903); *Illinois, etc. Ry. Co. v. Almon*, 100 Ill. App. 530 (1900); *Chicago, etc. Ry. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451 (1900); *Wabash Ry. Co. v. Lackey*, 31 Ind. App. 103, 67 N. E. 278 (1903); *Louisville, etc. Ry. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750, and note (1891); *Railroad Co. v. Stanford*, 12 Kans. 354, 15 Am. Rep. 362 (holding that "The spark negligently allowed to escape from the engine of the defendants is, in law, as well as popularly, the proximate cause of the burning of the hayrick thirty rods or four miles away"); quoted with approval in *St. Louis, etc. Ry. Co. v. League*, 71 Kans. 79, 80 Pac. 46 (1905); *Lumberman's Mut. Ins. Co. v. Kansas City, etc. Ry. Co.*, 149 Mo. 165, 50 S. W. 281 (1899); *Burlington, etc. Ry. Co. v. Westover*, 4 Neb. 268; *Butcher v. Vaca, etc. Ry. Co.*, 67 Cal. 518, 23 Am. & Eng. R. Cas. 356; *Annapolis, etc. Ry. Co. v. Gant*, 39 Md. 115; *Chicago, etc. Ry. Co. v. McBride*, 54 Kans. 172, 37 Pac. 978 (1894); *North Fork Lumber Co. v. Southern Ry. Co.*, 143 N. C. 324, 55 S. E. 781 (1906); *St. Louis, etc. Ry. Co. v. Wilbanks*, 113 S. W. (Tex.

English decisions.⁴³ It is undoubtedly the law.

§ 31. **Intervening cause, breaking connection.** — The second alternative involves many important questions. In the first place, the causal connection must be actually broken, the sequence interrupted, in order to relieve the defendant from responsibility. The mere fact that another person concurs or co-operates in producing the injury or contributes thereto, in any degree, whether large or small, is of no importance.⁴⁴ If the injuries caused by the concurrent acts of two persons are plainly separable, so that the damage caused by each can be distinguished, each would be liable only for the damage which he caused;⁴⁵ but if this is not the case, all the persons who contribute to the injury by their negligence are liable, jointly or severally, for the whole damage.⁴⁶ It is im-

App.) 318 (1908); *Ide v. Boston*, etc. R. Co., 83 Vt. 66, 74 Atl. 401 (1909).

⁴³ *Smith v. Southwestern R. Co.*, L. R. 6 C. P. 14; aff'g s. c., 5 Id. 98.

⁴⁴ *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Barrett v. Third Avenue R. Co.*, 45 Id. 628; *Galvin v. New York*, 112 Id. 223; 19 N. E. 675; *Phillips v. N. Y. Central, etc. R. Co.*, 127 N. Y. 657, 27 N. E. 978; *Eaton v. Boston, etc. R. Co.*, 11 Allen, 500; *Drommie v. Hogan*, 153 Mass. 29, 26 N. E. 237; *Martin v. North Star Works*, 31 Minn. 407; *Delaware, etc. R. Co. v. Salmon*, 39 N. J. Law, 299; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141; *Hunt v. Missouri R. Co.*, 14 Mo. App. 160; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091; *Colorado Mortg. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42. See other cases under § 35, *post*. The law is said to be different in Iowa (*DeCamp v. Sioux City*, 74 Ia. 392, 37 N. W.

971; *Knapp v. Sioux C. R. Co.*, 65 Ia. 91, 21 N. E. 198). But this is owing entirely to a misapprehension of the loose language of Shaw, C. J., in one of his hair-splitting opinions (*Marble v. Worcester*, 4 Gray, 395), which related only to the construction of a peculiar statute, and is not followed except as to that.

⁴⁵ See *Nitro-Phosphate Co. v. London, etc. Docks Co.*, L. R. 9 Ch. Div. 503, where this principle was applied to injury caused in part by negligence and in part by "act of God."

⁴⁶ *Lynch v. Nurdin*, 1 Q. B. 29; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New Haven R. Co.*, 20 Id. 492; *Barrett v. Third Ave. R. Co.*, 45 Id. 628; *Johnson v. N. W. Tel. Co.*, 51 N. W. 225, 48 Minn. 433; *Johnson v. Chicago, etc. R. Co.*, 31 Minn. 57; *Flaherty v. Minneapolis, etc. R. Co.*, 39 Id. 328, 40 N. W. 160; *Powell v. Deveney*, 3 Cush. 300; *Lane v. Atlantic Works*, 111 Mass. 140; *Lake v. Milliken*, 62 Me. 240; *Ricker v. Freeman*, 50 N. H.

material how many others have been in fault, if the defendant's act was an efficient cause of the injury.⁴⁷

420; *Wilder v. Stanley*, 65 Vt. 145, 26 Atl. 189; *Weick v. Lander*, 75 Ill. 93. It may be impossible to apportion the damages caused by the concurring negligence of two wrong-doers who cause a single injury to a third person; nevertheless, either is responsible for the combined result (*Slater v. Mersereau*, 64 N. Y. 138; aff'g 5 Daly, 445). In that case, a contractor for the erection of a building sublet a portion of the work to an independent contractor. Each of them was negligent in performing his respective portion of the work. It was held that, as the negligence of the contractor, united with that of the sub-contractor, caused the injury, he was liable for the whole of the resulting damages. Compare *Burrows v. March Gas Co.*, L. R. 5 Exch. 67; aff'd L. R. 7 Exch. 96. See *Thatcher v. Central Traction Co.*, 166 Pa. St. 66, 30 Atl. 1048; *Edwards v. Carr*, 13 Gray, 234; and other cases cited under § 122, *post*. *Slater v. Mersereau*, 64 N. Y. 138; *Taylor v. Yonkers*, 105 N. Y. 202; *Dutton v. Landsowne*, 198 Pa. St. 563, 48 Atl. 494, 82 Am. St. Rep. 814, 53 L. R. A. 469 (1901); *White on Personal Inj. on Railroads*, § 1041; *Beven on Negligence* (3d ed.), p. 79; *San Marcos Elec., etc. Co. v. Compton*, 48 Tex. App. 586, 107 S. W. 1151, writ of error refused (1908); *Seigel v. Treka*, 115 Ill. App. 56; aff'd 75 N. E. 1053, 218 Ill. 559, 2 L. R. A. (N. S.) 647, 109 Am. St. Rep. 302 (1905); *Burk v. Creamery Pckg. Mfg. Co.*, 126 Ia. 730, 102 N. W. 793, 106 Am. St. Rep. 377 (1905); *Bowden v. Derby*, 99 Me. 208, 58 Atl. 993 (1905); *contra*: *Missouri, etc. Ry. Co. v. Harrison*, 97 Tex. 611, 80 S. W. 1196 (1904). See *post*, § 39.

⁴⁷ *McMahon v. Davidson*, 12 Minn. 357; *Postal Tel. Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. 633; *Boone Co. v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Cline v. Crescent City R. Co.*, 43 La. Ann. 327, 9 So. 122; *Townsend v. City of Boston*, 187 Mass. 283, 72 N. E. 991 (1905); *Snydor v. Arnold*, 122 Ky. 557, 92 S. W. 289 (1906); *St. Louis Nat. Stockyards Co. v. Godfrey*, 101 Ill. App. 40, aff'd 198 Ill. 288, 65 N. E. 90 (1902); *Logansport, etc. Gas Co. v. Coate*, 29 Ind. App. 299, 64 N. E. 638 (1902); *Bragg v. Metropolitan St. Ry. Co.*, 192 Mo. 331, 91 S. W. 527 (1905); *Boston, etc. Ry. Co. v. Sargent*, 72 N. H. 455, 57 Atl. 688 (1904); *Barnes v. Masterson*, 38 App. Div. 612, 56 N. Y. Supp. 939 (1899); *Gardner v. Friederick*, 25 App. Div. 521, 49 N. Y. Supp. 1077, aff'd 163 N. Y. 568, 57 N. E. 1110 (1900); *Ray v. Pecos, etc. Ry. Co.*, 40 Tex. App. 99, 88 S. W. 466 (1905); *Choctaw, etc. Ry. Co. v. Holloway*, 114 Fed. 458, 52 C. C. A. 260, aff'd 191 U. S. 334, 24 S. Ct. 102, 48 L. Ed. 207 (1903); *Galveston, etc. Ry. Co. v. Vollrath*, 89 S. W. (Tex. App.) 279 (1905); *Neal v. Randall*, 100 Me. 574, 62 Atl. 706 (1905); *Pratt v. Chicago, etc. Ry. Co.*, 107 Ia. 287, 77 N. W. 1064 (1899); *Buchner v. Stockyards, etc. Co.*, 221 Mo. 709, 120 S. W. 766 (1909); *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50 (1909); *Louisville v. Hart*, 141 Ky. 171, 136 S. W. 212 (1911); *Missouri, etc. Ry. Co. v. Lasater*, 53 Tex. App. 51, 115 S. W. 103 (1909); *Atkinson, etc. Ry. Co. v. Mills*, 53 Tex. App.

Therefore, in an action against one who, by negligence, inflicted an injury which would naturally cause death, it is no defence to show that the injured person was so unskillfully treated as to hasten his death,⁴⁸ or that, by proper treatment, his life would have been saved. Nor, in such an action, is the defence that the decedent died from an independent disease made out, unless it is clearly shown that he must have died from it, when he did, even if he had not suffered from the defendant's negligent act.⁴⁹ Of course, where two causes contribute in producing the injury, for both of which defendant is responsible, no question of proximate cause arises.⁵⁰

§ 32. Must be either a superseding or a responsible cause. — The connection between the defendant's negligence and the plaintiff's injury may be broken by an in-

359, 116 S. W. 852 (1909); *Merrill v. Los Angeles Gas Co.*, 158 Cal. 499, 111 Pac. 534 (1910); *Miller v. Kelly*

Coal Co., 239 Ill. 626, 88 N. E. 196, 130 Am. St. Rep. 245 (1909); *Brown v. Chesapeake, etc. Ry. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717 (1909); *Wells Fargo, etc. Co. v. Zimmer*, 186 Fed. 130 (1911). *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827 (1888), ("in order that the concurrent negligence of a third person can be interposed to shield another, whose negligence has caused an injury, the one whose negligence contributed to the injury must have sustained such a relation to each other, in respect to the matter then in progress, that in contemplation of law the negligent act of the third person was, upon the principle of agency, or co-operation in a common or joint enterprise, the act of the person injured"). *Alabama, etc., Ry. Co. v. Hanbury*, 161 Ala. 358, 49 So. 467 (1909), (quot-

ing *Knightstown v. Musgrove*, *supra*, as above).

⁴⁸ *Nagel v. Missouri Pacific R. Co.*, 75 Mo. 653. Compare *Sauter v. N. Y. Central R. Co.*, 66 N. Y. 50; *Lyons v. Erie R. Co.*, 57 Id. 489; *Klutts v. St. Louis, etc. R. Co.*, 75 Mo. 642; *Pullman Car Co. v. Bluhm*, 109 Ill. 20; *Allender v. Chicago, etc. R. Co.*, 37 Ia. 264.

⁴⁹ *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163. Compare *Thompson v. Louisville, etc. R. Co.*, 91 Ala. 496, 8 So. 406. In *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826, it was held that if plaintiff had a constitutional tendency to disease, and the injury was the proximate cause of aggravating that tendency, plaintiff might recover. To same effect, *Louisville, etc. R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284.

⁵⁰ As where the unusual speed of the car and the state of the pavement were the two contributing causes, and defendant was responsible for both (*Kraut v. Frankford*,

tervening cause. In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one, if it is the culpable act of a human being, who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury, when the connection is thus actually broken by a responsible intervening cause. But the connection is not actually broken, if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation. Of course, the very definition of a superseding cause implies that the defendant's negligence cannot be the cause of the injury.

§ 33. Superseding cause and inevitable accident, distinguished. — The first alternative needs little comment. It is simply the case of inevitable accident, which has already been considered, with only this difference, that such accident occurs after the defendant has been negligent, and when, perhaps, but for the intervention of that accident, he might have been liable. But it must be carefully noted that inevitable accident, in order to furnish a complete defence in such a case, must be the sole cause of the injury, and therefore that it is no defence, if, but for the defendant's negligence, the plaintiff would not have been exposed to injury from such accident;⁵¹ while,

etc. R. Co., 160 Pa. St. 327, 28 Atl. v. Hedge, 44 Neb. 448, 62 N. W. 887.
783). S. P., Burrell v. Uncapher, 117 It must be so overwhelming that it
Pa. St. 353, 11 Atl. 619 (object in would have produced the injury in-
road frightening horse, and unrailed dependently (Grand Valley, etc. Co.
embankment). v. Pitzer, 14 Colo. App. 123, 59 Pac.

⁵¹ Condict v. Grank Trunk R. Co., 420 (1909).
54 N. Y. 500; St. Joseph, etc. R. Co.

if it contributed to any part of the resulting damage, it is only a defence in case that part of the damage can be accurately distinguished from the rest.⁵²

§ 34. Intervening responsible cause, not superseding.

— The second alternative, of a responsible but not superseding cause, needs further statement. If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not concur in point of time, and the negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not. If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another.⁵³ If it could not have been thus an-

⁵² Nitro-Phosphate Co. v. London, was injured by the falling of a panel etc. Docks Co., L. R. 9 Ch. Div. 503; in a snow fence, and it appeared Workman v. Great Northern R. Co., that previously, seeing the panel had 32 L. J. Q. B. 279; Benedict Pine- fallen, his brother had raised but apple Co. v. Atlanta, etc. Ry. Co., failed to secure it, also that the fence 55 Fla. 514, 46 So. 514, 46 So. 732, was defectively constructed, held 20 L. R. A. (N. S.) 92 (1908). that the company was liable as the

⁵³ Clark v. Chambers, L. R. 3 Q. B. Div. 327 (practically overruling Man- original wrong was the efficient gan v. Atterton, L. R. 1 Ex. 239); negligence such as might reasonably Lynch v. Nurdin, 1 Q. B. 29; Abbott have been foreseen. The court adds, v. Macfie, 2 Hurlst. & C. 744; Collins “the liability of a person charged v. Middle Level Com., L. R. 4 C. P. with negligence does not depend upon 279; Colorado Min. Co. v. Rees, 21 the question whether, with the exer- Colo. 435, 42 Pac. 42 (1895), (quot- cise of reasonable prudence, he could ing this section); Cleveland, etc. Ry. or ought to have foreseen the very Co. v. Patterson, 37 Ind. App. 617, injury complained of; but he may be 75 N. E. 857 (1905); Fishburn v. held liable for anything which, after Burlington, etc. Ry. Co., 727 Ia. 483, the injury is complete, appears to 103 N. W. 481 (1905), where a child have been a natural and probable incapable of contributory negligence consequence of his act.” Edging-

ticipated, then the intervening negligent person alone is responsible.⁵⁴

§ 35. Intervening cause illustrated.—Thus, one who leaves a horse loose and unattended, in a city street, is responsible for injuries done by the horse in running away, although that might not have happened but for the wrongful act of a stranger in frightening it,⁵⁵ and though, after the horse began to run, its owner did his best to

ton v. Burlington, etc. Ry. Co., 116 Ia. 410, 90 N. W. 95, 57 L. R. A. 561 (1902), (when the defendant was guilty of negligence in keeping a turntable in a place where children might reasonably be expected to resort, it will not be absolved from liability because the plaintiff's injury was immediately caused by other children putting it in motion); Pittsfield, etc. Co. v. Pittsfield Shoe Co., 72 N. H. 546, 58 Atl. 242 (1904); Howe v. West Seattle, etc. Co., 21 Wash. 594, 59 Pac. 495 (1899); Detzur v. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 949, 44 L. R. A. 500 (1899), (defendant held liable for injury to a pedestrian on the sidewalk injured by a broken pane of glass being dislodged by the wind); Benedict Pineapple Co. v. Atlantic, etc. Ry. Co., 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92 (1908); Evans v. Chicago, etc. Ry. Co., 109 Minn. 64, 122 N. W. 876, 26 L. R. A. (N. S.) 278 (1909); Texas, etc. Ry. Co. v. Bellar, 51 Tex. App. 154, 112 S. W. 323 (1908), (defendant held liable for injury by fire, set by cause unknown, to oil which it had negligently allowed to saturate the ground on its right of way).

⁵⁴See *Hofnagle v. N. Y. Central R. Co.*, 55 N. Y. 608. Where the defendant negligently sold gunpowder to a child, but the child gave all the

powder to its parents, who afterward allowed the child to take some of it, by the explosion of which he was injured, the defendant was held not liable, and quite correctly, because all effect of his negligence had been cured by the intervening prudence of the child's parents in taking charge of the gunpowder, and their subsequent negligence in allowing the child to have it again could not restore the connection between the defendant's original imprudence and the final injury (*Carter v. Towne*, 103 Mass. 507). The purchase by a father, for his son eleven years of age, of a toy-gun, cannot be held to have been made in reasonable anticipation of an injury caused by the use of the gun by another boy to whom the son lent it (*Harris v. Cameron*, 81 Wis. 239, 51 N. W. 437; s. p., *Chaddock v. Plummer*, 88 Mich. 225, 50 N. W. 135).

⁵⁵*Lynch v. Nurdin*, 1 Q. B. 29; *Illidge v. Goodwin*, 5 Carr & P. 192; *Rompillon v. Abbott*, 1 N. Y. Supp. 662, 49 Hun, 607 *mem.* One who left his cart in the street unattended, with which, while so standing, another cart came in collision, in consequence of which plaintiff was injured, is liable (*Powell v. Deveney*, 3 Cush. 300). s. p., *Proctor v. Jennings*, 6 Nev. 83; *Phillips v. DeWald*, 79 Ga. 732, 7 S. E. 151; *Belk*

stop it.⁵⁶ So also the owner of any machine, or other thing capable in its nature of doing injury, is liable for injury which ensues to a person, not himself careless, in consequence of the owner's negligently leaving it exposed and unguarded, in a public place, and its being there set in motion by a negligent person.⁵⁷ So where a gas company furnishes leaky pipes, and thus by its negligence fills the plaintiff's room with gas, it is responsible for an explosion caused by a gasfitter taking a lighted candle without due caution, for the purpose of finding where the leak was.⁵⁸ The rule that the defendant is liable for any negligence of other persons which he might have anticipated as the result of his own, has been carried to such an extent as to hold that where the defendant descended in a balloon upon private grounds, and the spectacle attracted upon the grounds a crowd of people, by whom the premises were injured, he was liable to the owner for the

v. People, 125 Ill. 584, 17 N. E. 744. See § 645, *post*. For cases of injuries caused by defects in highways, the negligence of third persons contributing, see §§ 346, 347, *post*.

⁵⁶ McCahil v. Kipp, 2 E. D. Smith, 413.

⁵⁷ Lane v. Atlantic Works, 111 Mass. 140; Weick v. Lander, 75 Ill. 93; s. p., Clark v. Chambers, L. R. 3 Q. B. Div. 327; Mars v. Delaware, etc. C. Co., 8 N. Y. Supp. 107, 54 Hun, 625 *mem.* [locomotive]; Mexican Nat. R. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075 [locomotive]. So held as to a gun left loaded and primed (Dixon v. Bell, 5 Maule & S. 198). In Henry v. Dennis, 93 Ind. 452, defendant left an open barrel of fish brine in the street; a stranger emptied the barrel into the street; plaintiff's cow drank the brine and was killed thereby; defendant held liable. See note to this case, 47 Am. Rep. 381. Where an open cellar-way in a public building was insecurely

covered by a bench, easily movable, and which in fact was removed by a third person, shortly before the plaintiff fell through the opening, the owner's negligence held to be the proximate cause of the injury (Howe v. Ohmart, 7 Ind. App. 32, 33 N. E. 466). See Handyside v. Powers, 145 Mass. 123, 13 N. Y. 462; McIntire v. Roberts, 149 Mass. 450, 22 N. E. 13.

⁵⁸ Burrows v. March Gas Co., L. R. 5 Ex. 67, *aff'd* 7 Id. 96. In Bartlett v. Boston Gas Co., 117 Mass. 533, where the gas company was held not liable for an explosion, the circumstances were alike in every respect, except as to contributory negligence. In Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522, a third person, not defendant's agent, struck the match which caused the explosion; defendant held liable, as being responsible for the escape of the gas from defective main. See

§ 695, *post*.

damage;⁵⁹ but this decision is condemned upon satisfactory grounds.⁶⁰

⁵⁹ *Guille v. Swan*, 19 Johns, 381.

⁶⁰ *Wharton, Negl.*, § 95. In *Fairbanks v. Kerr*, 70 Pa. St. 87, it was held that where a street preacher attracted a crowd around him, and some of them mounted a pile of stones, and by their weight broke them, it was a question of fact for the jury, and not one of law, whether the speaker should have anticipated this result. In the latter case it is to be observed that it was the very object of the street preacher to collect a crowd, whereas, in the former case, a crowd was probably the last thing which the descending balloonist desired. In the following cases it has been held that there was no independent intervening cause. Where the plaintiff seized the bridle of her horse, frightened by the negligence of the defendant, to prevent his running away and was injured (*Willis v. Providence Telegram Pub. Co.*, 20 R. I. 285, 38 Atl. 947 (1897); where the plaintiff and another were about being driven over by the negligence of the defendant, and plaintiff's companion, to escape, moved the log on which they were sitting, throwing the plaintiff under the team (*Chambers v. Carroll*, 199 Pa. 371, 49 Atl. 128 (1901); where a passenger is negligently thrown from a train by a violent jerk and falling on the track is run over while in a stunned condition by another train (*Southern Ry. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109 (1902); where a gas well near the highway is negligently blown off, frightening a horse, the reins being weak, broke, and plaintiff was injured (*Snyder v. Philadelphia Co.*, 54 W. Va. 149, 46 S. E. 366 (1903); where

the streets of a city are unlawfully occupied by defendants by a dangerous structure, injury to one attempting to use the gangway, his horse having become frightened from another cause (*Shippers, etc. Co. v. Davidson*, 35 Tex. App. 558, 80 S. W. 1032; writ of error refused (1904); where to avoid being struck by a runaway horse plaintiff jumped aside, falling on a pile of lumber and breaking his leg, the express company, whose wagon negligently struck the hind wheel of another wagon that was being loaded from the sidewalk, forcing it against the horse whereby it was frightened, is liable (*Collins v. West Jersey Express Co.*, 72 N. J. Law, 231, 62 Atl. 675, 5 L. R. A. (N. S.) 373 (1905); one's return to a burning building, negligently fired, and her subsequent injuries (*Birmingham Light, etc. Co. v. Hinton*, 146 Ala. 273, 40 So. 988 (1906); though the fright of the plaintiff's horse might have been directly caused by wind carrying the steam across the highway, negligent operation by defendant of the steam exhaust having started the horse (*Ft. Wayne Coop. Co. v. Page*, 170 Ind. 585, 82 N. E. 83 (1907); it has also been held that the opening of the door to an elevator shaft by third person, for plaintiff's accommodation, is such an intervening cause as will defeat plaintiff's action for injury received by stepping into the shaft (*Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509 (1904); and, in like manner, that the negligence of a railway company in failing to see that lumber was properly piled on its cars is an intervening cause that will prevent

§ 36. **Intervening cause must be culpable.** — The chain of responsible connection is not broken so long as the defendant is in any proper sense the cause of the plaintiff's injury, unless the person whose act intervenes is culpable. If such person's act is innocent it is no defence.⁶¹ And, generally speaking, the intervener must be one who can be held responsible in an action at law for the damage. But the act of the State or of the United States might intervene to break the connection of respon-

recovery against the lumber company for such negligent loading (*Fowles v. Briggs*, 116 Mich. 425, 74 N. W. 1046, 73 Am. St. Rep. 536, 40 L. R. A. 528 (1898); failure to give the proper signals is such an intervening cause as will avoid liability for injury caused by collision alleged to have been due to leaky condition of locomotive (*Louisville, etc., Co. v. Keiffer* (Ky. App. Ct.) 113 S. W. 433 (1908); where a boy had found a dynamite cap, and his parents allowed him to play with it, knowing its dangerous character, there is such an intervening cause as will relieve the party who negligently left the cap where it was found (*Pittsburgh Reduction Co. v. Horton*, 113 S. W. (Ark.) 647 (1908); where one is able to conceive suicide and the means thereof, there is such an intervening cause of suicide as avoids the alleged effect of injury negligently inflicted as producing insanity and suicide (*Brown v. Amer., etc., Co.*, 43 Ind. App. 560, 88 N. E. 80 (1909); where a fire had been negligently set by a railway company to combustible material negligently allowed to accumulate on its right of way, and extended until it threatened the destruction of her mother's home, the attempt of a fifteen-year-old girl to put it out, though made with due care, was such an intervening cause

as would relieve the company from liability for injuries thus received, from which she died (*Seale v. Gulf, etc. Ry. Co.*, 65 Tex. 274, 57 Am. R. 602 (1886); the decision is violative of the principles both of law and humanity. Where there was a negligent failure of the railway company to allow a mother to dismount from a train, her child having been previously taken therefrom, and the child was injured in the attempt by a by-stander to hand it to the mother, held, that the attempt to place the child on the train was an intervening cause, and that there was no causal connection between the railway company's neglect and the injury (*Atchison, etc. Ry. Co. v. Calhoun*, 213, 53 L. Ed. 671, 29 Sup. Ct. 321 (1908).

⁶¹ Thus, where a traveler upon a sidewalk in a city street steps upon a loose board forming part of the walk, so that the end of the board tips up and strikes another traveler, the latter has his remedy against the city, whose duty it was to maintain the sidewalk (*Emporia v. Schmidling*, 33 Kans. 485). To same effect, *Chacey v. Fargo*, 5 N. Dak. 173, 64 N. W. 932. Plaintiff went into defendant's lumber yard to purchase lumber. A team caught a projecting end of one of the timbers; it fell on plaintiff. Held, that the negligence

sibility, and yet no action be allowed. The intervention of a private person, however, can never relieve the defendant from liability for an injury of which he was the cause, unless such person could be made responsible in an action. If, therefore, the intervener is so young, or a person of such weak mind, that greater care than he shows could not reasonably be expected from him, such intervention is no defence.⁶² This doctrine is fully illustrated in the chapter on Contributory Negligence.

§ 36a. Who are responsible for intervening negligence? — As all persons, including married women,⁶³ lunatics, and children,⁶⁴ without discretion, are responsible for original or primary negligence, so, too, they are responsible as authors of wrongful acts or omissions amounting in law to intervening negligence, discharging from liability those guilty of original or primary negligence, unless such acts or omissions could reasonably have been foreseen by those of the latter class as probable. Regarding the contributory negligence of lunatics and children without discretion, as the doctrine of contributory negligence rests on public policy, so, in their case, it is limited by public policy according to the extent or degree of discretion possessed by them. These subjects are more specifically treated elsewhere in this work, and are mentioned here in order as expository of the definition of negligence given by the authors.

§ 37. Intervening cause must be a free agent. — Neither is the intervening cause sufficient, if the inter-

of defendant in piling the lumber of the cartridges, thereby killing one of the boys who bought it, defendant was held liable (*Binford v. Johnston*, 82 Ind. 426; s. p., *Otten v. Cohen*, 1 N. Y. Supp. 430). But see § 34, *ante*.

⁶² Thus, where defendant sold pistol cartridges to children, knowing that they were dangerous and that the purchasers were unfit to use them, and the purchasers allowed another boy, six years old, to fire one

⁶³ *Post*, § 120b.

⁶⁴ *Post*, § 121.

vener was not a free agent, since he could not be culpable in his act or responsible for it.⁶⁵ Thus, where the defendant chased a boy with an axe, and the boy, escaping into the plaintiff's store, injured property in his terror, the defendant was held liable for the damage.⁶⁶ So where, by the defendant's negligence, a horse was frightened and ran away, bringing its driver into collision with the plaintiff, the defendant was held liable.⁶⁷ The same principle applies to all cases in which the intervener acts so completely under the influence of sudden alarm as not to be responsible for his acts, especially if this alarm is caused by the defendant's fault; although we do not think that an indispensable condition. This point will be illustrated in the chapter on Contributory Negligence.

§ 38. Intervener not culpable if ignorant of the facts.

—Neither is the alleged intervener culpable, if he was ignorant of the facts which would, if known, have imposed a duty of special care upon him. And, therefore, the intervention of a person, thus ignorant, is no defence, even though his act was the sole immediate cause of the injury. Thus, where the defendant negligently sells to a third person, in a concealed form, for the plaintiff's use, poison or other articles likely to cause personal injury, and such person innocently and unsuspectingly gives them to the plaintiff, who is injured thereby, he can re-

⁶⁵ Wharton, Negl., §§ 89, 138. The familiar "squib case" is an apt illustration of the doctrine. In that case, A., in violation of a statute, threw a lighted squib into a market house, and it fell near B. The latter, to prevent injury to himself, seized it and threw it near C., who in turn threw it toward D., who was injured thereby. A. was held liable to D. for the injury of which his act was the proximate cause (Scott v. Shepherd, 2 W. Blackst. 892; s. c., 3 Wils. 403).

⁶⁶ Vandenburg v. Truax, 4 Den. 464.

⁶⁷ Lowery v. Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608. A. was injured by B.'s horse, which was frightened by the overturn of the sleigh to which it was attached, on a heap of snow and ice, wrongfully left in a highway by C. Held, that C.'s act was the proximate cause of A.'s injury (Lee v. Union R. Co., 12 R. I. 383). So where, in consequence of defendant's changing the course of a creek, beavers dammed it up, caus-

cover damages from the defendant.⁶⁸ And if the person who shipped the nitro-glycerine, in the well-known case arising out of its explosion while in transit,⁶⁹ could have been found, it is evident that the fact of the explosion having been directly caused by the rough handling of the carrier would have been no defence to him, since the carrier had been deceived by him as to the nature of the goods.

§ 38a. Same tests to be applied to intervener's acts or omissions in determining whether they are a responsible cause as in cases of original or primary negligence.—From the matters specifically treated in the two preceding sections it is apparent that to discharge the original wrongdoer the intervening act or omission, to be a responsible cause, must present the same elements requisite to constitute negligence as an original wrongful cause. This affirmatively determines his liability; otherwise the only useful purpose in the separate consideration of intervening causes is the ascertainment of whether the original wrongdoer remains liable or is thereby discharged. He does remain liable if his negli-

ing the water to overflow adjoining 1 Law Quarterly Review, 516, the land, he was held liable for resulting editor, approving the decision in injury (Cheeves v. Danielly, 80 Ga. Elliott v. Hall, 15 Q. B. D. 315, to 114, 4 S. E. 902). See similar cases the effect that the seller of coals, cited under §§ 355, 426, 626, *post*.

⁶⁸ George v. Skivington, L. R. 5 loose trap-door in it, is liable to the Exch. 1; Norton v. Sewall, 106 buyer's servants if they go through Mass. 143; Elkins v. McKean, 79 Pa. the trap-door in the course of unload- St. 493; Langridge v. Levy, 2 Mees. ing the coals, adds: "Perhaps it is & W. 519; *aff'd* 4 Id. 337; said by not too much even to hope that the Brett, M. R., to be badly reported. Court of Appeal will some day fol- (Heaven v. Pender, *infra*.) Thomas low the leading New York case of Thomas v. Winchester, 6 N. Y. 397, goes still Thomas v. Winchester, 6 N. Y. 397, which, though regarded with a kind of suspicious fear by English com- further; its authority has been ques- mentators, is, in our opinion, very tioned (see Bigelow on Torts, 609; good law." Wharton, Negl., § 91; Heaven v. Pender, L. R. 11 Q. B. Div. 503); but we think it correct. It is reaffirmed in ⁶⁹ Parrot v. Wells, 15 Wall. 524. Devlin v. Smith, 89 N. Y. 470. In

gence continues to be an efficient cause in producing the injury; and he is not otherwise liable, if the intervening cause is thus a responsible cause, unless he had some agency in producing it, or one of reasonable prudence in his position at the time, and with a full knowledge of all the facts, could have foreseen that the happening of such intervening cause was reasonably probable. The familiar proposition, that one is ordinarily under no obligation of duty to foresee or anticipate the negligence of another, has no application. It is merely a question of fact for the jury.

§ 39. Superior force concurring with defendant's negligence. — It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the "act of God" or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given.⁷⁰ It is also agreed that, if the negligence of the

⁷⁰ *Holladay v. Kennard*, 12 Wall. blowing (*Cook v. Gourdin*, 2 Nott & 154; *Bostwick v. Baltimore, etc.*, R. M. 19); or for a wagoner to start Co., 45 N. Y. 712; *Michaels v. N. Y. across a stream with an insufficient Central R. Co.*, 30 Id. 564; *Read v. team (Loomis v. Pearson, Harp. Spaulding, Id. 630; George v. Fisk, 470)*; and they will not be excused 32 N. H. 32; *Baltimore, etc., R. Co. for a loss occurring by reason of the v. Sulphur Spring*, 96 Pa. St. 65; *Wind or sudden rising of the stream. Watkins v. Roberts*, 28 Ind. 167; *In Jackson v. Wisconsin Tel. Co.* (88 Pruitt v. Hannibal, etc., R. Co., 62 Wis. 243, 60 N. W. 430), a telephone Mo. 527; *Clark v. Pacific R. Co.*, 39 company negligently left a wire connecting plaintiff's building with Id. 184. The filling of a steamer's boilers over night, to be ready for another greatly higher building surmounted by a high pole. Plaintiff's building was burned by reason of lightning striking the pole on the other building, and being conducted along the wire to his. Held, that the leaving of the wire between the two vessels over night (*Siordet v. Hali*, 4 Bing. 607). It is negligent for a buildings was the proximate cause of ferryman to start a little boat across the fire and the company was liable. a river when a dangerous wind is *Commonwealth Electric Co. v. Rose*,

defendant concurs with the other cause of the injury, in point of time and place,⁷¹ or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it,⁷² the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force which, concurring with his own negligence, produced the damage.⁷³ But if

214 Ill. 545, 73 N. E. 780 (1905); causing her death. Defendant held Greely v. State, 88 N. Y. Supp. 468, liable. Compare Henry v. Dennis, 94 App. Div. 605 (1904). 93 Ind. 452 (*supra*, § 35, n. 72). In

⁷¹ Scott v. Hunter, 46 Pa. St. 192. See Cooley on Torts, 72.

⁷² See Baltimore, etc. R. Co. v. Sulphur Spring, 96 Pa. St. 65. The defendants' vessel, owing to their negligence, struck, and was driven by the wind and tide upon a sea-wall, damaging the same. In that state of the weather and tide, it was impossible to prevent this result, after the ship had once struck. Held, that defendants were liable for the damage caused to the wall (Romney v. Trinity House, L. R. 5 Ex. 204; aff'd 7 Id. 247). In Sherman v. Inman Steamship Co., 26 Hun, 107, it was held that, if the jury were satisfied that the captain was negligent in endeavoring to continue a voyage in the disabled condition of the steamer, the plaintiff was entitled to recover for loss of cargo shipped by him.

⁷³ Woodward v. Aborn, 35 Me. 271 [wrongfully placing deleterious substance near plaintiff's well, into which an extraordinary freshet carried it, spoiling the water]. In Frith v. Bowling Iron Co. (L. R. 3 C. P. Div. 254), defendant, being bound to maintain a division fence, constructed it with old wire rope; this decayed by rust, and some of the fragments fell on plaintiff's land and were swallowed by his cow,

defendant negligently suffered fence to be broken down; plaintiff's cow escaped and was killed; defendant held liable. s. r., West v. Ward, 77 Ia. 323, 42 N. W. 309 [defendant left plaintiff's fence open; mare escaped, and was injured in a wire fence]. An action lies by a passenger against a carrier, if the injury occurred in part from an unforeseen cause, and in part by negligence (Brehm v. Great Western R. Co., 34 Barb. 256). The defendant had wrongfully placed a dam across a stream on plaintiff's land, and allowed it to remain there; being swept away by a freshet, the rush of water injured plaintiff's property; defendant held liable (Dickinson v. Boyle, 17 Pick. 78). In an action for obstructing a water-course, where the overflow was increased by the effects of melting snows and falling rains, neither the court nor jury are required to discriminate between the damages so caused and those resulting from the action of the living stream (Bird v. Hannibal, etc. R. Co., 30 Mo. App. 365). The fact that a railroad culvert would not have given way but for the breaking of a dam on adjoining property, over which defendant had no control, will not prevent

the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury.⁷⁴

recovery by a passenger, if the negligent manner of the culvert's construction contributed to the injury (*Bonner v. Wingate*, 78 Tex. 333, 14 S. W. 790; *Ilfrey v. Sabine*, etc. R. Co., 76 Tex. 63, 13 S. W. 165). To same effect, *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737; *Webster v. Rome*, etc. R. Co., 115 N. Y. 112, 21 N. E. 725. [leaving cars unsecured on side track whence they were blown by high winds]. See § 465, *post*. In *Rodgers v. Central Pacific R. Co.*, 67 Cal. 607, 8 Pac. 377, defendant's bridge fell by reason of its defects, combined with an enormous fall of water from "a cloud-burst;" defendant held liable. *s. p.*, *Philadelphia*, etc. R. Co. v. *Ander-son*, 94 Pa. St. 356; *Davis v. Vermont Cent. R. Co.*, 55 Vt. 84. In *Ellet v. St. Louis*, etc. R. Co., 76 Mo. 518, a storm of unusual severity carried away a railway embankment. The defendant ran a train without first causing the roadbed and track to be carefully examined, and a train was wrecked in consequence. The company was held liable. Where the servants of a railroad company, aware that a bridge on the line had been carried away by a flood, neglected to take steps to warn and stop an approaching train, the company was held liable (*Lambkin v. Southeastern R. Co.*, L. A. 5, App. Cas. 352). The defendant hung a sign over a street, in violation of an ordinance; it was blown down by the wind in an extraordinary storm, and in its fall a bolt, which was part of its fastenings, struck and broke plaintiff's window; defendant held liable

(*Salisbury v. Hirchenroder*, 106 Mass. 458). For cases of street obstructions occasioned, in part, by natural causes — winds, ice and snow — see § 363, *post*. *Common-wealth Elec. Co. v. Rose*, 214 Ill. 545, 73 N. E. 780 (1905), ("Where an injury is the result of the negligence of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury"); *Howe v. West Seattle*, etc. Co., 21 Wash. 594, 59 Pac. 495 (1899). *St. Louis*, etc. Ry. Co. v. *Mackey*, 95 Ark. 297, 129 S. W. 78 (1910), ("It is the duty of a railroad company to provide proper and sufficient openings or culverts for the escape of the water of all streams crossing its roadbed, so as not to flood the land of upper riparian owners, whether at ordinary stage of water or during floods which could reasonably have been foreseen and guarded against; and if it fails to provide such openings it is liable to any person damaged thereby," quoting this section of this work). *Birsch v. Citizens' Electric Light Co.*, 36 Mont. 574, 93 Pac. 940 (1910); *Schmidt v. St. Louis Tr. Co.*, 140 Mo. App. 182, 120 S. W. 96 (1909).

⁷⁴ Thus where a building is carried away by a flood, which a culvert under defendant's railway embankment was not sufficiently large to pass, a charge, in effect, that defendant's negligence concurring with the act of God, although that negligence did not produce the injury, and

§ 39a. **Acts of animals as an intervening cause.** — The acts of animals, consequent on defendant's negligence, and intervening between such negligence and the infliction of injury, though standing alone as an adequate cause and one without which the injury would not have happened, will not relieve him from liability. The instinctive action of animals in such cases is analogous to the operation of the laws of matter. It has been thought by some that when the action of animals is so unusual and extraordinary that it could not reasonably have been anticipated, the negligent defendant should not be held liable for such consequences as would not otherwise have occurred. But the weight of reason and authority is the other way, viz.: because the action of brute animals under given conditions, as of fright or anger, is incapable of being foreseen, a negligent defendant, who has either incited them or given an opportunity for their exercise, will be liable for their co-operative consequences whatever they are, whether ordinary and anticipated or extraordinary and unforeseen. By the ancient common law the owner of land is liable for injuries inflicted by his trespassing animals, such as horses, for his obligation is to fence them in. This rule still prevails in many States. But in many others the common-law rule is that

its absence would not have prevented witz v. Netherlands Steam Nav. Co.,
it, was sufficient to render the de- 64 Hun, 262, 19 N. Y. Supp. 75).
fendant liable, was held erroneous The working loose of long lumber on
 (Baltimore, etc. R. Co. v. Sulphur two freight cars, properly packed
 Springs, etc., 96 Pa. St. 65). "To and inspected, so that the ends of
 create liability, it must have re- the lumber struck a passing car,
 quired the combined effect of the act held to be an accident which could
 of God and the concurrent negli- not have been anticipated (Knox v.
 gence to produce the injury" (Ib.; N. Y., Lake Erie, etc. R. Co., 69
compare Philadelphia, etc. R. Co. v. Hun, 93, 23 N. Y. Supp. 198).
 Anderson, 94 Pa. St. 351). Where a Grand Valley, etc. Co. v. Pitzer,
 lurch of the vessel caused a passen- 14 Colo. App. 123, 59 Pac. 1909).
 ger to trip on socket fixed in floor Where injury to land is caused
 of saloon, alleged to have been in- by the building of defendant's ir-
 sufficiently lighted, held the cause of rigation ditch by the heaviest rain
 the fall was the action of the sea, storm that had ever occurred in that
 and the carrier was not liable (Brus- locality, it appearing that every

the owner of land should fence against them.⁷⁵ In the latter jurisdictions, therefore, it may be asumed, the owner of a horse, believing it to be gentle, at least having no notice of its vicious disposition, would not be liable for injury inflicted on a human being by his horse which has been allowed to range free. The law is otherwise where the injury occurs in a city or town providing by ordinance against horses and other animals being allowed to run loose, if on the occasion of the injury the horse was running loose through the negligence of the owner. The defendant who negligently frightens a horse is liable for any injury caused by his frantic condition.⁷⁶ As is also the owner who negligently leaves his horse or team untied in the public highway.⁷⁷ And in the case of *Isham v. Dow*,⁷⁸ where one had unlawfully and wantonly shot a dog which in its frenzy injured a woman, the court said: "In these circumstances the law treats the act of the intestate" — the wrongdoer — "as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or was not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events." It is the universal rule that one who has negligently left his horse untied in the streets of a city is liable for all injury inflicted by his being frightened by a third party.

§ 40. Superior force concurring with defendant's delay. — In the application of this principle, a serious

practicable means of carrying off surplus water had been provided, the court, referring to this section of this work, said, "So far as disclosed by the evidence, the damage proximately resulted, not from human agency, but from one of those unexpected, unanticipated, superior causes, over which the canal com-

pany had no control, and which no reasonable precaution would have prevented."

⁷⁵ *Post*, § 418.

⁷⁶ *Ante*, § 37; *post*, §§ 57n, 355.

⁷⁷ *Ante*, § 35; *post*, §§ 365n, 629, 634, 645.

⁷⁸ 70 Vt. 788.

difference of opinion has arisen as to what is a natural sequence of negligence, exposing the property of another to injury. In Pennsylvania,⁷⁹ Massachusetts,⁸⁰ Ohio,⁸¹ Iowa,⁸² Nebraska,⁸³ and Arkansas,⁸⁴ as well as in the United States Supreme Court,⁸⁵ it is held that where a carrier, by negligent delay, exposes goods to injury by the "act of God," or other cause for which he is not responsible, and which he could not naturally foresee, he is *not* liable for injuries arising from such a cause, although they would not have affected the goods if he had not negligently delayed their transportation. This decision is put upon the ground that he could not reasonably have anticipated such a result of his delay, and that, for aught that he could possibly foresee, promptness might have exposed the goods to the risk quite as much as delay.⁸⁶

⁷⁹ In *Morrison v. Davis*, 20 Pa. St. 171, a canal boat started with a lame horse; a consequent delay occurred, pending which the goods were lost by an extraordinary flood. But for the lameness of the horse the boat would have passed the place where the flood occurred. Carrier not liable.

⁸⁰ *Denny v. N. Y. Central R. Co.*, 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Tr. Co.*, 115 Mass. 304.

⁸¹ One who, having engaged to tow a barge over Lake Michigan, delayed commencing the voyage, so that after it was commenced a storm was encountered in which the barge was lost, was not liable for the loss, although the delay was unreasonable and unnecessary, and although the barge but for the delay would probably have been safe (*Daniels v. Ballantine*, 23 Ohio St. 532).

⁸² Where plaintiff deposited wood at one end of a bridge, which he intended to take over the bridge into

the city, but was delayed by the neglect of the city to repair it, and the wood was subsequently carried away by a flood, it was held that he could not recover (*Dubuque Wood, etc. Co. v. Dubuque*, 30 Iowa, 176).

⁸³ Where a train, being behind time, was upset by a gale of wind, which it would have escaped had it been on time, held, that the carrier was not liable (*McClary v. Sioux, etc. R. Co.*, 3 Neb. 44).

⁸⁴ *Martin v. St. Louis, etc. R. Co.*, 55 Ark. 510, 19 S. W. 314.

⁸⁵ *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Thomas v. Lancaster Mills*, 34 U. S. App. 404, 71 Fed. 481, 19 C. C. A. 88; *Scott v. Baltimore, etc. Steam B. Co.*, 19 Fed. 56. To the same effect, *Dalzell v. Steamboat "Saxon"*, 10 La. Ann. 280; *Yazoo, etc. Ry. Co. v. Millsaps*, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543 (1899).

⁸⁶ *Colt, J., Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

In New York,⁸⁷ New Hampshire,⁸⁸ Missouri,⁸⁹ and Tennessee,⁹⁰ the very opposite doctrine is firmly settled. In all courts, the act of a master of a vessel in unnecessarily deviating from the usual course of his voyage would be held the proximate cause of damage caused by a tempest, in itself the act of God.⁹¹

⁸⁷ In New York it is well settled that if the defendant's delay was unreasonable, and such delay exposed the goods to loss, *e. g.*, by fire, the loss is to be attributed directly to the defendant's fault (*Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, and cases cited). Compare *Read v. Spaulding*, 30 N. Y. 630; *Bostwick v. Baltimore, etc. R. Co.*, 45 Id. 712; and *Michaels v. N. Y. Central, etc. R. Co.*, 30 Id. 564, where forwarder was held liable for delay in forwarding goods, by which they became damaged by extraordinary rise of water in river. So held also in *Graw v. Baltimore, etc. R. Co.*, 18 W. Va. 361. In *Smeed v. Foord* (1 El. & El. 602) the delay was in the delivery of a threshing machine, with knowledge on the part of the company that it was needed to thresh wheat in the field. The grain was injured by the delay. The carrier was held liable.

⁸⁸ *Deming v. Grand Trunk R. Co.*, 48 N. H. 455.

⁸⁹ *Pruitt v. Hannibal, etc. R. Co.*, 62 Mo. 527, and cases cited.

⁹⁰ *Deming v. Merchants' Cotton Press Co.*, 90 Tenn. 306, 17 S. W. 89. To the same effect *Louisville, etc. R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753; *Hernsheim v. Newport News, etc.*, 18 Ky. Law Rep. 227, 35 S. W. 1115 (1896).

⁹¹ *Davis v. Garrett*, 6 Bing. 716. Same rule as to carriers by land (*Powers v. Davenport*, 7 Blackf. 497; *Lawrence v. McGregor*, Wright, 193; *Phillips v. Brigham*, 26 Ga. 617). If a carrier agrees to transport goods by canal, and he takes them out to sea (*Hand v. Baynes*, 4 Whart. 204), or agrees to send them by one line of boats and sends them by another (*Johnson v. N. Y. Central R. Co.*, 33 N. Y. 610), and they are lost by act of God, he is liable. *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Constable v. National Steamship Co.*, 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903. Carrier held liable for goods destroyed by Chicago fire, route through Chicago being unusual (*Dispatch Tr. Co. v. Kahn*, 76 Ill. 520).

CHAPTER III.

DEGREES OF NEGLIGENCE.

- | | |
|--|---|
| <p>§ 41. The theory of two degrees of negligence.</p> <p>42. Its impracticability in modern affairs.</p> <p>43. Unsatisfactory tests of "ordinary care."</p> <p>44. Necessity of an exceptional degree of care.</p> <p>45. The requirement just and reasonable.</p> <p>46. "Utmost care," when required.</p> <p>47. The standard — no technical degrees of negligence.</p> <p>48. Correlative degrees of negligence.</p> | <p>§ 49. "Gross," "ordinary" and "slight" negligence defined.</p> <p>50. Standard of "great care" stated.</p> <p>51. Application of the rule to passenger carriers.</p> <p>51a. Comparative negligence.</p> <p>51b. Effect of Federal Employers' Liability Act of 1908.</p> <p>51c. Interpretation of doctrine of Illinois.</p> <p>51d. Former Illinois doctrine not applicable to the interpretation of Federal statute.</p> |
|--|---|

§ 41. The theory of two degrees of negligence. — We desire to express the obligation under which we, in common with the courts and the bar, have been placed by the eminent ability and learning with which Dr. Wharton has expounded the Roman law concerning degrees of negligence, and by which he has cleared up the confusion which had so long existed upon this subject. He has conclusively shown that the real Roman law *did* recognize different kinds of negligence, or rather of care and skill to be required, and that it did *not* recognize the division and definition into the degrees which were invented by the scholastic jurists of the Middle Ages.

We should be glad to accept and follow Dr. Wharton's theory to the fullest extent, if we could feel justified in doing so. We shall accept the definitions which he has drawn from the Roman law; but we are compelled to differ from him upon one important point; although, in

doing so, we vary nearly as much from the theory of our first three editions as we should by accepting his views without qualification. In those editions, which were all issued before Dr. Wharton's work appeared, we referred to the difficulties and confusion which surrounded the whole question of degrees of negligence, and, while insisting that some difference in the degree of care, diligence and skill to be required from persons in very different positions must be recognized, we admitted that the definitions usually given of these degrees were unsatisfactory.

The analysis of Dr. Wharton shows clearly wherein these definitions were unsatisfactory and also why they were so. They were not derived from the real Roman law, framed, as that was, by jurists dealing with practical affairs; they were invented by mere students, having no experience of practical life. So far, the reasoning of Dr. Wharton is conclusive. He goes further, however, and insists that only two degrees, or, more accurately, two kinds of care or negligence should be recognized in our law, as only two were acknowledged by the Roman jurists.

These are (1) the care to be required by one who is not, and does not profess to be, a good man of business or an expert in the affairs under consideration, and (2) the care to be required of one who is, or professes to be, such an expert. Great care, he holds, should not be demanded in any case, if it is to be understood as implying anything more than what is here called ordinary care, the care of an expert, measured by what is usual among good men of business in the same line.

§ 42. Its impracticability in modern affairs.—It is quite true that the middle-age definitions of the degrees of care, and still more the application of those definitions to particular cases and the reasons assigned for it, were the product of mere abstract speculation, without the aid of practical experience. The result of all attempts to

apply these speculations to practice has been to drop out of sight nearly all the examples of great care and slight negligence which were given in the old books. But a new class of cases has arisen within the last century, in which, as the result of that very experience which Dr. Wharton justly considers the true foundation of all theories in law, the courts of Great Britain and the United States have felt so strongly the necessity of a special, unusual degree or kind of care, that they have held defendants as common carriers of passengers to the duty of using the “*utmost care*,” or “highest practicable degree of care.”

Dr. Wharton justly contends that, in all these cases, only ordinary care has really been exacted, that is, the care usually shown in such cases by a good man of business, accustomed to that line of business.

§ 43. Unsatisfactory tests of “ordinary care.” — According to the common understanding of language no possible definition of ordinary care can include within it the actual decisions of the best courts as to the duty of common carriers of persons. Dr. Wharton admits that the general language of the leading judicial opinions is inconsistent with the theory that ordinary care only is required in such cases.¹ But he urges that this language is only theoretical, and that the courts, when stating as a principle that the utmost care and skill, the highest degree of prudence and the greatest foresight, are demanded from carriers, only mean that they must use that degree of care and skill “which a good specialist, skilled in his particular department, is accustomed to apply,”² or “which good business men of the class are accustomed, under similar circumstances, to apply.”³ If, as

¹ Wharton, Negligence, § 636.

² Id. § 636.

³ Id. § 629. See remarks of Justice McLain of the Supreme Court of Iowa, author of the article on Carriers, 6 Cyc. p. 592. It is not by forcing classification under the great est possible generality of expression

doubtless is the case, it is meant that no greater care and skill are required than such as is generally shown by average good business men of the same class, and especially such as they usually bestow upon their own protection, under similar circumstances, these phrases are misleading. They are not mere students or "school-men" who have invented a different rule; they are judges, the majority of whom have been more or less engaged in railway business, and many of whom were for years actively engaged in the defence of railway companies against claims for personal injuries. Yet they are unanimous, or very nearly so, in requiring the managers of railways, steamboats, etc., to use a degree of care, diligence and skill for the protection of passengers, which they know perfectly well that such carriers never would use, if it were not for these decisions, and which the men who conduct the practical details of such business rarely use for their own protection.⁴ The courts are not influenced by prejudice, in thus holding common carriers to an ideal, though not really impracticable, standard of perfection. They do it because, from long experience and observation of affairs, they know that, if they lowered their standard to the average degree of care used by those who are reputed to be good and careful railway managers and servants, human life would be needlessly put in peril every day.

§ 44. Necessity of an exceptional degree of care.— Let us suppose that the plaintiff has left a watch to be repaired. If the defendant has used as much skill and care in the work as is usual among watchmakers reputed

the law advances, but by noting distinctions and differentiations as they arise in the actual conduct of affairs and in the conceptions of duty, and adopting and incorporating conclusions of fact universally found to be true, thus constantly narrowing

the field of uncertainty. Cp. Holmes Common Law, Ch. Negligence and Trespass, pp. 111-112.

⁴ For the rule of the degree of care required of carriers of passengers, see §§ 51, 495, *post*.

to be good and reasonably skillful workmen, the plaintiff cannot recover damages for a defect in the work, even though he proves that such a defect was never known in the work of two or three of the most famous watchmakers in the world. But, on the other hand, let us suppose the plaintiff to have been injured by a railway accident, caused by a flaw in a wheel. If the plaintiff proved that three of the best railway companies had a thoroughly tested, convenient and practicable process in use by which they could and would have discovered this flaw, and that this fact was known to the defendant, the plaintiff can recover, in spite of proof that three hundred other companies did not use such a test.⁵ The only question in such a case is whether even as much proof as this would be necessary. This is but one of many instances in which the courts have sternly enforced the rule that common carriers of passengers, and especially those who use steam or electric power, must use, not that degree of care which is usual among prudent and competent carriers, but that degree of care which the court can see *ought* to be used by them all, and is in use by a few unusually prudent carriers. And it is worthy of note, as indicating the force of the considerations which have led practical men to recognize the necessity of this exceptional degree of care, that it has been established and enforced, with the severest strictness, by judges who had been counsel for railway companies when at the bar, many of them owning railway stock while on the bench, and that while many legislatures have been wholly controlled by railway corporations, none of them ever ventured to relax the stringency of this rule.

§ 45. The requirement just and reasonable. — While no definition of ordinary care calls for more care than prudent experts generally use for their own protection, it is

⁵ See cases under next section.

settled law in most American States, if not in all, that a carrier of passengers by steam is responsible for any defect in engines, cars or other means of transportation which could have been detected by any known test, either when purchased, or while in use⁶ or in the process of manufacture, if the company manufactures its own machinery.⁷ As a matter of fact, not one practical railway official in a thousand would ever apply these tests for his own protection if he had not formed the habit of doing so for the sake of passengers; and we are confident that not one in ten, if one in a hundred, would do it even now, if they were the only passengers in the train. We feel confident, moreover, that neither the railway companies nor the car manufacturers ever applied to any one car, which they did not specially suspect of defects, all the tests which the courts unanimously hold them bound to apply to every car. So the courts hold that common carriers are bound to adopt all inventions which have been demonstrated to increase the safety of passengers, and which are in actual use by some carriers.⁸ But a great majority of railways in America are still without many of these improvements; and very few of them would ever be adopted by railway officials merely for their own protection; while many

⁶ *Ingalls v. Bills*, 9 Metc. 1; *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Carroll v. Staten Island R. Co.*, 58 Id. 126; *Caldwell v. N. J. Steamboat Co.*, 47 Id. 282; *Alden v. N. Y. Central R. Co.*, 26 Id. 102; reaffirmed, *Palmer v. Delaware & H. Canal Co.*, 120 N. Y. 170; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Carpue v. Brighton, etc. R. Co.*, 5 Q. B. 749; *Skinner v. Brighton, etc. R. Co.*, 5 Exch. 787; *Collett v. Northwestern R. Co.*, 16 Q. B. 984; and other cases cited under §§ 410, 497, *post*.

⁷ *Hegeman v. Western R. Co.*, 13 N. Y. 9; *Sharp v. Grey*, 9 Bing. 457, 2 Moore & S. 620; *Burns v. Cork, etc. R. Co.*, 13 Irish C. L. 543. The case of *Hegeman v. Western R. Co.*, *supra*, goes farther than the test and declares liability for a latent defect, though discoverable only in the process of manufacture, whether the company manufactures its own machinery or not; but in this it is contrary to the modern doctrine uniformly concurred in.

⁸ *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Smith v. N. Y. & Harlem R. Co.*, 19 Id. 127; *Knight v. Portland R. Co.*, 56 Me. 234; see *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225, and §§ 51, 410, 495, 497, *post*.

would never be adopted at all, if it were not for fear of heavy damages in negligence suits.

§ 46. “**Utmost care,**” when required. — The modern demand for the exercise of what is often called “the utmost care” is largely due to the essentially modern regard for human life and the development of applied science. It is only within a very recent period that life has been considered more sacred than property; and, side by side with the growth of this feeling, there has been a wonderful extension of human powers by means of new inventions. But, in our own time, legislatures have absolutely forbidden gas companies to cast their refuse into rivers; although these companies unanimously declared, with entire sincerity, that they could not conduct their business at all in any other way. So legislatures have compelled manufacturers to consume their own smoke; although none of them knew how to do it. And the result, in these and other cases, has fully vindicated the wisdom of this stern legislation. When factories were compelled to consume their smoke, their owners paid inventors to devise a method of doing so. When gas companies were threatened with ruin, if they could not dispose of their refuse, they paid the cost of experiments, which resulted in the invention of aniline colors and increased the wealth of the gas companies themselves, while putting an end to an intolerable nuisance, which they had always declared to be unavoidable. In the light of such experiences, the courts are justified in holding those who take charge of the lives of human beings to any degree of care which is not incompatible with the transaction of business, especially when its practicability has been demonstrated by its adoption in that business by the most careful class of persons.⁹

⁹ *Taber v. Delaware, etc. R. Co.*, 71 St. 436; *Fleet v. Hollenkemp*, 13 B. N. Y. 489; *Wilson v. Cunningham*, Monr. 219. “Not ordinary, but extraordinary, diligence is required as

§ 47. The standard — no technical degrees of negligence. — The standard of care, which never varies, is such as a man of ordinary prudence would use under the

to passengers, and the company is responsible for the utmost care and watchfulness, and answerable for the smallest negligence" (Sandham v. Chicago, etc. R. Co., 38 Iowa, 88). *S. P.*, Bemis v. Connecticut, etc. R. Co., 42 Vt. 375; Louisville, etc. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Railroad Co. v. Fort, 17 Wall. 553, per Davis, J. A railroad company is bound to use "the utmost care and diligence which human prudence and foresight will suggest" to secure the safety of its passengers (Palmer v. Delaware, etc. Canal Co., 120 N. Y. 170, 24 N. E. 302). See §§ 51, 495, *post*. A much greater degree of care is required in driving along a thoroughfare that is crowded and obstructed with teams and foot passengers than along one that is free from such obstructions (Garmon v. Bangor, 38 Me. 443; Cayzer v. Taylor, 10 Gray, 274; Denver Tramway Co. v. Reid, 4 Col. App. 53, 35 Pac. 269; McAdoo v. Richmond, etc. R. Co., 105 N. C. 140, 11 S. E. 316, and cases cited under §§ 461-464, *post*). It may be "ordinary caution" in a master to apprise an adult servant of a danger to be guarded against in the use of machinery, while in the case of one not yet beyond the years of thoughtless childhood it would be gross and most culpable, if not criminal, carelessness for a master to content himself with pointing out dangers not likely to be appreciated, or, if appreciated, not likely to be kept in mind with sufficient distinctness and caution, and against which effectual precaution ought to be provided (Bartonshill Coal Co. v. McGuire, 3 Macq. H. L. 300; O'Connor v. Adams, 120 Mass. 427; Sullivan v. India Mfg. Co., 113 Id. 396; Coombs v. New Bedford, etc. Co., 102 Id. 572; Hill v. Gust, 55 Ind. 45; East Saginaw R. Co. v. Bohn, 27 Mich. 503. See § 219, *post*). A heavy electric car requires greater caution in its management than an ordinary vehicle (Cincinnati R. Co. v. Whitcomb, 14 C. C. A. 183, 66 Fed. 915). The term "greatest possible care" is used by the Supreme Court of the United States as properly designating the care due by common carriers of passengers, but it has been thought elsewhere to exclude the limitation of practicability and has, on that account, not been accepted; the term "utmost care" being preferred, while the "highest degree of practicable care" is deemed best of all. On the first proposition see Indianapolis, etc. R. Co. v. Horst, 93 U. S. 291; Philadelphia, etc. R. Co. v. Derby, 14 How. 486; Steamboat "New World" v. King, 16 How. 469; New York, etc. R. Co. v. Lock, 17 Wall. 357. On the other propositions, International, etc. Ry. Co. v. Welch, 86 Tex. 203, 24 S. W. 390, 40 Am. St. Rep. 829 (1893), the court stating that it had been unable to find any other case to the same effect as the three first above cited. And though they have frequently been cited by the Supreme Court of the United States itself, it is not known that the expression used has ever been expressly modified. But there is abundant evidence they are not understood to mean more than the greatest possible degree of care practicable. See also Houston, etc. Ry. Co. v. Keel-

circumstances of the particular case. Negligence in its typical form consists in the failure to conform to the conduct of a prudent, careful, skillful or diligent man in a particular place or situation,¹⁰ and when reference is made to one engaged in a dangerous service, requiring skill and expertness, by the term "person of ordinary prudence" is meant one possessing the requisite competency and skill and responding to judgment or conscience according to ordinary standards.¹¹ There are no

ing, 129 S. W. (Tex.) 847 (1909). The highest degree of practicable care is the rule generally adopted in the United States, though a great variety of expressions is used to indicate it (Illinois, etc. R. Co. v. Davidson, 76 Fed. 517, 22 C. C. A. 306; Southern Kansas R. Co. v. Walsh, 45 Kans. 653, 26 Pac. 45 (1891); Louisville, etc. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434 (1891); McCurrie v. Southern, etc. Co., 122 Cal. 558, 5 Am. Neg. Rep. 117, 55 Pac. 324 (1898).

¹⁰ This branch of the definition applies to all cases of negligence (Johnson v. Hudson River R. Co., 20 N. Y. 65, aff'g s. c., 6 Duer, 633; Field, J., Parot v. Wells, 15 Wall. 524; Willes, J., Vaughan v. Taff Vale R. Co., 5 Hurlst. & N. 679; Kay v. Pennsylvania R. Co., 65 Pa. St. 269; Pennsylvania R. Co. v. Coon, 111 Id. 430; Grant v. Ludlow, 8 Ohio St. 1; Cleveland, etc. R. Co. v. Terry, Id. 570, 581; Fallon v. Boston, 3 Allen, 38; Fletcher v. Boston, etc. R. Co., 1 Id. 9, 15; Holly v. Boston Gas Co., 8 Gray, 123, 131; Parvis v. Philadelphia, etc. R. Co., 8 Del. 436, 17 Atl. 702 [railroad crossing]; Spokane Truck, etc. Co. v. Hoefer, 2 Wash. St. 45, 25 Pac. 1072 [hoisting safe]). Determining what was reasonable care required a high degree of care (Uggle v. West End

R. Co., 160 Mass. 351, 35 N. E. 1126). "Negligence is want of care under the circumstances. No fixed rule of duty, applicable to all cases, can be established. A course of conduct, justly regarded as resulting from the exercise of ordinary care under some circumstances, would exhibit the grossest negligence under other circumstances; the opportunity for deliberation and action, the degree of danger, and many other considerations of like nature, affect the standard of care which may be reasonably required in a particular case" (Sterrett, J., in Pennsylvania R. Co. v. Coon, *supra*). "Negligence in its common or typical form * * * consists in the failure in the particular place or situation to conform to the conduct of a prudent, careful, skillful, or diligent man often called the average man" (Bigelow on Torts, p. 110, 8th ed. (1907). "By average man * * * when applied to one engaged in a dangerous service, requiring skill and expertness, is usually meant one possessing the requisite competency and skill and responding to judgment or conscience according to ordinary standards" (Street on Personal Injuries in Texas, § 34 (1910). See Townes on Torts, p. 208.

¹¹ See Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869; Olwell v.

technical degrees, except as the highest practicable degree of care is required by the common law of common carriers of passengers, or as may be required by statute, but from a common-sense point of view the degree of care required in every case varies with the particular circumstances and conditions.

In every case it must be understood, as an essential part of the definition, that the test applied is the kind of care usually exercised by persons of the class referred to, under circumstances similar to those of the case under consideration, where their own interests are to be protected from a similar injury,¹² and when they honestly

Milwaukee R. Co., 92 Wis. 330, 66 N. W. 362; Houston, etc. R. Co. v. Brin, 77 Tex. 174, 13 S. W. 886. The case of the steamboat *New World v. King*, *supra*, is a leading one on the subject treated and has often been cited with approval. See *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 28 L. Ed. 513, 24 S. C. 408 (1904).

¹² *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Duff v. Budd*, 3 Brod. & B. 177; *Schwartz v. Gilmore*, 45 Ill. 455; *Searcy v. Holmes*, 45 Ala. 225; *Sawyer v. Hannibal*, etc. R. Co., 37 Mo. 240. This is a vital element of the definition, very often overlooked. Thus, in determining whether a railroad engineer has been negligent in running over a horse, the test of his care is not the care generally taken by an engineer to avoid injuring other people's horses, but the care which a prudent engineer would take if he saw *his own* horse upon the track (*Alabama, etc. R. Co. v. McAlpine*, 75 Ala. 113; *East Tennessee, etc. R. Co. v. Bayliss*, Id. 466, and cases cited). In *Quimby v. Vermont, etc. R. Co.*, 23 Vt. 387, it was held that this rule

was too favorable to the defendant, presumably because the engineer might, as a matter of expediency, choose to endanger the life of the beast rather than check the train. Where a reservoir burst, and the water did damage to an adjoining garden, it was held that the owners of the reservoir were bound to take the same degree of care which they would have been likely to take had the garden been their own (*Todd v. Cochell*, 17 Cal. 98), and no greater care (*Campbell v. Bear River Mining Co.*, 35 Id. 679; s. p., *Waldo v. Beckwith*, 1 N. Mex. 97). The degree of care over logs of others in its possession required of a boom company is that which an ordinarily prudent man in charge of his own property would exercise (*Chesley v. Mississippi, etc. Boom Co.*, 39 Minn. 83; 38 N. W. 769). Gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to *his own person* or life, under circumstances of equal or similar danger (*Louisville, etc. R. Co. v. McCoy*, 81 Ky. 403).

intend to be careful.¹³ What they do, or omit to do, when in a careless or reckless mood, is never any standard by which to judge.

§ 48. Correlative degrees of negligence.—Strictly speaking, it is not correct to divide negligence into degrees at all, because there can be no negligence, within the legal meaning of the term, except where the degree of care required by law in the particular case has not been given;¹⁴ and, indeed, it is a solecism to speak of “ordinary negligence,” since, if the negligence were ordinary (that is, in accordance with the usual course of practice among all men of average prudence), it would cease to be negligence at all. But so far as common carriers of passengers and the requirements by statute of a certain kind or degree of care and giving a right of action as for “gross” negligence are concerned, the courts must and constantly do recognize these distinctions.

§ 49. “Gross,” “ordinary” and “slight” negligence, defined.—Wherever these distinctions are observed gross negligence is said to be the want of slight care;¹⁵ ordinary negligence is the want of ordinary

¹³ Wharton, Negligence, § 46.

¹⁴ Grill v. Gen. Iron Screw Co., L. R. 1 C. P. 600.

¹⁵ Gross negligence is the want of slight diligence (See First Nat. Bank v. Graham, 85 Pa. St. 91; Wright v. Clark, 50 Vt. 130; Smith v. N. Y. Central R. Co., 24 N. Y. 222). “Want of ordinary care” and “gross negligence” are not equivalent terms (Galbraith v. West End R. Co., 165 Mass. 572, 43 N. E. 501; Chicago, etc. R. Co. v. Avery, 8 Ill. App. 133). They were erroneously confounded in Gibblin v. McMullen, L. R. 2 P. C. 317. Gross negligence is that entire want of care which would raise a presumption of a con-

scious indifference to consequences

(Southern Cotton Press, etc. Co. v. Bradley, 52 Tex. 587; followed, Mo.

Pacific R. Co. v. Shuford, 72 Id. 165).

It implies a thoughtless disregard of consequences, without the exertion of effort to avoid them (Schindler v. Milwaukee, etc. R. Co., 87 Mich. 400; 49 N. W. 670). To same effect Lake Shore, etc. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692. The term “criminal negligence,” as used in a statute making railroad companies liable for all injuries to passengers, except such as arise from the “criminal negligence” of the passenger, held to mean “gross negligence,” or such negligence as would

care;¹⁶ and slight negligence is the want of great care.

amount to a flagrant and reckless disregard of the passenger's own safety, and a willful indifference to the injury liable to follow (*Omaha, etc. R. Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114). "Gross negligence is a relative term. It is, doubtless, to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of the care that was requisite under the circumstances" (*Davis, J., Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 494). See *Steamboat New World v. King*, 16 How. (U. S.) 469; *Cronk v. Chicago, etc. R. Co.*, 3 So. Dak. 93, 52 N. W. 420; *Austin, etc. R. Co. v. Beatty*, 73 Tex. 592, 11 S. W. 858; *Chicago, etc. R. Co. v. Ryan*, 62 Ill. App. 264. Gross negligence is not the equivalent of willful or intentional negligence (*Jacksonville, etc. Ry. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093 (1891); *Stringer v. Ala. Mid. Ry.*, 99 Ala. 397, 13 So. 75 (1894). Nor does its existence necessarily authorize the recovery of exemplary damages. "Exemplary damages can be allowed in cases of negligence, as distinct from those of intentional injury, only where the negligence is of a gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects; or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them" (*Fla., etc. Ry. Co. v. Hirst*, 30 Fla. pp. 1, 38, 11 So. Rep. 506 (1893).

"Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it" (*Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408 (1888)). See also *Hays v. International Ry. Co.*, 46 Tex. 272 (1877). The term is one of description rather than of definition (*Kelly v. Malott*, 135 Fed. 74, 67 C. C. A. 548. *Rolf, B.*, said in *Wilson v. Brett*, 4 M. & W. 113, "that he could see no difference between negligence and gross negligence; that it was the same thing with the addition of a vituperative epithet." Some courts content themselves with saying that it means more than the want of ordinary care (*Galbraith v. West End St. Ry. Co.*, 165 Mass. 572, 43 N. E. 501 (1896)).

¹⁶See definitions of ordinary care, *ante*, § 47; *Jager v. Adams*, 123 Mass. 26; *Schienfeldt v. Norris*, 115 Id. 17; *Moore v. Cass*, 10 Kans. 288; *Murphy v. Chicago, etc. R. Co.*, 38 Iowa, 539; *Carpenter v. Eastern Transp. Line*, 67 Barb. 570; *Norfolk, etc. R. Co. v. Ormsby*, 27 Gratt. 455; *Toncray v. Dodge County*, 33 Neb. 802, 51 N. W. 235; *Chicago, etc. R. Co. v. Fisher*, 49 Kans. 460, 30 Pac. 462; *Needham v. Louisville, etc. R. Co.*, 85 Ky. 423, 3 S. W. 797, and generally, *Cashill v. Wright*, 6 El. & Bl. 891; *Wyld v. Pickford*, 8 Mees. & W. 443; *Wilson v. Brett*, 11 Id. 113. Ordinary care is such care as reasonably prudent and cautious persons exercise under like circumstances (*Chicago, etc. Ry. Co. v. Ryon*, 62 Ill. App. 264 (1896)). It is not error to charge the jury that

§ 50. Standard of "great care." — In the foregoing definitions, our principal doubt is whether we have raised the standard of great care sufficiently high. Certainly,

ordinary care is such care as the great majority of men would use under similar circumstances (*Ellwell v. Milwaukee St. Ry.*, 66 N. W. 362 (1896)). It is proper to instruct that "care is required to be in proportion to the danger to be avoided and the fatal consequences that might ensue from neglect" (*Indianapolis St. Ry. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169, *Ib.* 72 N. E. 1034 (1905)). Such as a person of ordinary prudence and caution, according to the standard of the usual and general experience of mankind, would exercise in the same situation and under the same circumstances (*Tetherow v. St. Joseph, etc. Ry. Co.*, 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617 (1888)). The term is relative, dependent on the business in which the defendant is engaged, the nature of the duty owing to the plaintiff and the relation borne to the person injured (*DeBolt v. Kansas City, etc. Ry. Co.*, 123 Mo. 496, 27 S. W. 575 (1894)). See also *Ford v. Kansas City*, 181 Mo. 137, 79 S. W. 923 (1904); *Bradley v. Ohio River, etc. Ry. Co.*, 126 N. C. 735, 36 S. E. 181 (1900); *Ramsbottom v. Atlantic, etc. Ry. Co.*, 138 N. C. 38, 50 S. E. 448 (1905); *Hanlon v. Milwaukee Electric, etc. Co.*, 118 Wis. 210, 95 N. W. 100 (1903); *Williams v. North Wisconsin L. Co.*, 124 Wis. 328, 102 N. W. 589 (1905). A charge that ordinary care is "that degree of care which may be reasonably expected of persons in the situation of plaintiff," is error, it should be that care which may reasonably be expected of ordinarily prudent persons (*Paris, etc. Ry. Co. v. Nesbitt*, 11 Tex. App. 608, 38 S. W. 243 (1896)). An instruction that ordinary care means such care as men of ordinary prudence exercise under the circumstances, is not erroneous because it did not say such as they ordinarily use (*St. Louis, etc. Ry. Co. v. Brown*, 30 Tex. App. 57, 69 S. W. 1010 (1902)). The test is not what the particular person thought was proper to be done, but what an ordinarily prudent person would do (*Western, etc. Ry. Co. v. Vaughn*, 113 Ga. 354, 38 S. E. 851 (1901)). Such as persons of ordinary prudence would take under similar circumstances, to avoid accidents, in view of the risk incurred (*Reiss v. Wilmington City R. Co.*, 67 Atl. 153 (1907)). Ordinary care implies care to avoid injury that would probably otherwise occur, but is not to be tested by such conduct as it is afterwards seen would have avoided it (*Perry Mfg. Co. v. Eaton*, 83 N. E. 510, 41 Ind. App. 81 (1908); *Davenport v. Oceanic A. Co.*, 116 N. Y. Supp. 609, 132 App. Div. 368 (1909)). "Utmost care," "ordinary care" and "highest degree of care" are relative terms, and can only be understood in their application to the facts and circumstances of the particular case (*Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91 (1908); *Sandy v. Swift & Co.*, 159 Fed. 271, 165 Fed. 622, 92 C. C. A. 56 (1908)). Generally, *Wilkinson v. Oregon Short L. Ry. Co.*, 99 Pac. 466 (1909); *Grimm v. Milwaukee Elec. L. & R. Co.*, 138 Wis. 34, 119 N. W. 833 (1909); *Palmer v. Schulz*, 138 Wis. 455, 120 N. W. 348 (1909); *Arkansas City v.*

the objection which has been so forcibly urged against the *culpa levissima* of the mediæval jurists has no application to the definitions of great care and slight negligence here given. It is indeed absurd to require from any person perfection in care, diligence or skill. No human being is capable of maintaining so high a standard. It would be grossly unjust and impracticable to require from any ordinary person even that extraordinary degree of care which single individuals of eminent prudence and ability have succeeded in maintaining. But when the utmost degree of care required is that which has been demonstrated to be practicable by its observance on the part of a recognized class of persons engaged in similar affairs, there is no injustice or impracticability in requiring that standard to be observed by all persons who undertake that business, especially when such a requirement is only made in a few specific branches.

§ 51. **Application of rule to passenger carriers.** — It is the settled rule of common law throughout the United States, and probably also in Great Britain and Ireland, that common carriers of persons, and especially railway companies, are liable for any damage suffered by their passengers, which is proximately caused by the failure of such carriers to use the highest degree of prudence, and, in some cases, the utmost human skill and foresight.¹⁷ This precise language is constantly used in

Payne, 80 Kans. 353, 102 Pac. 781 (1909); Gardner v. Boston Elev. Ry. Co., 204 Mass. 213, 90 N. E. 534 (1910).
fraught with imminent danger to human life, and injury occurs thereby, is not only culpably negligent, but, I think, practices a fraud upon,

¹⁷ So in New York (Maverick v. Eighth Ave. R. Co., 36 N. Y. 378; Caldwell v. N. J. Steamboat Co., 47 Id. 282; Taber v. Delaware, etc. R. Co., 71 Id. 489). "A railroad company that neglects to provide safe and roadworthy vehicles for passengers, when the omission to do so is
and exhibits bad faith in respect to those it undertakes to carry" (per Wright, J., Smith v. N. Y. Central R. Co., 24 N. Y. 222). It does not, however, insure the safety of its vehicles (Carroll v. Staten Island R. Co., 58 N. Y. 126). A carrier of passengers, when approaching a

charging juries, and it is sustained by such controlling authority as to make it useless to discuss its propriety at any length. But while these words cannot be excepted to, the current of decisions shows that a carrier is entitled to have them explained to the jury. The courts do not hold that carriers are bound to use the highest degree of prudence or skill which could be conceived of as possible

dangerous place, is "bound to use the highest degree of care and prudence, the utmost skill and foresight" (*Coddington v. Brooklyn*, etc. R. Co., 102 N. Y. 66). And so in substance held in England (*Sharp v. Grey*, 9 Bing. 457); in Ireland (*Burns v. Cork*, etc. R. Co., 13 Irish C. L. 543); in Maine (*Edwards v. Lord*, 49 Me. 279); in Massachusetts (*Ingalls v. Bills*, 9 Metc. 1; *Simmons v. N. Bedford*, etc. Steamboat Co., 97 Mass. 361; *Moreland v. Boston*, etc. R. Co., 141 Mass. 31; 6 N. E. Rep. 225); in New Hampshire (*Taylor v. Grand Trunk R. Co.*, 48 N. H. 304. *Compare* *State v. Boston*, etc. R. Co., 58 Id. 408); in Connecticut (*Derwort v. Loomer*, 21 Conn. 245); in Pennsylvania (*Philadelphia*, etc. R. Co. v. *Boyer*, 97 Pa. St. 91); in Virginia (*Farish v. Reigle*, 11 Gratt. 697; *Virginia*, etc. R. Co. v. *Sanger*, 15 Id. 230; *Baltimore*, etc. R. Co. v. *Wightman*, 29 Id. 431); in West Virginia (*Searle v. Kanawha*, etc. R. Co., 32 W. Va. 370; 9 S. E. 248); in Georgia (*Crawford v. Georgia R. Co.*, 62 Ga. 566; *Chattanooga*, etc. R. Co. v. *Huggins*, 89 Id. 494, 15 S. E. 848); in Tennessee (*Nashville*, etc. R. Co. v. *Messino*, 1 Sneed, 220); in Indiana (*Sherlock v. Alling*, 44 Ind. 184); in Illinois (*Fink v. Potter*, 17 Ill. 406; *Chicago*, etc. R. Co. v. *George*, 19 Ill. 510); in Iowa (*Sales v. Western Stage Co.*, 4 Iowa, 547); in Missouri (*Lemmon v. Chansler*, 68 Mo. 340); in Arkansas (*St. Louis*, etc. R. Co. v. *Sweet*, 57 Ark. 287, 21 S. W. 587); in Nebraska (*Spellman v. Lincoln*, etc. R. Co., 36 Neb. 890, 55 N. W. 270); in Minnesota (*Johnson v. Winona*, etc. R. Co., 11 Minn. 296; *Watson v. St. Paul City R. Co.*, 42 Id. 46, 43 N. W. 904; *Hall v. Chicago*, etc. R. Co., 46 Minn. 439, 49 N. W. 239); in California (*Fairchild v. California Stage Co.*, 13 Cal. 599); in Washington (*Sears v. Seattle R. Co.*, 6 Wash. St. 227, 33 Pac. 389); and in all Federal Courts (*Pennsylvania Co. v. Roy*, 102 U. S. 451); *Curtis, J.*, saying, in *New World v. King* (16 How. [U. S.], 469): "When carriers undertake to carry passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." In Texas, a railroad company is required to use such means and foresight, in providing for the safety of passengers, "as persons of the greatest care and prudence usually exercise in similar cases" (*Houston*, etc. R. Co. v. *Gorbett*, 49 Tex. 573; see *Gulf*, etc. R. Co. v. *Hodges*, 76 Id. 90, 13 S. W. 64). But in Kentucky, an instruction that defendant was bound, "as far as human foresight and care would enable it, to carry plaintiff with safety," was held erroneous, as insisting on an impracticable degree

to man. They are only held to the highest degree which has been demonstrated by experience to be practicable. Thus, railway companies are responsible for their failure to use improvements and new inventions, the value of which has been demonstrated by actual experience,¹⁸ but not for omitting to try mere experiments or to adopt untried and unproved inventions.¹⁹ These qualifications

of care (*Louisville R. Co. v. Weams*, 80 Ky. 420). For cases in other States, see §§ 495, 498.

¹⁸ *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282, and cases cited under § 496, *post*. *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481 (1907), ("The rule * * * is that such companies are bound to use the best precaution in known practical use. This does not mean that such use must, in fact, have been known to a particular defendant, but simply that it must have been such that it would have been known to any company exercising the utmost care and diligence in keeping abreast with modern improvement in the matter of such precautions.") *Alabama, etc. Ry. Co. v. Guilford*, 119 Ga. 523, 46 S. E. 655 (1904), ("The defendant was required to use a headlight that was up to the standard of those in general use and well suited for the purpose for which it was intended; and it was not necessary in order to relieve it, that it should show that the headlight used on the occasion of the plaintiff's injuries was of 'the most approved pattern in use up to that time'"). *Crowe v. Michigan, etc. Ry. Co.*, 142 Mich. 692, 106 N. W. 395 (1906), (this was a three-step car, a standard car, of the height and construction such as are in common use, though four-step cars are also used. "The Court should have instructed the jury that the use of this car was not negligence").

Traphagen v. Erie Ry. Co., 73 N. J. L. 759, 64 Atl. 1072 (1906), (steps for alighting are sufficient if similar to those in common use and have proved adequate for the purpose). *St. Louis, etc. Ry. Co. v. Parks*, 40 Tex. App. 480, 90 S. W. 343 (1905), (charge, that defendant would not be liable for failure to provide a sufficient spark arrester provided its engine "was equipped with such appliances for preventing the escape of sparks or cinders as are in common use by railway companies that are managed by very cautious and prudent persons, approved). *Ozanne v. Illinois Cent. Ry. Co.*, 151 Fed. 900 (1907), (failure to equip the ladies' dressing room on Pullman car with seats and handholds is not negligence *per se*. The railway company has discharged its duty where it has supplied the best instrumentalities that a highly prudent person would have supplied in the same business in the then known condition of the art and business).

¹⁹ *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Jackson v. Natchez, etc. Ry. Co.*, 114 La. 981, 38 So. 701, 108 Am. St. Rep. 366, 10 L. R. A. 294 (1905), (the failure of a railway company to equip its cars with ax or other tool for the extrication of passengers in case of wreck renders them liable for such suffering as might have been thus prevented. The company is not liable for a defective bridge if it was as safe as

bring even this strong language, in our opinion, within the limits of our standard definition of "great care," but to no lower degree.

§ 51a. Comparative negligence. — Previous to the passage by Congress of the Employers' Liability Act of 1906, now substituted by the Act of 1908, there was no doctrine more generally discountenanced, as deducible from the common law, than that of comparative negligence. It never obtained a foothold in England. It is believed never to have been avowedly enforced as a common-law doctrine except in Illinois. One of the first cases in that State in which it was declared, and the one most frequently referred to of the early decisions, is *Galena Ry. v. Jacobs*,²⁰ in which the learned chief justice, delivering the opinion of the court, said: "We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action." It continued to be developed in that State in numerous decisions until a recent date, when the court frankly said, "The doctrine of comparative negligence is no longer the law of the court."²¹ Long before its explicit abrogation it had come in the

the highest degree of care and skill (N. S.) 316 (1908), ("An accident could make it when originally constructed, and the same care has since been used in inspection and repair). *Holland v. St. Louis, etc. Ry. Co.*, 105 Mo. App. 117, 79 S. W. 508 (1904), (automatic couplers, however direct the testimony as to their good condition, yet upon evidence that the same couplers have given away on previous occasions, the plaintiff has a right to have his case submitted to the jury.) *Roanoke, etc. Elec. Ry. Co. v. Sterrett*, 108 Va. 533, 62 S. E. 385, 19 L. R. A. is inevitable, if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it, or prevent its injuring another"), citing *Shearman & Redfield*, §§ 15, 16, and applying to the case of a hidden defect in the structure of a street railway bridge, which could not be guarded against by the most vigilant oversight.

²⁰ 20 Ill. 496.

²¹ *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892 (1894).

course of its development by the courts of Illinois to be more or less closely assimilated to the universally recognized common-law doctrine of contributory negligence. By statutory provisions it prevails in Georgia, Kentucky, Florida and Tennessee in a modified form.²²

In some other jurisdictions, however, though not expressly acknowledged, the law of contributory negligence has been declared in terms that more or less closely approximate the former Illinois rule of comparative negligence. It has never been recognized by the Supreme Court of the United States.²³ It has always been the common-law rule that for an injury willfully inflicted negligence by the plaintiff constitutes no defense. This rule furnished the only semblance of an excuse that ever existed for the claim that comparative negligence was a doctrine of the common law. In admiralty, in collision cases, the rule of apportioning the damage according to the respective degrees of negligence was first applied, but that which obtains is that, if both parties have been negligent, the loss shall be equally divided.²⁴

§ 51b. Effect of Federal Employers' Liability Act of 1908. — The doctrine of comparative negligence has received a new inspiration in the Federal Employers' Liability Act of 1908.²⁵

²² §§ 61, 62, 102, *post*.

²³ *New York, etc. Ry. Co. v. Lockwood*, 17 Wall. 357.

²⁴ *The C. R. Hoyt*, 136 Fed. 671 (1905); *The Chauncey M. Depew*, 39 Fed. (C. C. A.) 236 (1907).

²⁵ The Act of Congress of June 11, 1906, affecting the liability of common carriers engaged in interstate commerce to their servants or employees, was declared unconstitutional by the Supreme Court of the United States in the *Employers' Liability Cases*, 207 U. S. 463, and to cure the defect pointed out by the court in

the former the present act was adopted. The original act was held by the court to impose liability on such carriers in favor of any of their employees, without restriction as to the business in which either might be engaged at the time of the injury. The present act is by its terms limited to injuries sustained by employees while engaged in work pertaining to interstate or foreign commerce. It is also by its terms limited to railways. Contributory negligence it is declared shall not bar recovery, but the damages may be

§ 51c. Interpretation of doctrine of Illinois. — The importance of the doctrine of comparative negligence, in view of the recent Federal Employers' Liability Act, requires the consideration here of its very elaborate exposition in the well-considered case of *Calumet Iron & Steel Co. v. Martin*.²⁶ The opinion is by Mr. Justice Schoolfield, who, after an analysis of what are assumed in the opinion to be the leading cases in England and in several of the States of the Union upon the question of contributory negligence, in conclusion, uses this language: "It will be seen, from these cases, that the ques-

diminished by the jury in proportion to the negligence of the employee. Contributory negligence cannot be considered where the carrier's negligence consisted in the violation of any statute enacted for the safety of employees and resulted in injury or death. The employee is not to be held to have assumed such risk. Suit must be instituted within two years from date of injury. Receivers, or other persons or corporations having charge of the management and operation of railroads, are embraced in the term "common carrier." "Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of

any statute enacted for the safety of employees contributed to the injury or death of such employee." Approved April 22, 1908. The constitutionality of the statute was sustained by the Supreme Court of the United States in the *Second Employers' Liability cases*, 223 U. S. 1 (1911). By Act of Congress, April 5, 1910, it is expressly provided, "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no action arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

²⁶This case is believed to be regarded by the bench and bar of Illinois as the best exposition of the doctrine of comparative negligence as understood in that State previous to its distinct repudiation in *Lanark v. Dougherty*. Among the intervening cases to which reference may be made are *Chicago, etc. Ry. Co. v. Warner*, 123 Ill. 38; *Mansfield v. Moore*, 124 Ill. 133; *Pullman, etc. Co. v. Laack*, 143 Ill. 242; *Lake Shore, etc. Ry. Co. v. Hessions*, 150 Ill. 556, and *Winona C. Co. v. Holmquist*, 152 Ill.

tion of liability does not depend absolutely upon the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff, — that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it, very perceptible, running through very many of them, as to where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence; the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*,²⁷ and *Lynch v. Nurdin*.²⁸ We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action."

§ 51d. Former Illinois doctrine not applicable to the interpretation of Federal statute. — The former Illinois doctrine, however closely approximating in some of its methods of expression the terms in which the doctrine of contributory negligence has itself sometimes been expressed in other jurisdictions, differs from the latter wherever declared, in that the basic principle of contributory negligence is that if the plaintiff's negligence or fault so contributed to the injury as that it would not otherwise have occurred, then he cannot recover; a proposition that was rejected by the courts of that State.

²⁷ 9 C. & P. 613.

²⁸ 1 Q. B. 29.

All attempts, therefore, at the reconciliation of the two doctrines must be fruitless. Nor will the terms of the Federal statute admit of the application of the former Illinois doctrine. The statute declares "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The result is to abolish in such cases the *defence* of contributory negligence and to admit the evidence that would support the defence in *mitigation* of damages.²⁹

²⁹ Probably no more definite or satisfactory rule can be stated than that in cases of mutual negligence the question is one for the jury, to be submitted substantially in the terms of the statute.

CHAPTER IV.

QUESTIONS OF FACT AND LAW.

- | | |
|---|--|
| <p>§ 52. Negligence, a question of mingled law and fact.</p> <p>53. Province of court and jury.</p> <p>54. Questions proper for the jury.</p> <p>55. Proximate cause, when question for the jury.</p> | <p>§ 56. When question should not be left to the jury.</p> <p>56a. Instructions to juries.</p> <p>56b. Error in instructions to state what facts constitute negligence, etc.</p> |
|---|--|

§ 52. Negligence, a question of mingled law and fact.

— The definition of negligence, already given, shows upon its face that negligence is a question of mingled law and fact.¹ It includes, indeed, two questions: (1) whether a particular act has been performed or omitted, and (2) whether the performance or omission of this act was a breach of a legal duty. The first of these is a pure question of fact; the second a pure question of law.² But

¹ This is illustrated by many cases, cited under §§ 54 and 56. Whether a given state of facts constitutes negligence, is generally a question of law; but whether a particular negligence contributed to the catastrophe, is a question of fact (*Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282). *Jones v. Am. W. Co.*, 138 N. C. 337, 51 S. E. 106 (1909); *Neal v. Wilmington & N. C. Electric Co.*, 53 Atl. 338, 3 Pennw. 467 (1902); *Cleveland, C. C. & St. L. Ry. v. Houghland*, 85 N. E. 369 (Ia.) (1908); *Dudley v. Kingsbury*, 85 N. E. 76, 199 Mass. 258 (1908); *Wheeler v. Oregon R. & Nav. Co.*, 102 Pac. 347, 16 Idaho, 375 (1909); *Turbayfill v. Atlanta & C. A. Ry.*, 63 S. E. 278, 83 S. C. 325 (1909); *Chi., B. & Q. Ry. Co. v. Cook*, 102 Pac. 657 (Wyo.) (1909).

² *Tarwater v. Hannibal, etc. R. Co.*, 42 Mo. 193. "Negligence may be defined to be a failure to perform some act required by law, or doing the act in an improper manner. The law determines the duty; the evidence shows whether the duty was performed. What duty rested upon defendant was question of law. Was that duty properly performed is a question of fact" (*Nolan v. New Haven, etc. R. Co.*, 53 Conn. 461). To same effect, *Chicago, etc. R. Co. v. McLallen*, 84 Ill. 109; *Gibson v. Leonard*, 37 Ill. App. 344; *Marshall v. Schricker*, 63 Mo. 308; *McGowan v. St. Louis, etc. R. Co.*, 61 Id. 528; *Mobile, etc. R. Co. v. Thomas*, 42 Ala. 672). But this broad language seems to be limited by other decisions of the same courts. (See next section).

damage to the plaintiff, as well as negligence in the defendant, must be proved, in order to establish a cause of action; and thus the further questions arise, whether the plaintiff has suffered damage, and whether the defendant's negligence was the proximate cause of that damage. The first of these questions is mainly, though not exclusively, a question of fact; the second is about equally one of fact and of law.

§ 53. Province of court and jury. — Considering, first, the issue of negligence alone, it is to be observed that few cases readily resolve themselves into the simple elements stated in the last section, so that the distinction between the province of the court and that of the jury can be sharply drawn. There are no abstract rules, defining so clearly the duties of men, under all circumstances, that the court can state them without passing upon any question of fact. The extent of the defendant's duty is to be determined by a consideration of all the surrounding circumstances. The law imposes duties upon men, according to the circumstances in which they are called to act. And though the law defines the duty, the question, whether the circumstances exist which impose that duty upon a particular person, is one of fact.³ In very many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence or good men of business would use under similar circumstances. Of course, this raises a question of fact as to what men of this character usually do under the same circumstances. This is a point upon which a jury have a right to pass, even though no evidence of the usage were given; for they may properly determine the question by referring to their own experience and observation.⁴ Indeed, they must do so; since expert evidence on

³ See an excellent opinion, covering all this ground, in *McCully v. Clarke*, 40 Pa. St. 399.

⁴ The terms "ordinary care," "reasonable prudence," and such like terms have a relative signifi-

such points is usually not admissible.⁵ Consequently a

cance, and cannot be arbitrarily defined; and, when the facts are such that reasonable men differ as to whether there was negligence on the part of the plaintiff, the determination of the matter is for the jury; hence it is not error to instruct them to fix the standard for reasonable, prudent and cautious men according to their judgment and experience (*Grand Trunk R. Co. v. Ives*, 12 S. Ct. 679, 144 U. S. 408). But explaining to a jury the "care of a man of ordinary prudence" as "just such care as one of you, similarly employed, would have exercised under the circumstances," has been held reversible error (*Louisville, etc. R. Co. v. Gower*, 1 Pickle [Tenn.], 465, 3 S. W. 824. See *Missouri Pacific R. Co. v. Brown*, 75 Tex. 267, 12 S. W. 1117; *Houston, etc. R. Co. v. Smith*, 77 Tex. 179, 13 S. W. 972). The usual practice of others in the same business or employment under like circumstances may be shown to indicate whether ordinary care was used in a special instance (*Maynard v. Buck*, 100 Mass. 40; *Cass v. Boston, etc. R. Co.*, 14 Allen, 448; *Cook v. Champlain Transp. Co.*, 1 Den. 91; *Kolsti v. Minneapolis, etc. R. Co.*, 32 Minn. 133, 19 N. W. 655; compare *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Chicago, etc. R. Co. v. Clark*, 108 Ill. 113). A party's system or course of business may be proved to show whether he had exercised due care on a particular occasion (*Holly v. Boston Gas Co.*, 8 Gray, 123; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557). "There is no absolute rule as to what constitutes negligence; that conduct which might be so termed in one case, being in another properly considered ordinary care; nor, in cases where

it is concurrent, will the same rule apply to adults and to children. It is, therefore, always a question of fact for the jury, under the instruction of the court, as to the relative degree of care, or the want of it, growing out of the circumstances and conduct of the parties" (*Philadelphia, etc. R. Co. v. Spearen*, 47 Pa. St. 300). See, to same effect, *Curtiss v. Rochester, etc. R. Co.*, 20 Barb. 282; *McGrath v. Hudson River R. Co.*, 32 Id. 144; *Galena, etc. R. Co. v. Yarwood*, 17 Ill. 509, 519; *Galena, etc. R. Co. v. Dill*, 22 Ill. 264, 271; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Westchester, etc. R. Co. v. McElwee*, 67 Pa. St. 311, 315; *McCully v. Clarke*, 40 Id. 399; *Pennsylvania Canal Co. v. Bentley*, 66 Id. 30; *State v. Manchester, etc. R. Co.*, 52 N. H. 529; *Vinton v. Schwab*, 32 Vt. 612; *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Stoddard v. St. Louis, etc. R. Co.*, 65 Id. 514; *Chicago, etc. R. Co. v. Fisher*, 49 Kans. 460, 30 Pac. 462.

⁵ Where the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury must determine the question of negligence without the aid of experts (*Shafter v. Evans*, 53 Cal. 32; *Southern Kansas R. Co. v. Robbins*, 43 Kans. 145, 23 Pac. 113). A witness cannot state his opinion that a highway was or was not defective or dangerous, where the accident happened (*Lester v. Pittsford*, 7 Vt. 158; *Hutchinson v. Methuen*, 1 Allen, 33; *Lincoln v. Barre*, 5 Cush. 590; *Ryerson v. Abington*, 102 Mass. 531; *Yeaw v. Williams*, 15 R. I. 20; *Montgomery v. Scott*, 34 Wis. 338; *Griffin v. Willow*, 43 Id. 509; *Barnes*

case of this kind must be left to the jury, even if there is

v. Newton, 46 Ia. 567; *Rockford v. Hildebrand*, 61 Ill. 155). He cannot give his opinion as to the comparative danger of the place where the accident occurred and another place on the road (*Ivory v. Deer Park*, 116 N. Y. 476, 22 N. E. 1080); nor state what cause or occasion he saw for the accident (*Patterson v. Colebrook*, 29 N. H. 94); nor whether, in his opinion, the accident would not have happened if, etc. (*Crane v. Northfield*, 33 Vt. 124); nor whether the defendant's leaving his horse unhitched, under the circumstances, was the act of a prudent man (*Stowe v. Bishop*, 58 Vt. 498, 3 Atl. 490); nor whether a railroad crossing was dangerous (*King v. Missouri Pacific R. Co.*, 98 Mo. 235, 11 S. W. 563). An opinion that a stage was not overloaded is inadmissible (*Oleson v. Tolford*, 37 Wis. 327). A witness cannot be asked what he thought about the danger of doing a certain thing (*Sterling Bridge Co. v. Pearl*, 80 Ill. 251); nor how the bridge in question compared, in respect to the condition of repair, with other bridges (*Bliss v. Wilbraham*, 8 Allen, 564). In Connecticut (*Taylor v. Monroe*, 43 Conn. 36; *Dunham's Appeal*, 27 Id. 192), and in Pennsylvania (*Beatty v. Gilmore*, 16 Pa. St. 463), opinions of witnesses may be given as to whether an obstruction in a highway was dangerous. See, also, *Chicago v. McGiven*, 78 Ill. 347; *Alexander v. Mount Sterling*, 71 Id. 366; *Hughes v. Muscatine*, 44 Ia. 672; *Laughlin v. Street R. Co.*, 62 Mich. 220, 28 N. W. 873. Witnesses, though employees of defendant, where they were not responsible for the system of spark arresters adopted by the defendant, and were testifying upon a subject well known among those familiar with railroad engines, and the system of spark arresters in existence or adopted by different railroads, are competent to testify that the particular system adopted by defendant was in general use, and that it, in fact, arrested sparks as well as any kind known (*Frace v. N. Y. Lake Erie, etc. R. Co.*, 143 N. Y. 182, 38 N. E. 102). A person experienced in the running and management of railway trains is competent to testify as to whether, under an assumed state of facts, which the evidence tended to prove, all judicious and proper precautions were taken by the defendant's servants to prevent injuries (*Cincinnati, etc. R. Co. v. Smith*, 22 Ohio St. 227). The engineer of the locomotive, if an expert, may testify that it was impossible to stop the train, after he discovered animals on the track (*Bellefontaine, etc. R. Co. v. Bailey*, 11 Ohio St. 333). So it is competent to show by experts the distance in which the train could have been stopped. (*Meagher v. Coopers-town, etc. R. Co.*, 75 Hun, 455, 27 N. Y. Supp. 504). Evidence that an engine was often repaired and would not sustain a full head of steam and afterwards exploded, makes the question of negligence one for jury (*Kirkpatrick v. N. Y. Central, etc. R. Co.*, 79 N. Y. 240). Where the alleged incompetency of the engineer is in question, what training is necessary to make one a competent engineer is a question for the jury (*Joch v. Dankwardt*, 85 Ill. 331). But where the injury does not involve questions of science and skill, opinions of witnesses are inadmissible, *e. g.*, whether a brakeman could displace the rod of a car-brake, if

no conflict of evidence,⁶ unless, indeed, there is evidence enough to decide this point as well as all other questions in the cause.

§ 54. Questions proper for the jury. — The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence,⁷ but also

the pin had remained in it, or whether a pin could be lost out on the road (Bailey v. Rome, etc. R. Co., 55 Hun, 509, 8 N. Y. Supp. 780). For other illustrations, see cases *supra*, and Frey v. Lowden, 70 Cal. 550, 11 Pac. 838 [capacity of a ditch to carry off water]; Van Inwegen v. N. Y., Lake Erie, etc. R. Co., 76 Hun, 53, 28 N. Y. Supp. 169 [that blowing a locomotive whistle was malicious]; East Tennessee, etc. R. Co. v. Wright, 76 Ga. 532 [that the damage to goods resulting from the "blowing" of bilge-water in hold of vessel was occasioned by negligence].

⁶Railroad Co. v. Stout, 17 Wall. 657, 664, per Hunt, J.; Bernhard v. Rensselaer, etc. R. Co., 1 Abb. Ct. App. 131; Ernst v. Hudson Riv. R. Co., 35 N. Y. 9; Westchester, etc. R. Co. v. McElwee, 67 Pa. St. 311; Gaynor v. Old Colony, etc. R. Co., 100 Mass. 208. It has been said that whether there was negligence or want of care, in whatever degree, in either of the parties, will not, though the circumstances be admitted, be decided by the court as matter of law, but will be left to the jury (Beers v. Housatonic R. Co., 19 Conn. 566). See, to same effect, Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259; Johnson v. Bruner, 61 Id. 58; Toledo, etc. R. Co. v. Foster, 43 Ill. 415; Ohio, etc. R. Co. v. Callarn, 73 Ind. 261; Central Branch, etc. R. Co. v. Hotham, 22 Kans. 41; Meyer v. Pacific R. Co., 40 Mo. 151. But this must be limited as stated in § 56.

⁷In various cases it is said the question is for the jury if there is *some* evidence (Bernhard v. Rensselaer, etc. R. Co., 1 Abb. Ct. App. 131; Cumberland, etc. Iron Co. v. Scally, 27 Md. 589; Johnson v. Missouri Pacific R. Co., 18 Neb. 680, 26 N. W. 347); or *any* evidence tending to show actionable negligence (Sheldon v. Flint, etc. R. Co., 59 Mich. 172, 26 N. W. 507; Louisville, etc. R. Co. v. Red, 154 Ill. 95, 39 N. E. 1086); or any evidence, though *slight* (Painton v. Northern Cent. R. Co., 83 N. Y. 7; Moore v. Metropolitan R. Co., 2 Mackay [D. C.], 437); or when the case upon the facts is not free from doubt (Mynning v. Detroit, etc. R. Co., 59 Mich. 257, 26 N. W. 514; Robel v. Chicago, etc. R. Co., 35 Minn. 84, 27 N. W. 305; but see § 57, *post*); or if the facts are in substantial dispute (Newark, etc. R. Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067). It is said that the question should not be withdrawn from the jury unless the facts clearly warrant it (Boon v. Allegheny, etc. P. R. Co., 101 Pa. St. 334); or if there is more than a *scintilla* of evidence

where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts.⁸

(*Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226, 1 Atl. 217). The facts being doubtful, the case was held to have been properly left to the jury, in the following, among many other, cases: *Gonzales v. N. Y. & Harlem R. Co.*, 38 N. Y. 440; *Feler, v. N. Y. Central R. Co.*, 49 Id. 47; *Connolly v. Knickerbocker Ice Co.*, 114 Id. 104, 21 N. E. 101; *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Central R. Co. v. Moore*, 24 N. J. Law, 824; *Rauch v. Lloyd*, 31 Pa. St. 358; *West Chester, etc. R. Co. v. McElwee*, 67 Id. 311; *Pittsburgh, etc. R. Co. v. Evans*, 53 Id. 250; *Fritz v. Jenner*, 166 Id. 292, 31 Atl. 80; *Fiske v. Forsyth, etc. Bleaching Co.*, 57 Conn. 118, 17 Atl. 356; *Delaney v. Milwaukee, etc. R. Co.*, 33 Wis. 67; *Elmore v. Hill*, 51 Id. 365; *Donaldson v. Milwaukee, etc. R. Co.*, 21 Minn. 293; *Callahan v. Warne*, 40 Mo. 131; *Fletcher v. Atlantic, etc. R. Co.*, 64 Id. 484; *Greenleaf v. Illinois, etc. R. Co.*, 29 Ia. 14; *Gagg v. Vetter*, 41 Ind. 228; *Atchison, etc. R. Co. v. Feehan*, 47 Ill. App. 66; *aff'd* 36 N. E. 1036; *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352; *Wise v. Covington, etc. R. Co.*, 91 Ky. 537, 16 S. W. 351; *Western Union Tel. Co. v. Timmons*, 93 Ga. 345, 20 S. E. 649; *Augusta, etc. R. Co. v. Killian*, 79 Ga. 234, 4 S. E. 165; *Louisville, etc. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41; *Missouri Pac. Ry. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Chicago, B., etc. R. Co. v. Oleson*, 40 Neb. 889, 59 N. W. 354; *International, etc. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679; *Palmer v. Gordon*, 173 Mass. 410, 53 N. E. 909, 73 Am. St. Rep. 302 (1899); *Sack v. St. Louis Car Co.*, 112 Mo. App. 476, 87 S. W. 79 (1905); *Price v. Simon*, 62 N. J. Law, 153, 40 Atl. 689 (1898); *Strauss v. Buchman*, 89 N. Y. Supp. 226, 96 App. Div. 270, *aff'd* 76 N. E. 1109, 184 N. Y. 545 (1906); *Sheridan v. Interborough R. Tr. Co.*, 101 App. Div. 534, 91 N. Y. Supp. 1052 (1905); *Booth v. Dorsey*, 208 Pa. 276, 57 Atl. 562 (1904); *Dumontier v. Stetson, etc. Co.*, 39 Wash. 264, 81 Pac. 693 (1905); *Whitehouse v. Edwards*, 152 Fed. 72, 81 C. C. A. 296 (1907); *Doyle v. Eschen*, 89 Pac. (Cal. App.) 836 (1907); *United Breweries Co. v. O'Donnell*, 221 Ill. 334, 77 N. E. 547 (1906); *Lynch v. Lynn Box Co.*, 194 Mass. 307, 80 N. E. 580 (1907); *Serano v. New York Centr., etc. Ry. Co.*, 188 N. Y. 156, 80 N. E. 1025 (1907); *Kimie v. San Jose-Gatos, etc., Ry. Co.*, 156 Cal. 379, 104 Pac. 986 (1909); *Morris v. Trudo*, 83 Vt. 44, 74 Atl. 387 (1909).

⁸ If the inferences to be fairly drawn from the circumstances are not certain, it is for the jury to decide (*Hart v. Hudson R. Bridge Co.*, 80 N. Y. 622; *Bernhard v. Rensselaer, etc. R. Co.*, 1 Abb. Ct. App. 131; *aff'g s. c.*, 32 Barb. 165; *Johnson v. Bruner*, 61 Pa. St. 58; *Howett v. Philadelphia, etc. R. Co.*, 166 Pa. St. 607, 31 Atl. 336). See *Abbett v. Chicago, etc. R. Co.*, 30 Minn. 482; *Omaha St. R. Co. v. Loehneisen*, 40 Neb. 37, 58 N. W. 535; *Chicago, etc. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120. A question as to the existence of negligence should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly

Where this is the case, the issue must go to the jury, no matter what may be the opinion of the court as to the value of the evidence⁹ or the credibility of the wit-

taken of the facts which the evidence tends to establish (*Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 S. Ct. 140; *Terre Haute, etc. R. Co. v. Voelker*, 31 Ill. App. 314; *aff'd* 129 Ill. 540, 22 N. E. 20). Unless an inference of negligence or its absence is necessarily deducible from undisputed facts and circumstances (*Dahl v. Milwaukee R. Co.*, 62 Wis. 652; *Lasky v. Canadian Pacific R. Co.*, 83 Me. 461, 22 Atl. 367; *Bannon v. Lutz*, 158 Pa. St. 166, 27 Atl. 890); or if the evidence is not so plain that reasonable men might not reach different conclusions on the subject (*Erickson v. Twenty-third St. R. Co.*, 71 Hun, 108, 24 N. Y. Supp. 603), the case should be submitted to the jury. See, to same effect, *Bennett v. Syndicate Ins. Co.*, 39 Minn. 254, 39 N. W. 488. Although there is no dispute about the facts, yet, if they are numerous in details (*Central, etc. R. Co. v. Hotham*, 22 Kans. 41; compare *Johnson v. Husband*, Id. 277), or if the facts are complicated, and the general knowledge and experience of mankind do not at once condemn the conduct as careless (*Gaynor v. Old Colony R. Co.*, 100 Mass. 208; *Connolly v. Waltham*, 156 Id. 368, 31 N. E. 302; *Mangam v. Brooklyn*, 38 N. Y. 455; *Haycroft v. Lake Shore, etc. R. Co.*, 64 Id. 636; *West Chester, etc. R. Co. v. McElwee*, 67 Pa. St. 311; *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748), or the reverse, the question whether they establish negligence must be submitted to the jury. Where there are special circumstances which call for the determination of the applicability to the case at bar, of general principles

governing similar cases, as testified to by uncontradicted experts, the question is properly submitted to the jury (*Cornish Farm Buildings Ins. Co.*, 74 N. Y. 295). Thus whether in operating an electric railroad, it was negligent not to maintain a guard wire over the trolley wire so as to prevent a fallen telephone wire from resting thereon and charging it with electricity, to the injury of one on the street, is for the jury (*Block v. Milwaukee St. R. Co.*, 89 Wis. 371; 61 N. W. 1101); and so is the question whether the system and manner of inspecting cars were all that might be required of a carrier (*Palmer v. Delaware, etc. Canal Co.*, 120 N. Y. 170, 24 N. E. 302); and whether a train-dispatcher should have sent orders directly to the conductor and engineer of a train, thus lessening the possibilities of the telegraph operator's misinterpretation of the dispatcher's order (*Sutherland v. Troy, etc. R. Co.*, 46 Hun, 372); and whether it was negligence to run a train without a light or flagman on the track (*Winchell v. Abbot*, 77 Wis. 371, 46 N. W. 665); or at the rate of 25 miles an hour over a city street-crossing (*De Loge v. N. Y. Central, etc. R. Co.*, 92 Hun, 149, 36 N. Y. Supp. 697).

⁹Where there is conflicting evidence on a question of fact, whatever his own opinion as to the value of that evidence, the judge must leave the consideration of it to the jury. (*Dublin, etc. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Carver v. Detroit, etc. Plank-Road Co.*, 61 Mich. 584, 28 N. W. 721). Whether there is rea-

nesses.¹⁰ So, if the issue narrows itself to a distinction between what is reasonably safe and what is not so, the question is emphatically one for the jury.¹¹ It is for the court to say whether there is any evidence in the case from which negligence might reasonably be inferred; and

sonable evidence of negligence to be left to the jury is a question for the judge; it is for the jury to say whether and how far the evidence is to be believed (*Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Louisville, etc. R. Co. v. Baker*, 106 Ala. 624, 17 So. 452). *Holmes v. Birmingham, etc. Ry. Co.*, 140 Ala. 208, 37 So. 338 (1904); *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126 (1889); *Indianapolis St. Ry. Co. v. Marschke*, 166 Ind. 490, 77 N. E. 945 (1905); *Foster v. New York, etc. Ry. Co.*, 187 Mass. 21, 72 N. E. 331 (1905); *Meng v. St. Louis, etc. Ry. Co.*, 108 Mo. App. 553, 84 S. W. 213 (1904); *Chicago, etc. Ry. Co. v. Wilgus*, 40 Nev. 660, 58 N. W. 1125 (1894); *Gardner v. Friederich*, 25 App. Div. 521, 49 N. Y. Supp. 1077, 163 N. Y. 568, 57 N. E. 1110 (1900); *Pence v. California Min. Co.*, 27 Utah, 378, 75 Pac. 934 (1904); *Lincoln Tr. Co. v. Heller*, 72 Neb. 127, 100 N. W. 107; s. c., 102 N. W. 262 (1905); *Ferguson v. Central Ry. Co.*, 60 Afl. 383, 71 N. J. L. 647 (1905); *Ryan v. Ardis*, 190 Pa. St. 66, 42 Atl. 372 (1899); *Gulf, etc. Ry. Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068 (1906); *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214 (1901); *Ketterman v. Dry Forks Ry. Co.*, 48 W. Va. 606, 37 S. E. 683 (1900); *Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809 (1903); *Texas, etc. Ry. Co. v. Carlin*, 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462,

aff'd 189 U. S. 354, 23 Sup. Ct. 585, 47 L. Ed. 849 (1903). "Upon the assumption that the evidence for the plaintiff is true, the question for the court is whether it is logically and legally sufficient to support a finding by the jury in favor of the plaintiff upon a material issue" (*Hewett v. Woman's Hospital Aid Ass'n*, 73 N. Y. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496 (1906)).

¹⁰ Where there is testimony on behalf of plaintiff which, alone, if believed, would warrant a jury in inferring negligence, the case should be submitted to the jury, no matter how strong or persuasive be the countervailing proof (*Citizens, etc. R. Co. v. Foxley*, 107 Pa. St. 537 [car running over child]). See, among many other cases, to the same effect, *Swift v. Staten Island, etc. R. Co.*, 123 N. Y. 645, *mem.*, 25 N. E. 378; *Barker v. Paulson*, 116 N. Y. 660, *mem.*, 22 N. E. 959; *Puff v. Lehigh Valley R. Co.*, 71 Hun, 577, 24 N. Y. Supp. 1068; *Leopold v. Delaware, etc. Canal Co.*, 74 Hun, 137, 26 N. Y. Supp. 1123; *Moore v. N. Y. Central, etc. R. Co.*, 75 Hun, 381, 27 N. Y. Supp. 449; *Hanlon v. Missouri Pacific R. Co.*, 104 Mo. 381, 16 S. W. 233; *Omaha, etc. R. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Potter v. Chicago, etc. R. Co.*, 46 Ia. 399; *Texas, etc. R. Co. v. Levi*, 59 Tex. 674; *Leak v. Rio Grande, etc. R. Co.*, 9 Utah, 246, 33 Pac. 1045.

¹¹ *Leishman v. Brighton, etc. R. Co.*, 23 Law Times, 712; *Ugla v.*

then it is for the jury to say whether, from the facts thus proved, negligence ought to be inferred.¹²

§ 55. Proximate cause, when for the jury.—Where the right to recover depends upon the question whether the defendant's negligence was the proximate cause of the defendant's injury, that is to be submitted to the jury, under proper instructions,¹³ unless it is entirely free

West End St. R. Co., 160 Mass. 351, 35 N. E. 1126; Dacey v. Old Colony R. Co., 153 Mass. 112, 26 N. E. 437; Heucke v. Milwaukee, etc. R. Co., 69 Wis. 401, 34 N. W. 243.

¹² Metropolitan R. Co. v. Jackson, 3 App. Cas. 193, and cases *supra*. It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence (Omaha St. R. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007). Hence, where the accident was caused by the breaking of a draw-bar, a charge that "the mere fact that a drawbar of a car breaks when struck by another car in motion, is not sufficient to establish negligence," invades the province of the jury (Ohio, etc. R. Co. v. Wangelin, 152 Ill. 138, 38 N. E. 760). Whether a certain act or omission is competent evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury (Spears v. Chicago, etc. R. Co., 43 Neb. 720, 62 N. W. 68; s. p., Cope v. Hampton Co., 42 S. C. 17, 19 S. E. 1018).

¹³ "It is the province of a jury to look at the succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this

must be determined in view of the circumstances existing at the time" (per Strong, J., in Milwaukee, etc. R. Co. v. Kellogg, 94 U. S. 469). To the same effect are Insurance Co. v. Tweed, 7 Wall. 44; Insurance Co. v. Seaver, 19 Id. 531; Ehr Gott v. New York, 96 N. Y. 264; Cosulich v. Standard Oil Co., 122 Id. 118; Webb v. Rome, etc. R. Co., 49 Id. 420; Fairbanks v. Kerr, 70 Pa. St. 86; Lehigh Valley R. Co. v. McKeen, 90 Id. 122; Pennsylvania R. Co. v. Lacey, 88 Id. 458; Pennsylvania R. Co. v. Hope, 80 Id. 373; Scott v. Hunter, 46 Id. 192; Willey v. Belfast, 61 Me. 569; Lake v. Milliken, 62 Id. 240; Handyside v. Powers, 145 Mass. 123, 13 N. E. 462; Saxton v. Bacon, 31 Vt. 540; Littleton v. Richardson, 32 N. H. 59; Stark v. Lancaster, 57 Id. 88; Gilman v. Noyes, Id. 627; Clemens v. Hannibal, etc. R. Co., 53 Mo. 366; Toledo, etc. R. Co. v. Pindar, 53 Ill. 447; Kellogg v. Chicago, etc. R. Co., 26 Wis. 223; Jacker v. Chicago, etc. R. Co., 52 Id. 150; Sather v. Ness, 42 Minn. 379, 44 N. W. 128; Denver, etc. R. Co. v. Robbins, 2 Col. App. 313, 30 Pac. 261; Jeffs v. Rio Grande, etc. R. Co., 9 Utah, 374, 35 Pac. 505; Knahtla v. Oregon, etc. R. Co., 21 Ore. 136, 27 Pac. 91. For different illustrations of the general rule, see McCann v. Newark, etc. R. Co., 58 N. J. Law, 642, 34 Atl. 1052; Oliver v. La Valle,

from doubt.¹⁴ It has been already pointed out that the difficulties surrounding this question are often so great that the courts are unable to arrive at a conclusion which can be safely stated, as matter of law, to govern future cases, even upon undisputed facts.¹⁵ They, therefore, prefer to leave the decision of such cases to a jury, which, if it decides erroneously in the particular case, will at least not prejudice the rights of any future litigant; whereas one erroneous decision of the court, as in the famous Ryan fire case,¹⁶ may throw a whole department of law into confusion, and injuriously affect hundreds of persons before it can be corrected.

§ 56. When questions should not be left to jury. — The courts have sometimes used such broad language as to the necessity of leaving the question of negligence to the jury that it might be inferred that every case must be so left;¹⁷ but this is not true. When the facts are clearly

36 Wis. 592; *Waterman v. Chicago*, etc. R. Co., 82 Id. 613, 52 N. W. 247; *Peppers v. Missouri*, etc. R. Co., 67 Mo. 715; *Southside Pass. R. Co. v. Trich*, 117 Pa. St. 390, 11 Atl. 627; *Weiler v. Manhattan R. Co.*, 53 Hun, 372, 6 N. Y. Supp. 320; *Thuringer v. N. Y. Central*, etc. R. Co., 82 Hun, 33, 31 N. Y. Supp. 419 [water dripping from defendant's tank formed ice on sidewalk]; *Haverly v. State Line*, etc. R. Co., 135 Pa. St. 50, 19 Atl. 1013 [whether spread of apparently extinguished fire was caused by wind thereafter rising]; *Ewing v. North Versailles*, 146 Pa. St. 309, 23 Atl. 338 [whether town's failure to build a fence on highway caused railroad collision with animals]; *Blue-dorn v. Missouri Pacific R. Co.*, 121 Mo. 258, 25 S. W. 943 [whether excessive speed of train caused the accident]; *Boothby v. Grand Trunk R. Co.*, 66 N. H. 342, 34 Atl. 157 [whether station being closed was proximate cause of illness of passenger waiting on platform for delayed train, in inclement weather]; *Patten v. Chicago*, etc. R. Co., 32 Wis. 524 [similar]; *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 44 Pac. 320 [whether the humiliation consequent on plaintiff's wrongful expulsion from defendant's car was the proximate cause of her subsequent nervous paroxysms]; *Union Pacific R. Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 988 [whether conductor's ordering train ahead, or engineer's disregarding danger signal caused the accident]; *s. p.*, *Hall v. Ogden City R. Co.*, 13 Utah, 243, 44 Pac. 1046.

¹⁴*Henry v. St. Louis*, etc. R. Co., 76 Mo. 288; *Kerrigan v. Hart*, 40 Hun, 389.

¹⁵See § 28, *ante*.

¹⁶*Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210.

¹⁷See *Central R. Co. v. Coggin*, 73 Ga. 689; *Cleveland v. Central R. Co.*,

settled, and the course which common prudence dictated can be so clearly discerned that only one inference can be drawn, it is not only the duty of the court to set aside a verdict contrary to such inference,¹⁸ but to take the case away from the jury and direct a verdict or a non-suit, as the case may require.¹⁹ The question is then one of law,

Id. 793; *Cumberland, etc. Iron Co. v. Scally*, 27 Md. 589.

¹⁸ *Kitchen v. Carter*, 47 Neb. 776, 66 N. W. 855. Where, granting as true all the evidence tends to prove, it can be clearly seen that the conclusion, whether of negligence or contributory negligence, is one about which reasonable minds cannot differ, it is the proper function of the court to direct a verdict (*Wilson v. Illinois Cent. R. Co.*, 210 Ill. 603, 71 N. E. 398 (1904); *Chicago City Ry. Co. v. Nelson*, 215 Ill. 436, 74 N. E. 458 (1905); *Hunnewell v. Haskell*, 174 Mass. 557, 55 N. E. 320 (1899); *Brown v. Citizens of Durham*, 141 N. C. 249, 53 S. E. 513 (1906); *Christensen v. Metropolitan St. Ry. Co.*, 137 Fed. 708, 70 C. C. A. 657 (1905); *Clark v. Zarriko*, 106 Fed. 607, 45 C. C. A. 494 (1901); *Cole v. German Savings, etc. Co.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416 (1903); *Neal v. Southern Ry. Co.*, 113 Ga. 341, 38 S. E. 824 (1901); *Strasburger v. Vogel*, 103 Md. 85, 63 Atl. 202 (1906); *Chandler v. Kansas City, etc. Co.*, 174 Mo. 321, 73 S. W. 502, 62 L. R. A. 474, 97 Am. St. Rep. 570 (1903); *Hoffman v. Philadelphia R. Tr. Co.*, 214 Pa. 87, 63 Atl. 409 (1906); *Kitterman v. Dry Forks Ry. Co.*, 48 W. Va. 606, 37 S. E. 683 (1900); *Birmingham Ry., etc. Co. v. Baker*, 126 Ala. 135, 28 So. 87 (1900); *Louisville, etc. Ry. Co. v. Pearce*, 142 Ala. 680, 39 So. 72 (1905); *Lofsten v. Brooklyn H. Ry. Co.*, 184 N. Y. 148, 76 N. E. 1035 (1906); *Daily v. New York, etc. Ry. Co.*, 167 Fed. (U. S. C. C.) 592 (1909); *Brown v. Amer., etc. Co.*, 88 N. E. (Ind.) 80 (1908); *Cincinnati, etc. Ry. Co. v. Harrod's Admr.*, 115 S. W. (Ky.) 699 (1909); *Baltimore R., etc. Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1056 (1909); *Davis v. Chicago, etc. Ry. Co.*, 83 Neb. 611, 119 N. W. 1121 (1909); *Wheeler v. Oregon R., etc. Co.*, 16 Idaho, 375, 102 Pac. 347 (1909); *Dallas Con. Elec. Ry. Co. v. Chambers*, 118 S. W. (Tex. App.) 851 (1909); *Chicago, etc. Ry. Co. v. Cook*, 102 Pac. (Wyo.) 657 (1909); *Whitfield v. Louisville, etc. Ry. Co.*, 7 Ga. App. 268, 66 S. E. 973 (1910); *Mellody v. Missouri, etc. Ry. Co.*, 124 S. W. (Tex. App.) 702 (1910); *Shriver v. Marion Co. Ct.*, 66 W. Va. 685, 66 S. E. 1062 (1910). In such cases, where the whole case has been disclosed by the evidence, the proper course is to direct a verdict, otherwise to grant a non-suit without prejudice.

¹⁹ *Elliott v. Chicago, etc. R. Co.*, 150 U. S. 245, 14 S. Ct. 85; *Union Pacific R. Co. v. McDonald*, 152 U. S. 262, 14 S. Ct. 619; *Caggar v. Lansing*, 64 N. Y. 417, 427. The amount and character and the weight and effect of evidence in rebuttal of the inference arising from the facts shown are questions of law, when the evidence is undisputed (*Menomonie River, etc. Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176).

for the court to decide.²⁰ And it is now well settled in all the English and the chief American courts that a mere *scintilla* of evidence is not enough to go to the jury.²¹ There must be evidence upon which reasonable men could reasonably and properly find the fact of negligence; or, in default of this, a verdict or non-suit should be ordered according to the practice of the court.²² The case should

²⁰ Where the facts are undisputed and such that only one conclusion can be drawn from them, the question of negligence is one of law (*Dickens v. N. Y. Central R. Co.*, 1 Abb. Ct. App. 504; *Keller v. N. Y. Central R. Co.*, 2 Id. 480; *Indianapolis, etc. R. Co. v. Watson*, 114 Ind. 20, 15 N. E. 824; *Woolwine v. Chesapeake, etc. R. Co.*, 36 W. Va. 329, 15 S. E. 81; *Knight v. Albemarle, etc. R. Co.*, 110 N. C. 58, 14 S. E. 650; *Russell v. Carolina Cent. R. Co.*, 118 N. C. 1098, 24 S. E. 512; *Cope v. Hampton*, 42 S. C. 17, 19 S. E. 1018; *Jacoboski v. Grand Rapids, etc. R. Co.*, 106 Mich. 440, 64 N. W. 461; *Bradley v. Ft. Wayne, etc. R. Co.*, 94 Mich. 35, 53 N. W. 915; *Seefeld v. Chicago, etc. R. Co.*, 70 Wis. 216, 35 N. W. 278; *Aurandt v. Chicago, etc. R. Co.*, 90 Ia. 617, 57 N. W. 442; *Wardlaw v. California R. Co.* [Cal.], 42 Pac. 1075). See, also, *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Stubley v. Northwestern R. Co.*, L. R. 1 Exch. 13; *Crafter v. Metropolitan R. Co.*, L. R. 1 C. P. 300; *Glassey v. Hestonville, etc. R. Co.*, 57 Pa. St. 172; *Pittsburgh, etc. R. Co. v. McClurg*, 56 Id. 294; *Carter v. Towne*, 103 Mass. 507; *Chaffee v. Old Colony R. Co.*, 17 R. I. 658, 24 Atl. 141.

²¹ *Improvement Co. v. Munson*, 14 Wall. 442, 448; *Hathaway v. East Tenn., etc. R. Co.*, 29 Fed. 489; *Jewell v. Parr*, 13 C. B. 909, 916; *Avery v. Bowden*, 6 El. & Bl. 953; *Mellors v.*

Shaw, 1 Best & S. 437; *Wheelson v. Hardisty*, 8 El. & Bl. 232; *Baulec v. Harlem R. Co.*, 59 N. Y. 356, 366. Cases in which a *scintilla* of evidence was allowed to go to the jury are found in *Arkansas* (*Little Rock, etc. R. Co. v. Perry*, 37 Ark. 164), *South Carolina* (*State v. Boles*, 18 S. C. 534; see *Carrier v. Dorrance*, 19 Id. 30; *Simms v. South Carolina R. Co.*, 26 Id. 490, 2 S. E. 486), *Iowa* (*Muldowney v. Illinois, etc. R. Co.*, 32 Ia. 176; *Way v. Illinois, etc. R. Co.*, 35 Id. 585), *Ohio* (*Dick v. Railroad Co.*, 38 Ohio St. 389), and *Illinois* (*Guerdon v. Corbett*, 87 Ill. 272; *Chicago, etc. R. Co. v. Sykes*, 96 Id. 162, 176), and *Nebraska* (*Smith v. Sioux City, etc. R. Co.*, 15 Neb. 583, 19 N. W. 638; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690, 26 N. W. 347; *Leigh v. Omaha St. R. Co.*, 36 Neb. 132, 54 N. W. 134). Where the doctrine of "*scintilla* of evidence" prevails, the court cannot take the case from the jury when there is *any* evidence tending to prove the issue (*Robinson v. Louisville, etc. R. Co.*, 2 Lea, 594; *Smith v. Gillett*, 50 Ill. 290). See § 54, *ante*.

²² *Ryder v. Wombwell*, L. R. 4 Ex. 32, 39; *Improvement Co. v. Munson*, 14 Wall. 442. See *Babcock v. Fitchburg R. Co.*, 140 N. Y. 308, 35 N. E. 596. "Negligence is ordinarily a question for the jury, *but only when* the facts would authorize the jury to infer it" (per Andrews, J.,

not be left to the jury, but the complaint should be dismissed, if there is no evidence of negligence,²³ or if the evidence only suggests a possibility of negligence,²⁴ or is as consistent with the absence of all negligence as with its existence.²⁵ The court has no right to allow a jury

Sutton v. N. Y. Central R. Co., 66 N. Y. 243 [accident which could not have been anticipated]); *s. p.*, *Pleasants v. Fant*, 22 Wall. 116, 120.

²³ *De Vau v. Penn., etc. Canal Co.*, 130 N. Y. 632, 28 N. E. 532; *Reading, etc. R. Co. v. Ritchie*, 102 Pa. St. 425; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145 [horse bolting without assignable cause; driver not lacking in skill]; *Pennsylvania R. Co. v. Righter*, 42 N. J. Law, 180; *N. J. Express Co. v. Nichols*, 33 Id. 434; *Barton v. St. Louis, etc. R. Co.*, 52 Mo. 253; *Hoth v. Peters*, 55 Wisc. 405; *Hoyt v. Hudson*, 41 Id. 105.

²⁴ *Baulec v. Harlem R. Co.*, 59 N. Y. 356; *McCaffrey v. Twenty-third St. R. Co.*, 47 Hun, 404; *Raby v. Cell*, 85 Pa. St. 80; *Wittkowsky v. Wasson*, 71 N. C. 451; *Mercier v. Mercier*, 43 Ga. 323; *Zettler v. Atlanta*, 66 Id. 195; *Crookshank v. Kellogg*, 8 Blackf. (Ind.) 256; *Weis v. Madison*, 75 Ind. 241. The court must be able "to perceive what more the defendant could have done or was bound to do," than he actually did, before allowing a jury to pass upon the question (*Kelly v. Sea Beach R. Co.*, 109 N. Y. 44, 15 N. E. 879).

²⁵ If the evidence would justify an inference consistent with the absence of negligence on the part of the defendant, just as well as it would an inference of negligence, the plaintiff cannot recover (*Smith v. First National Bank*, 99 Mass. 605; *Cotton v. Wood*, 8 C. B. N. S. 568; *Toomey v. Brighton, etc. R. Co.*, 3 Id. 146; *Baulec v. Harlem R. Co.*, 59 N. Y. 356; *Hayes v. Forty-second St. R.*

Co., 97 Id. 259; *Priest v. Nichols*, 116 Mass. 401; *Beaulieu v. Portland Co.*, 48 Me. 291; *Jackson v. Hyde*, 28 Upper Canada, 294; *Deverill v. Grand Trunk R. Co.*, 25 Id. 517; *Welfare v. Brighton R. Co.*, L. R. 4 Q. B. 693). This language has been used so often that *Moody v. Osgood*, 54 N. Y. 488, cannot be considered a valid authority against it. When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which defendant is responsible, and for the other not, the plaintiff must fail, if it is just as probable that they were caused by the one as by the other (*Searles v. Manhattan R. Co.*, 101 N. Y. 661). See *post*, § 57. *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310 (1897); *Williams v. Southern Ry. Co.*, 130 N. C. 116, 40 S. E. 979 (1902); *Phelps v. Erie Ry. Co.*, 119 N. Y. Supp. 141, 134 App. Div. 729 (1909). The rule is stated thus in *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 514 (1904): "The burden of proof is upon plaintiff, and is not satisfied if the conclusion to be reached from the testimony offered is merely a matter of conjecture. If such conclusion be equally consonant with the truth of the allegations, and with some other theory, or theories, inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. Thus in an ordinary case of negligence, like the one under consideration, plaintiff has the burden of proving the negli-

to act upon "mere surmise or conjecture."²⁶ On the other hand, if negligence and the necessary damage proximately flowing from it are so clearly proved, both in fact and inference, that there is no room for an honest difference of opinion between reasonable men, the court should direct a verdict for the plaintiff.²⁷ There are some cases in which the courts seem to have held that such a direction should never be given, but that the farthest extent to which the court can go, in favor of a plaintiff, is to leave the question to the jury. But this is not sustained by the best authorities, and is entirely inconsistent with principle. All courts pass upon the contributory negligence of the plaintiff, as matter of law, when clearly proved; and, if courts are qualified to do this, they are equally competent to decide the same issue against the defendant.

gence of defendant as alleged, and also that such negligence was the proximate cause of plaintiff's injury. If the testimony leaves either the existence of negligence of defendants, or that such negligence was the proximate cause of the injury, in conjecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proved, it does not tend to prove them within the meaning of the rule above announced. The use of the word 'tend' does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith." Quoted with approval in *Winnicott v. Orman* (Montana), 102 Pac. 570 (1909).

²⁶ *Martin v. Pettit*, 117 N. Y. 118, 124, 22 N. E. 566 (*sub nom.* *Wasson v. Pettit*); *Morris v. Lake Shore*, etc. R. Co., 148 N. Y. 182, 185, 42 N. E.

579. While negligence of a railway company, in operating a train at a crossing, may be made out from the proof of all the surrounding circumstances, including the absence of signals and the rate of speed; yet, unless there is something in that proof, taken as a whole, which, if believed by the jury, would establish a failure on its part to perform a legal duty, or to use reasonable care and prudence in what it did, the case should not be submitted to them (*Heaney v. Long Island R. Co.*, 112 N. Y. 122, 19 N. E. 422).

²⁷ *Hogan v. Manhattan R. Co.*, 149 N. Y. 23, 43 N. E. 403; *Moore v. Westervelt*, 1 Bosw., 357. Even if there be controversy in the evidence as to some facts, yet if those that are uncontroverted clearly and indisputably establish negligence, it is a question of law for the court (*Abbett v. Chicago*, etc. R. Co., 30 Minn. 482; *s. p.*, *Cook v. N. Y. Central R. Co.*, 1 Abb. Ct. App. 432; *Williams v. O'Keefe*, 24 How. Pr. 16).

§ 56a. **Instructions to juries.** — The universal rule in common-law jurisdictions is that the court shall determine the law and the jury the facts. Such differences as exist in the rules of practice and procedure as to method of submitting the case to the jury by instructions, where not controlled by statute, arise solely from varying conceptions as to how this may best be done so as to leave the jury entirely free to determine the facts shown by the evidence and the inferences of fact to be drawn from them, while still intelligently presenting the case as developed by the evidence and the law applicable to its various phases. In the English and federal courts²⁸ and in New York, and perhaps one or two other States, it has not been thought to infringe on the province of the jury for the trial judge to indicate his own opinion as to what facts are shown by the evidence and the conclusion to be drawn from them, provided he instructs the jury, notwithstanding such intimations, that it is their exclusive province to determine the facts. While in the State courts generally it is deemed highly improper for the judge to express any opinion whatever on the evidence, to comment on it, or its weight, the conclusion to be deduced from it, or the credibility of witnesses. But in the latter jurisdictions the practice varies as to what will be considered reversible error in this regard. Some of the State courts holding that an instruction expressly or impliedly postulating by inadvertent or inartificial expression the existence of *any* material and contested fact, notwithstanding that in other portions of the charge all the facts are submitted to the jury and that they are told it is their exclusive province to determine them, will constitute such error; while others hold that if the charge, considered as a whole, cannot reasonably be held to have

²⁸ *Freese v. Kemplay*, 118 Fed. 428, organic or statutory law of the State 55 C. C. A. 258 (1902). The powers in which they are held (*Vicksburg, of the Federal courts in this respect etc. Ry. Co. v. Putnam*, 118 U. S. are not subject to the control of the 360).

had that effect, the error is harmless and the judgment will not be reversed on that account. In some of the State courts of the former class the appellate courts are avowedly controlled by early statutory provisions that may or may not happily express the common-law rule; but even where the statute only affirms generally the common-law rule the courts have not always felt themselves at liberty to disregard a violation of its express terms while professing to maintain its spirit. In such jurisdictions the recognized practice is for the trial judge merely to state the facts in issue under the pleadings and evidence and the abstract propositions of law applicable to them. The importance of this question at this time, as one of practice and procedure, can scarcely be overestimated. The rapid increase of the country in population and industrial development has been coeval with the growth of a keener sense of social justice, and in no branch of the law has their combined influence been more sensibly felt than in that of negligence, and more particularly in personal injury cases. This condition has resulted in an amount of litigation that the courts, as formerly organized, were unable to dispose of within a reasonable time, hence a great outcry arose against the law's delays. One of the most fruitful causes of delay has been the reversal of judgments of the trial courts in negligence cases on account of supposed error in the instructions of the court in charging on the weight of the evidence. The earlier decisions, when not controlled by statute, were rested on the constitutional ground that the jury, being liable to be influenced by such expressions, the party cast in the suit was thereby deprived of his right of trial by jury. These decisions it was thought in some jurisdictions necessary to follow under the doctrine of *stare decisis*. Growing out of the exigency that has thus arisen in some States statutes have recently been passed, and in others are now being urged, to the effect that judgments shall not be reversed unless upon the

whole record it shall appear that the error complained of "has injuriously affected the substantial rights of the parties." In others modifications of the rule originally acted upon have been made by the courts when the exact form in which the question is presented had not been previously ruled.²⁹

§ 56b. Error in instructions to state what facts constitute negligence, to assume controverted facts, to emphasize a particular fact and ignore others that are essential; and, in most jurisdictions, to charge on the weight of the evidence. — It is generally reversible error for the court to state what facts constitute negligence, to assume controverted facts, to emphasize particular facts and ignore others that are essential, and, generally, to charge on the weight of the evidence.³⁰

²⁹ A bill presented to Congress by the American Bar Association is now pending containing, among other provisions, the following: "No judgment shall be set aside, or reversed, or new trial granted, by any court of the United States in an case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties." The following shows the line of cleavage: In the case of *Post v. Brooklyn, etc. Ry. Co.*, 195 N. Y. 62, the court said: "There are errors in this record, but we find none calling for reversal, when the circumstances under which the erroneous rulings were made and their probable effect on the result are taken into account. Un-

der our system of appeals every error does not require a new trial, for the vast judicial work of the State could not be done on that basis. Unless the error is so substantial as to raise a presumption of prejudice, it should be disregarded for undue delay is a denial of justice." In *Collins v. Dillingham, Receiver*, 7 Tex. App. 93, where the plaintiff was walking along a railway track at night, a charge "That if by looking and listening plaintiff could have discovered the approaching train in time to get off the track and avoid the injury, then he was guilty of contributory negligence, and cannot recover," was held reversible error. This Judge Thompson calls "going to a senseless extreme." Thompson on Negligence, 2d ed., § 468, note 481.

³⁰ *Higginbotham v. Higginbotham*, 106 Ala. 314; *Missouri Pac. R. Co. v. Byars*, 58 Ark. 108; *Kauffman v. Maier*, 94 Cal. 269; *McVickle v. Conkle*, 96 Ga. 584; *William Graver Tank Works v. McGee*, 58 Ill. App.

So numerous have been the instructions in such cases that have come before the appellate courts, so varied the conditions to which they have been applied, and so diverse the views of courts of review, often difficult to reconcile even when proceeding from the same court, volumes would be required even to enumerate them without comment, with, it is believed, but little, if any, compensating advantage. It may be said, however, that in a large majority of the cases where the instructions have been deemed erroneous an examination will disclose that such errors are due to inadvertence or inartificiality in expression, which would readily have been corrected in the court below had the rules of practice afforded an opportunity, as by requiring that such errors be pointed out while the jury were at the bar. On the other hand, some of the rulings of appellate courts in holding charges in negligence cases to be reversible error have been such as to provoke from so distinguished a writer as the late Judge Thompson the terms "childish refinements," "hypercriticism," and "hair splitting."³¹

250; *Ohio, etc. R. Co. v. Percy*, 128 Ind. 207; *Lorie v. Adams*, 51 Kans. 692; *Wright v. Commonwealth*, 85 Ky. 123; *State v. Benner*, 64 Me. 267; *McGregory v. Prescott*, 5 Cush. (Mass.) 67; *Kearney v. State*, 68 Miss. 233; *Gilliam v. Ball*, 49 Mo. 249; *Wastl v. Montana Union R. Co.*, 17 Mont. 213; *Wilson v. Gamble*, 50 Neb. 426; *State v. Tickel*, 13 Nev. 502; *Weisenfield v. McLean*, 96 N. C. 248; *Jackson v. Jackson*, 32 S. C. 591; *Citizens' St. R. Co. v. Burke* (Tenn. 1897), 40 S. W. 1085; *Missouri Pac. Ry. Co. v. Bartlett*, 81 Tex. 42; *Tyler v. Chesapeake, etc. Ry. Co.*, 88 Va. 394; *Bardwell v. Ziegler*, 3 Wash. 34; *Dickeschied v. Wheeling Ex. Bank*, 28 W. Va. 341. The rule generally enforced in the courts whose decisions are cited above has been thus well expressed: "Trial judges 'cannot legally indicate their opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact in issue, and the subject of the evidence. They may declare the law fully and freely, but whether a certain contested fact has been proved is entirely for the jury, which involves both the credibility of the witness and the existence of the fact, whether said fact depends upon direct and positive testimony or upon inferences to be drawn from other proved facts. In fine, the whole matter of finding the facts of the case must be left entirely to the jury, without suggestions or leadings by the court'" (*State v. Williams*, 31 S. C. 238).

³¹ See note 29, *ante*.

CHAPTER V.

EVIDENCE.

<p>§ 57. Plaintiff's burden of proof.</p> <p>58. Burden of proof does not shift, etc.</p> <p>58a. <i>Res ipsa loquitur</i>.</p> <p>58b. Does not arise from the injury itself but from the nature of its cause.</p>	<p>§ 59. Presumptions of negligence.</p> <p>60. Illustrations of presumptive negligence.</p> <p>60a. Admissions and declarations.</p> <p>60b. Other similar accidents.</p> <p>60c. Subsequent repairs.</p>
---	--

§ 57. Plaintiff's burden of proof.—In an action founded upon negligence, the burden of proof of course rests upon the plaintiff.¹ He must make out his case by a fair preponderance of evidence; ² but he is not bound to

¹ Parrott v. Wells, 15 Wall. 524; Bridges v. North London R. Co., L. R. 6 Q. B. 377; 7 H. L. 232; The Marpesia, L. R. 4 P. C. 212; The Benmore, L. R. 4 Adm. 132; Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; aff'g 56 Barb. 425; Curran v. Warren Chem., etc. Co., 36 N. Y. 153; Moody v. Osgood, 54 Id. 488; Hale v. Smith, 78 Id. 480; Allan v. State Steamship Co., 132 Id. 91, 30 N. E. 482 [ship's physician furnished from the ship's stores calomel when quinine was called for]; Illinois, etc. R. Co. v. Cragin, 71 Ill. 177; Brown v. Congress St. R. Co., 49 Mich. 153; Button v. Frink, 51 Conn. 342; Donovan v. Hartford St. R. Co., 65 Id. 201, 32 Atl. 350. As to admissibility of opinion evidence, and the practice of others in the same employment, see § 53, *ante*. As to burden and sufficiency of proof in actions by servants for master's negligence, see §§ 222, 223, *post*; in actions against

municipal corporations in respect to public works, highways, etc., see §§ 290, 367, 382, *post*; in actions against railroads for negligent construction and maintenance of track and accessories, see § 411, *post*; in actions against railroads for collisions with animals, see § 432, *post*; and for collisions with persons, see § 485, *post*; in actions by passengers against carrier, see §§ 516-518; as to origin of fire, see §§ 675, 676; in management of gas works, see § 697, *post*.

² Searles v. Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66; McCaig v. Erie R. Co., 8 Hun, 599. Plaintiff's testimony that the frog in which he was injured was then unblocked is sufficient to carry the question to the jury, though a number of witnesses testify that, just after the accident, the frog was found to be properly blocked (Union Pac. R. Co. v. James, 163 U. S. 485, 16 S. Ct. 1109).

do so beyond a reasonable doubt.³ The burden of proof as to defendant's negligence remains upon plaintiff throughout the trial.⁴ The extent to which it continues upon him, even where the issue is as to his own contributory negligence, will be considered in the chapter of Contributory Negligence.⁵ It is certainly the duty of the plaintiff to prove affirmatively that the defendant has been negligent. It is not enough for him to prove that he has suffered damage by reason of some event which happened upon the defendant's premises,⁶ or even by reason of some act or omission of the defendant.⁷ He

³ In actions upon negligence, issues of fact are to be determined by the jury upon the preponderance of evidence; and it is not necessary that defendant's negligence should be proved beyond a reasonable doubt (*Seybolt v. N. Y., Lake Erie, etc. R. Co.*, 95 N. Y. 562; *Hart v. Hudson River Bridge Co.*, 80 Id. 622; *Bradwell v. Pittsburgh, etc. R. Co.*, 139 Pa. St. 404, 20 Atl. 1046; *Quaife v. Chicago, etc. R. Co.*, 48 Wis. 513; *Hartwig v. Chicago, etc. R. Co.*, 49 Id. 358; *Fitts v. Cream City R. Co.*, 59 Id. 323; *Kelly v. Hannibal, etc. R. Co.*, 70 Mo. 604; *Louisville, etc. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902, and cases cited under § 54, *ante*).

⁴ The burden of sustaining the affirmative of the issue remains on the plaintiff throughout the trial; and the jury must believe from the whole case that the allegation is supported by the evidence (*Heinemann v. Heard*, 62 N. Y. 448; *Dowell v. Guthrie*, 99 Mo. 653, 12 S. W. 900).

⁵ See §§ 106-109, *post*.

⁶ *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; *Curran v. Warren Chemical Co.*, 36 N. Y. 153; *Nason v. West*, 78 Me. 253, 3 Atl. 912. The mere fact of an explosion in an oil refinery does not raise a presumption

of negligence (*Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 25 N. E. 259). *s. p.*, *Henry v. Brackenridge Lumber Co.*, 48 La. Ann. 950, 20 So. 221 [injury from defendant's machinery]; *Davidson v. Davidson*, 46 Minn. 117, 48 N. W. 560 [negligence cannot be presumed merely from fall of elevator weights]; *Turnier v. Lathers*, 59 Hun, 623, *mem.*; 13 N. Y. Supp. 500 [elevator rope breaking].

⁷ *Reiss v. New York Steam Co.*, 128 N. Y. 103, 28 N. E. 24 [steam pipes furnished by defendant exploded]. A defect in a highway at a particular time and place, is not to be inferred merely from the fact that an injury was sustained at that time and place; but that fact may be taken into consideration, in connection with the other facts of the case (*Church v. Cherryfield*, 33 Me. 460; *Sherman v. Kortright*, 52 Barb. 267). The condition of the road in the immediate vicinity of the place where the accident occurred may be shown (*Cox v. Westchester Turnpike Co.*, 33 Barb. 414), but not in the "locality" generally (*Ruggles v. Nevada*, 63 Iowa, 185; see *Grand Rapids v. Wyman*, 46 Mich. 516). In an action against a railway com-

must also prove that the defendant in such act or omission violated a legal duty incumbent upon him.⁸ He must, therefore, prove that the defendant has violated some contract⁹ or rule of law,¹⁰ thus infringing upon the

pany, for injuries to cattle on its track (unless some statute declares

proof of injury *prima facie* evidence of negligence), proof that the cattle were injured by the defendant's engines is not enough (*Sneesby v. Lancashire, etc. R. Co.*, L. R. 9 Q. B. 263; 1 Q. B. Div. 42; *Bradley v. Buffalo, etc. R. Co.*, 34 N. Y. 427; *Tracy v. Troy, etc. R. Co.*, 38 Id. 433; *Perkins v. Eastern R. Co.*, 29 Me. 307; *Maynard v. Boston, etc. R. Co.*, 115 Mass. 458; *Baxter v. Boston, etc. R. Co.*, 102 Id. 383; *White v. Concord R. Co.*, 30 N. H. 207; *Smith v. Eastern R. Co.*, 35 Id. 357; *Hook v. Worcester, etc. R. Co.*, 58 Id. 251; *Bulkley v. N. Y. & New Haven R. Co.*, 27 Conn. 479; *Lindsay v. Connecticut, etc. R. Co.*, 27 Vt. 643; *Quimby v. Vermont Central R. Co.*, 23 Id. 387; *Vandegrift v. Rediker*, 22 N. J. Law, 185; *Price v. New Jersey, R. etc. Co.*, 31 Id. 229, 32 Id. 19; *Galpin v. Chicago, etc. Co.*, 19 Wis. 637; *McCandless v. Chicago, etc. R. Co.*, 45 Id. 365; *Turner v. St. Louis, etc. R. Co.*, 76 Mo. 261; *Orange, etc. R. Co. v. Miles*, 76 Va. 773; *Campbell v. Atlantic, etc. R. Co.*, 4 Hughes C. C. 170; *Chicago, etc. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Northland*, 30 Id. 451; *Indianapolis, etc. R. Co. v. Means*, 14 Ind. 30; *Schneir v. Chicago, etc. R. Co.*, 40 Iowa, 337; *Grand Rapids R. Co. v. Judson*, 35 Mich. 507; *Mobile, etc. R. Co. v. Hudson*, 50 Miss. 572; *Bethje v. Houston, etc. R. Co.*, 26 Tex. 604). See § 419, *post*. The rule is otherwise in South Carolina (*Murray v. So. Carolina R. Co.*, 10 Rich. Law, 227; *Roof v. Railroad Co.*, 4 S. C. 61; see § 432, *post*).

⁸ *Dubois v. Kingston*, 102 N. Y. 219, 6 N. E. 273; *McGrath v. Hudson River R. Co.*, 32 Barb. 144; *Terry v. N. Y. Central R. Co.*, 22 Id. 574; *Robinson v. Fitchburg, etc. R. Co.*, 7 Gray, 92; *Tourtellot v. Rosebrook*, 11 Metc. 460; *Lester v. Pittsford*, 7 Vt. 158; *Allen v. Willard*, 57 Pa. St. 374; *M'Cully v. Clarke*, 40 Id. 399; *Baltimore, etc. R. Co. v. Bahrs*, 28 Md. 647; *Frech v. Philadelphia, etc. R. Co.*, 39 Id. 574; *State v. Philadelphia, etc. R. Co.*, 60 Id. 555; *Herring v. Wilmington, etc. R. Co.*, 10 Ired. Law, 402; *Bachelor v. Heagan*, 18 Me. 32; *Beaulieu v. Portland Co.*, 48 Id. 291; *Mobile, etc. R. Co. v. Thomas*, 42 Ala. 672; *Fuller v. Citizens' Bank*, 15 Fed. 875; *Crandall v. Goodrich Transp. Co.*, 16 Id. 75; *Crew v. St. Louis, etc. R. Co.*, 20 Id. 87; *Button v. Frink*, 51 Conn. 342; *Illinois Central R. Co. v. Cragin*, 71 Ill. 177; *Terre Haute, etc. R. Co. v. Augustus*, 21 Id. 186; *Wabash, etc. R. Co. v. Locke*, 112 Ind. 404; 14 N. E. 391; *Michigan Central R. Co. v. Coleman*, 28 Mich. 440; *Norfolk, etc. R. Co. v. Ferguson*, 79 Va. 241, and cases cited under §§ 8-13, 25-27, *ante*.

⁹ *McCaldin v. Parke*, 142 N. Y. 564, 37 N. E. 662 [plaintiff's vessel, while under charter by defendant, struck a rock on approaching defendant's wharf; plaintiff held bound to show contract to furnish sufficient depth of water]; *Arent v. Squire*, 1 Daly, 347. Compare *Watson v. Bauer*, 4 Abb. N. S. 273.

¹⁰ See cases cited under § 13, *ante*.

plaintiff's known rights;¹¹ or else he must prove facts and circumstances, from which it can be ascertained with reasonable probability what particular precaution the defendant ought to have taken but did not take.¹² If a defect was not obvious, there must be some evidence from which it can be inferred how it might and ought to have been discovered.¹³ He must also prove facts from which it can fairly be inferred that the defendant's negligence was the *cause*,¹⁴ and the *proximate cause*,¹⁵ of the injury.

¹¹ See § 27, *ante*.

¹² *Daniel v. Metropolitan R. Co.*, L. R. 3 C. P. 216, 591, 5 H. L. 45. In that case, Willes, J., said: "It is necessary for the plaintiff to establish * * * reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." This language was cited with approval in *Hayes v. Michigan Central R. Co.*, 111 U. S. 228, and in *Philadelphia, etc. R. Co. v. Stebbing*, 62 Md. 504. s. p., *Williams v. Great Western R. Co.*, L. R. 9 Exch. 157; *Railroad Co. v. Stout*, 17 Wall. 657; *Randall v. Baltimore, etc. R. Co.*, 109 U. S. 478; *Lovegrove v. Brighton, etc. R. Co.*, 16 C. B. N. S. 669. The judgment given by Willes, J., was reversed, but this doctrine was distinctly affirmed. s. p., *Kelly v. Sea Beach R. Co.*, 109 N. Y. 44, 15 N. E. 879. Plaintiff cannot show that other fastenings could have been used, without proof that they were in common use (*McCarthy v. Boston Duck Co.*, 165 Mass. 165, 42 N. E. 568). Where the complaint specifies the negligence complained of, and the court finds that the defects claimed could not have caused the accident, it is not incumbent on

defendant to show that no other defect could have produced the injury (*Lennon v. Rawitzer*, 57 Conn. 583, 19 Atl. 334). Where mismanagement of the engine which set the fire was the only negligence alleged, defendant was not obliged to prove that the engine was in good condition (*Atchison, etc. R. Co. v. Ayers*, 56 Kans. 176, 42 Pac. 722).

¹³ *De Graff v. N. Y. Central R. Co.*, 76 N. Y. 125.

¹⁴ *Cochran v. Dinsmore*, 49 N. Y. 249; *Dobbins v. Brown*, 119 Id. 188, 23 N. E. 537; *Geoghegan v. Atlas Steamship Co.*, 146 N. Y. 369, 40 N. E. 507. Plaintiff is not bound to show the precise cause; it is enough if he shows the injury to be attributable to one or other of several causes (*e. g.*, sparks from one or other of defendant's locomotives), for each of which defendant is responsible (*Bevier v. Delaware, etc. Canal Co.*, 13 Hun, 254, 257). But where goods were injured by two different causes for only one of which defendant is responsible, the burden of proof is on plaintiff to show that the damage was occasioned by the latter cause (*Priest v. Nichols*, 116 Mass. 401; *Snider v. New Orleans, etc. R. Co.*, 48 La. Ann. 1, 18 So. 695. s. p., *Searles v. Manhattan R. Co.*, 101 N. Y. 661).

¹⁵ *Holbrook v. Utica, etc. R. Co.*, 12 N. Y. 236; *Kelsey v. Jewett*, 28

Mere surmise or conjecture, on any of these points, will not do.¹⁶

§ 58. Burden of proof does not shift, but burden or weight of evidence on particular issues does. — The ambiguity of the phrase “burden of proof” lies in its use to express either a result of the evidence or the means of reaching such result. This indifferent use has led to confusion in discussion. “Burden of proof, as a phrase, means therefore either: (1) The necessity of establishing a certain fact or set of facts which preponderates to a legally required extent, or (2), the necessity which exists on a party at a particular time during a trial to create a *prima facie* case in his own favor or to overthrow one when created against him.”¹⁷ The learned

Hun, 51; Philadelphia, etc. R. Co. v. (1903); Amer. Hoist, etc. Co. v. Boyer, 97 Pa. St. 91; Fox v. Borkey, Hall, 110 Ill. App. 463 (1903); 126 Id. 164, 17 Atl. 604; Pennsylvania Co. v. Hensil, 70 Ind. 569; N. E. 6, 60 Am. St. Rep. 680, 39 Crandall v. Goodrich Transp. Co., 16 L. R. A. 737 (1895); Willis v. Channing, 90 Tex. 617, 40 S. W. 395, 59 Fed. 75. See § 54, *ante*. To entitle him to recover the plaintiff must show by a preponderance of the evidence the defendant's wrongful act or omission constituting a breach of duty towards him and that he was proximately injured thereby. Preponderance “simply means the greater weight of evidence” (Bryan v. Chicago, etc. Ry. Co., 464, 19 N. W. 295 (1884). See also Hoffman v. Land, 111 Mich. 156, 69 N. W. 231 (1894). It has sometimes been held that a preponderance which “satisfies” or “reasonably satisfies” the jury is required (Kansas City, etc. Ry. Co. v. Henson, 132 Ala. 528, 31 So. 590 (1902); McKean v. Chicago, etc. Ry. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252 (1894); Louisville, etc. Ry. Co. v. White, 100 Fed. 239, 40 C. C. A. 352 (1900). *Contra*, Carter v. Fulgham, 134 Ala. 238, 32 So. 684

¹⁶ Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537 [unsafe machinery]. Recovery for explosion of a boiler cannot be had, though an inexperienced man had been placed in charge, it being shown that the explosion was not due to his negligence, and the cause being left to mere conjecture (Brunner v. Blaisdell, 25 Pa. St. 170, 32 Atl. 607). In an action for injuries caused by defendant's frightening plaintiff's horse and causing it to run away, the defendant is entitled to have the jury charged, literally or in substance, that no recovery could be had without proof to their satisfaction that the frightening of the horse was the cause of the accident (Mitchell v. Turner, 149 N. Y. 39, 43 N. E. 403).
¹⁷ If merely conjectural the case should not be submitted to the jury

writer of the article from which this extract is taken proceeds with excellent acumen to discuss the law arising from the use of the phrase in the latter sense under the head of "Burden of Evidence" while applying the term "burden of proof" to the necessity of finally establishing the fact or facts in issue. The burden of proof in the latter sense, its proper use, never shifts.¹⁸ The plaintiff is not bound to prove more than enough to raise a fair presumption¹⁹ of negligence on the part of the de-

(*Powers v. Pere Marquette Ry. Co.*, 143 Mich. 379, 106 N. W. 1117 (1906); *Waters Pierce Oil Co. v. Van Elderen*, 137 Fed. 557, 70 C. C. A. 255 (1905); *Cowfield v. Asheville St. Ry. Co.*, 11 N. C. 597, 16 S. E. 703 (1893).

¹⁸ Per Baldwin, Justice: "The term 'burden of proof' is an ambiguous one. It may be used to indicate the burden which rests on every party to a cause, presenting a claim for relief or pleading in avoidance, or going forward, if he is met by a traverse, and establishing what is well defined by an authoritative writer on the law of evidence (who has done much towards setting it in a scientific form) as the total proposition or series of propositions which constitute his disputed case (*Thayer's Preliminary Treatise on Evidence*, 380). It may also be used to denote a duty cast by law on one party to meet and rebut the effect of some piece of evidence introduced by the other by proof of what may suffice to overbear it in the mind of the trier" (*Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 166, 42 L. R. A. 514 (1898). Per Bigelow, Justice: "The 'burden of proof' and the weight of evidence are very different things. The former remains on a party affirming the fact in support of his case, and does

not change in any aspect of the cause though the latter shifts from side to side in the progress of a trial according to the nature and strength of the proofs offered in support or denial of the main fact to be established" (*Central Bridge Cor. v. Butler*, 2 Gray, 132). See, also, *Williams v. Casebeer*, 126 Cal. 77, 58 Pac. 380 (1907); *Heinman v. Herd*, 62 N. Y. 448; *Blanchard v. Young*, 11 Cush. 345; *Clark v. Hills*, 67 Tex. 141; *St. Louis, etc. Ry. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740 (1903).

¹⁹ But to be sufficient to sustain a verdict, this presumption must be the conclusion from facts proved or admitted, and not a presumption from a presumption (*Philadelphia, etc. R. Co. v. Henrice*, 92 Pa. St. 434; *Gillespie v. McGowan*, 100 Id. 144; *Northern Central R. Co. v. State*, 54 Md. 113; *Sorenson v. Menasha, etc. Co.*, 56 Wisc. 338). In actions for damages caused by fire communicated from defendant's locomotive, the burden has been held in some courts to be on plaintiff to prove more than this origin of the fire (*Gandy v. Chicago, etc. R. Co.*, 30 Iowa, 420; *Albert v. Northern, etc. R. Co.*, 98 Pa. St. 316; *Philadelphia, etc. R. Co. v. Yergler*, 73 Id. 121; *Henderson v. Philadelphia, etc. R. Co.*, 144 Id. 461, 22 Atl. 851; *Indianapolis, etc. R. Co. v. Paramore*,

fendant and of resulting injury to himself. Having done this, he is entitled to recover, unless the defendant produces evidence sufficient to rebut this presumption.²⁰ It has sometimes been held not sufficient for the plaintiff to

31 Ind. 143; *Ruffner v. Cincinnati*, etc. R. Co., 34 Ohio St. 96). But in other States, this evidence casts the burden on the defendant to disprove negligence. *New York*: *Case v. Northern Central R. Co.*, 59 Barb. 644; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Field v. N. Y. Central R. Co.*, 32 Id. 339. *Missouri*: *Coale v. Hannibal*, etc. R. Co., 60 Mo. 227; *Palmer v. Missouri Pacific R. Co.*, 76 Id. 217; *Bedford v. Hannibal*, etc. R. Co., 46 Id. 456. *Compare* *Smith v. Hannibal*, etc. R. Co., 37 Id. 287. *Tennessee*: *Simpson v. East Tennessee R. Co.*, 5 Lea, 456. *Wisconsin*: *Spaulding v. Chicago*, etc. R. Co., 30 Wis. 110, 33 Id. 582. By statute in Maryland, Illinois, Iowa, Arkansas and Utah, the burden is placed on railroad companies to disprove negligence in cases of fire communicated by sparks from engines (see *Annapolis*, etc. R. Co. v. Gantt, 39 Md. 115; *Baltimore*, etc. R. Co. v. Shipley, 39 Id. 251; *Chicago*, etc. R. Co. v. Clampit, 63 Ill. 95; *Pittsburgh*, etc. R. Co. v. Campbell, 86 Id. 443; *Toledo*, etc. R. Co. v. Larmon, 67 Id. 68; *Slosson v. Burlington*, etc. R. Co., 51 Iowa, 294; *Small v. Chicago*, etc. R. Co., 50 Id. 338; *Engle v. Chicago*, etc. R. Co., 77 Id. 661, 37 N. W. 6; *Tilley v. St. Louis*, etc. R. Co., 49 Ark. 535, 6 S. W. 8; *Anderson v. Wasatch*, etc. R. Co., 2 Utah, 518). See § 671, *post*. The fact that the roof fell while defendant was raising it was sufficient evidence of defendant's negligence in executing the work to go to the jury (*Barnowski v. Hel-*
son, 89 Mich. 523, 50 N. W. 989). As to when an inference that defendant came to his death through having touched uninsulated wire was justified, see *Suburban Electric Co. v. Nugent*, 58 N. J. Law, 658, 34 Atl. 1069. What evidence will sustain a verdict on a charge of negligent laying of rails, see *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482. As to burden of proof in statutory actions against railroad companies for injuries from operation of locomotives, cars and machinery, see *Central R. Co. v. Small*, 80 Ga. 519, 5 S. E. 794; *Savannah*, etc. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82; *Hamlin v. Yazoo*, etc. R. Co., 72 Miss. 39, 16 So. 877; *Mobile*, etc. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146, and against railroad companies for injuries to animals from neglect to fence track, etc., see § 421, *post*, and for injuries to persons from neglect of statutory precautions, see § 467, *post*.
²⁰ *Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30; *Sullivan v. Union R. Co.*, 7 N. Y. App. Div. 238, 40 N. Y. Supp. 84. See also *Mullen v. St. John*, 57 N. Y. 567; *Atchison*, etc. R. Co. v. Bales, 16 Kans. 252; *Kendall v. Boston*, 118 Mass. 234; *McKee v. Bidwell*, 74 Pa. St. 218; *Toledo*, etc. R. Co. v. O'Connor, 77 Ill. 391; *Correll v. Burlington*, etc. R. Co., 38 Iowa, 120; *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Picken v. Jones*, 28 Cal. 618 [plaintiff lawfully in street injured by defendant's cattle driven there].

establish a probability of the defendant's fault;²¹ but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence. As already stated, the plaintiff is not bound to prove his case beyond a reasonable doubt;²² and, although the facts shown must be more consistent with the negligence of the defendant than with the absence of it, they need not be inconsistent with any other hypothesis.²³ It is well settled that evidence of negligence need not be direct and positive.²⁴ Circumstantial evidence is sufficient.²⁵ In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence; and as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence, a kind of evidence which might not be satisfactory in other classes of cases,

²¹ *Sheldon v. Hudson River R. Co.*, 29 Barb. 226; *Lehman v. Brooklyn, cago, etc. R. Co.*, 48 Wis. 513; *Johnson v. Agricultural Ins. Co.*, 25 29 Id. 234. See, too, *Beaulieu v. Hun*, 251; *Hays v. Gallagher*, 72 Pa. Portland Co., 48 Me. 291. "So much of the instruction as lays down the proposition that in order to recover for future consequences they must be 'reasonably certain' to ensue is incorrect. Certainty means the absence of doubt, and the proposition means that the jury should be satisfied of their occurrence beyond a reasonable doubt. We think the evidence should show a reasonable probability" * * * "and that it need show no more * * *

(*Gulf, etc. Ry. Co. v. Harriet*, 80 Tex. 73, 15 S. W. 556 (1891). See also *Leggett v. Illinois Central Ry. Co.*, 72 Ill. App. 577, and *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979 (1891).

²² *Seybolt v. N. Y., Lake Erie, etc. R. Co.*, 95 N. Y. 582; *Quaife v. Chi-* ²³ *Toomey v. Brighton R. Co.*, 3 C. B. N. S. 146, 150. "The plaintiff is not bound to prove his case so clearly as to exclude the possibility of any other theory" (*Whitney v. Clifford*, 57 Wis. 156).

²⁴ Direct and positive evidence is not required. Any circumstance from which negligence may be reasonably inferred may be sufficient (*Atchison, etc. R. Co. v. Brassfield*, 51 Kans. 167, 32 Pac. 814; *Cincinnati, etc. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287).

²⁵ Circumstantial evidence alone may authorize the finding of negli-

open to clearer proof. This is on the general principle of the law of evidence, which holds that to be sufficient or satisfactory evidence, which satisfies an unprejudiced mind.²⁶ Proof that similar accidents do not happen from similar things, when properly managed, is competent to raise a presumption of negligence, where an accident has happened.²⁷

§ 58a. *Res ipsa loquitur*. — This maxim is peculiar to the law of negligence. It is more frequently applied to passenger cases, but not exclusively so. Its meaning and the rationale on which it rests are simple enough, but their consideration may well be preceded by a brief reference to the law of presumptions of fact, which branch of the law of evidence the maxim belongs.

A presumption of fact is an inference or conclusion of the existence or non-existence of some fact drawn from other facts in evidence. It is, or may be, thus presumed because "it is the probable inference which common sense, enlightened by human knowledge and experience, draw from the connection, relation and coincidence of facts and circumstances with each other." The facts and circumstances from which the inference arises must themselves be established by direct evidence, and this precludes resting one inference on another. The rule dispenses with direct evidence of the fact inferred because, in the first instance, the inference is so natural as to render it unnecessary. It is always rebuttable. In the

gence (Jacksonville, etc. R. Co. v. 48 Wis. 513; Wood v. Chicago, etc. Peninsular, etc. Mfg. Co., 27 Fla. 1. R. Co., 51 Id. 196; Illinois Central v. 157, 9 So. 661). Cragin, 71 Ill. 177; McKissock v. St.

²⁶ Gandy v. Chicago, etc. R. Co., Louis, etc. R. Co., 73 Mo. 456; 30 Iowa, 421; Garrett v. Chicago, Buesching v. St. Louis Gas Light etc. R. Co., 36 Id. 123; Hart v. Hud- Co., 73 Id. 219; Kelly v. Hannibal, son R. Bridge Co., 80 N. Y. 622; etc. R. Co., 70 Id. 604; Lackawanna, Jones v. N. Y. Central, etc. R. Co., etc. R. Co. v. Doak, 52 Pa. St. 379. 28 Hun, 364; Lyons v. Rosenthal, 11 ²⁷ Mason v. Tower Hill Co., 83 Hun, Id. 46; Nichols v. Smith, 115 Mass. 479, 32 N. Y. Supp. 36 [splice in 332; Quaife v. Chicago, etc. R. Co., rope].

absence of rebutting evidence it makes a *prima facie* case, where the inference is of the main fact to be established, and will support a verdict. Whether it will warrant a peremptory instruction is to be determined as in other cases by the answer to the question, is there any other reasonable view of the case? The inference is ordinarily merely one which the jury is allowed to draw; it is not constrained to find in favor of the *prima facie* case; that depends on the strength of the inference, *i. e.*, on the weight of the evidence supporting it, a matter peculiarly for the determination of the jury.

§ 58b. Does not arise from the injury itself, but from nature of its cause. — An inference or presumption of negligence arises not from the injury itself, as has sometimes been incorrectly said, but from the very nature of the cause of the injury; in such case it is said the efficient cause of the injury itself declares its negligence character. This is the doctrine of *res ipsa*. Certain conditions must concur. The causative force of the injury must be shown to be controlled by the defendant; it must also appear that there was no other equally efficient proximate cause. If from the nature of the event causing the injury an enquiry naturally arises which one of two or more persons, acting independently, is responsible; or, if it appear that the injury was proximately caused by the independent acts of two or more persons, the application of the maxim is excluded by its terms. Finally, it must appear that the cause of the injury was something out of the usual order.²⁸ The most frequent application of the doctrine, as stated, is to passenger cases because the passenger of necessity passively submits himself to be acted upon by forces exclusively under the carrier's control. The derailment of a train by which the passenger is injured is generally considered a

²⁸ Ency. of Evidence (Camp. & Street (T. A.), Foundations of Legal Crowe), Vol. VIII, 871 *et seq.*; Liability, Vol. I, p. 107 *et seq.*

typical case of *res ipsa*. How far this view has been confirmed or modified by the decisions will be discussed in connection with the subject of Railroads and Street Railways as common carriers of passengers. The doctrine has been applied in other negligence cases by the courts, and, sometimes, without being expressed *eo nomine*. "Where the thing is shown to be under management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of proper care."²⁹ Where a landslide occurred in a cut, derailing the train in which the plaintiff was traveling as a passenger and injuring him, it was held, by the Supreme Court of the United States, that the mere fact that a wreck was so caused raised a *prima facie* presumption of negligence, for, said the court, it was the duty of the company so to construct the banks of its cuts as that they would not slide by reason of the action of ordinary natural causes, such as wet weather and vibrations due to operations of trains."³⁰

"It is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The "res," therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring the exist-

²⁹ Scott v. London Docks Co., 3 H. & C. 596, Earle, C. J.

³⁰ Gleeson v. Va. Mid. Ry., 140 U. S. 435.

ence of the traversible or principal fact in issue, the defendant's negligence. * * * When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of '*res ipsa loquitur*,' when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence."³¹

§ 59. Res ipsa or presumptions of negligence, continued. — The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault.³² Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured any one, is enough to make out a presumption of negligence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.³³ So, also: "Where it is shown that the accident

³¹ *Davis v. Galveston, etc. Ry. Co., Brick Co.*, 117 Ga. 106, 43 S. E. 42 Tex. App. 55 (1906). 443 (1903); *Cincinnati, etc. Ry. Co.*

³² *Cummings v. National Furnace v. South Fork Coal Co.*, 139 Fed. Co., 60 Wis. 603; *Briggs v. Oliver*, 528, 71 C. C. A. 316, 1 L. R. A. 4 Hurlst. & C. 403; *Mullen v. St. (N. S.)* 533 (1905); *Sauer v. Eagle John*, 57 N. Y. 567; *Kearney v. Brewg. Co.*, 3 Cal. App. 127, 84 Pac. Brighton, etc. R. Co., L. R. 6 Q. B. 425 (1906); *Wood v. Wilmington* 761; aff'g s. c., 5 Id. 411; *Byrne v. City Ry. Co.*, 5 Pennw. (Del.) 369, Boadle, 2 Hurlst. & C., 722. 64 Atl. 246 (1905); *Armour v.*

³³ *Scott v. London Docks Co.*, 3 Gorkowska, 202 Ill. 144, 66 N. E. Hurlst. & C., 596; *Seybolt v. N. Y.*, 1037 (1903); *Dean v. Tarrytown, Lake Erie, etc. R. Co.*, 95 N. Y. 562; etc. Ry. Co., 99 N. Y. Supp. 250, *Butler v. Cushing*, 46 Hun, 521; 113 App. Div. 437 (1906); *Ross v. Tuttle v. Chicago, etc. R. Co.*, 48 Double Shoals Cotton Mills, 140 N. Iowa, 236 [where satisfactory explanation was given]; *Chenall v. Palmer* (N. S.) 298 (1905); *Richmond Ry.*,

is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.”³⁴

§ 60. Illustrations of presumptive negligence generally. — Not only is it evidence of negligence to show that the defendant or his chattel was trespassing on the plaintiff's premises, and that the injury occurred in consequence of that trespass, but it is also sufficient to show that something belonging to the defendant, which ought not to have been on the highway at the time, injured the plaintiff while he was on the highway. Thus, the falling of cinders,³⁵ or of a bolt³⁶ from an overhead railroad, or the fall of overhead telegraph wires upon the road below;³⁷ the fall of a barrel from a window,³⁸ or of bricks

etc. Co. v. Hudgins, 100 Va. 409, 41 S. E. 736 (1902); De Yoe v. Seattle Elec. Co., 53 Wash. 588, 104 Pac. 647 (1909); Eaton v. New York, etc. Ry. Co., 195 N. Y. 267, 88 N. E. 378 (1909).

³⁴Per Channell, B., Bridges v. North London R. Co., L. R. 6 Q. B., 377, 391. But this rule only applies where the evidence is such as to give rise to a presumption of negligence by the defendant, and not where it is equally consistent with his innocence (Texas, etc. Ry. Co. v. Kowsikowski, 125 S. W. (Tex.) 3 (1910). Where an injury may have resulted from one of two causes, for which only defendant would be liable, there can be recovery (Graefe v. St. Louis, etc. Co., 224 Mo. 232, 123 S. W. 835 (1909).

³⁵Lowery v. Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608. But not so, where only one cinder, smaller than a pinhead, fell in plaintiff's eye, and there was no evidence that more than this one coal ever fell (Wiedmer v. N. Y. Elev. R. Co., 114 N. Y. 462, 21 N. E. 1041; rev'g 41 Hun, 284).

³⁶Volkmar v. Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870; Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403; Maher v. Manhattan R. Co., 53 Hun, 506, N. Y. Supp. 309.

³⁷Thomas v. Western Union Tel. Co., 100 Mass. 156; Penn. Tel. Co. v. Varnau (Pa.) 15 Atl. 624; Denver Electric Co. v. Simpson, 21 Colo. 371; 41 Pac. 499; Larson v. Central R. Co., 56 Ill. App. 263.

³⁸Byrne v. Boadle, 2 Hurlst. & C.

from a bridge or other building,³⁹ is sufficient evidence of negligence, without proving actual want of care as the cause of such fall. For, on such a state of facts, the presumption is that the defendant has violated the duty which the law imposes upon him, of using due care to keep his property off the highway.⁴⁰ On proof, however, that the defendant has used due care for that purpose, the burden of evidence is upon the plaintiff to show other negligence,⁴¹ such, for example, as that the defendant did not use a proper degree of care to control his property after it had got upon the highway. So the fall of a building,⁴² a scaffold,⁴³ an elevator,⁴⁴ or other hoisting machinery,⁴⁵ the sudden giving way of the door of a railway carriage,⁴⁶ the fall of a gangway plank between a ship and wharf,⁴⁷ or the explosion of a boiler,⁴⁸ is presumptive evidence of negligence.

722; *Scott v. London Docks Co.*, 3 Id. 596 [bag coffee]; *Dehring v. Comstock*, 78 Mich. 153, 43 N. W. 1049 [bales hay].

³⁹ "It is not a matter of common occurrence for bricks to come loose and to fall from the fabric to which they belong" (*Kearney v. London and Brighton R. Co.*, L. R. 5 Q. B. 411, 6 Id. 759). Where one engaged in a building is injured by a falling brick, in the absence of explanation by the contractor doing the brick work, it will be presumed that it occurred from want of reasonable care on his part (*Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. 484).

⁴⁰ *Mullen v. St. John*, 57 N. Y. 567; *McKune v. Santa Clara Valley Mill, etc. Co.*, 110 Cal. 480, 42 Pac. 980.

⁴¹ *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66; *McCaig v. Erie R. Co.*, 8 Hun, 599.

⁴² *Mullen v. St. John*, 57 N. Y. 567; *Vincett v. Cook*, 4 Hun, 318. Otherwise, where an effort is being

made to tear down a building, and it merely falls before it is expected to fall (*Weideman v. Tacoma R. Co.*, 7 Wash. St. 517, 35 Pac. 414).

⁴³ See *Flynn v. Gallagher*, 52 N. Y. Superior, 524.

⁴⁴ *Moran v. Racine Wagon Co.*, 74 Hun, 454, 26 N. Y. Supp. 852; *Lawson v. Merrall*, 69 Hun, 278, 23 N. Y. Supp. 560; *Gerlach v. Edelmeyer*, 47 N. Y. Superior, 292. In *Murphy v. Hays* (68 Hun, 450, 23 N. Y. Supp. 70) held otherwise, as against a servant, where elevator started up suddenly.

⁴⁵ *Lyons v. Rosenthal*, 11 Hun, 46.

⁴⁶ *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161.

⁴⁷ *Eagle Packet Co. v. Defries*, 94 Ill. 598.

⁴⁸ *Illinois Central R. Co. v. Phillips*, 55 Ill. 194; *Bahr v. Lombard*, 53 N. J. Law, 233, 23 Atl. 167 [explosion oil pipe]; *Grimsley v. Hankins*, 46 Fed. 400. Evidence sufficient to repel presumption; see *Reiss v. N. Y. Steam Co.*, 128 N. Y. 103, 28 N. E.

§ 60a. Admissions and declarations. — An admission by either party personally, out of court, that he was in fault, is entitled to great weight, but is not necessarily

24; *Losee v. Buchanan*, 51 N. Y. 476; *McMahon v. Davidson*, 12 Minn. 357; *Robinson v. N. Y. Central R. Co.*, 20 Blatchf. 338; *Rose v. Stevens*, etc. Transp. Co., Id. 411; *Posey v. Scofield*, 10 Fed. 140. Explosion is not even presumptive evidence of negligence in favor of the operator himself (*Toledo, etc. R. Co. v. Moore*, 77 Ill. 217). Compare *Caldwell v. N. J. Steamboat Co.*, 56 Barb. 425; *aff'd* 47 N. Y. 282. So where a safety device in an elevator to prevent its falling failed to work (*National Biscuit Co. v. Wilson* (Ind. App.), 80 N. E. 33 (1907)). Where defendant was erecting a building and one rightfully on the premises was struck by an object falling from above (*Melvin v. Pennsylvania Steel Co.*, 180 Mass. 196, 62 N. E. 379 (1902)). The falling of defendant's wall on plaintiff's house (*Scharff v. Southern Illinois Constr. Co.*, 115 Mo. App. 157, 92 S. W. 126 (1905)). Material falling into the street from a building in course of construction (*Wolf v. Amer. Tract. Co.*, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241 (1900)). The fall of a chimney (*Travers v. Murray*, 84 N. Y. Supp. 558, 87 App. Div. 552 (1903)). The fall of a loaded elevator (*Edwards v. Mfg. Bldg. Co.*, 27 R. I. 248, 61 Atl. 646, 114 Am. St. Rep. 37 (1905)). Fall of window of a railway coach on plaintiff's hand (*Carroll v. Chicago, etc. Ry. Co.*, 99 Wis. 399, 75 N. W. 176 (1898)). In a case of the sudden and unaccountable starting of machinery, it was said: "It is only, as here, when there is no direct evidence of a defect in the machine, and the physical conditions surrounding the transaction do not ordinarily produce injury, that the occurrence speaks for itself" (*Ross v. Double Shoals Cotton Mills* (Sup. Ct. N. C.), 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298 (1905)). It is sufficient to take the case to the jury that the accident is such as commonly would not happen if due care was used, and the doctrine applies where the roof of a car blew off from some unaccountable cause, being in defendant's possession (*McNamara v. Boston, etc. Ry. Co.*, 202 Mass. 491, 89 N. E. 131 (1909)). But it has been held in the following cases that the facts were not sufficient to give rise to the presumption of negligence. The mere fact that a child is incapable of contributory negligence (*Lee v. Jones*, 181 Mo. 201, 79 S. W. 927, 103 Am. St. Rep. 596 (1904)). The sudden breaking of machinery properly constructed (*Robinson v. Chas. Wright & Co.*, 94 Mich. 283, 53 N. W. 938 (1892)); *Piehl v. Albany Ry.*, 51 N. Y. 755, 30 App. Div. 166, *aff'd* in 162 N. Y. 617, 57 N. E. 1122 (1900)). The mere fact of the falling of iron trusses while defendant was placing them in a building (*May v. Berlin Bridge Co.*, 60 N. Y. Supp. 550, 43 App. Div. 569 (1899)). The explosion of a hot water heating apparatus (*Kirby v. President Del. & H. C. Co.*, 62 N. Y. Supp. 1110, 48 App. Div. 636 (1900)). The fall of a pile of lumber stacked in the usual manner (*Nigro v. Wilson*, 99 N. Y. Supp. 344, 50 Misc. 656 (1906)). The mere fact of two young men killed on a railway track gives rise to no presumption that a proper lookout

conclusive against him.⁴⁹ But admissions by a husband against his wife,⁵⁰ by a wife against her husband,⁵¹ or by a servant against his master,⁵² are not competent evidence. Declarations of any person engaged in the transaction, including the plaintiff, are admissible against the defendant, when part of the *res gestae*; ⁵³ but to be so

was not kept, or that the failure to keep a proper lookout was the proximate cause of their death, causal connection being alleged but unproven, negligent act cannot be presumed (Texas & Pac. Ry. Co. v. Shoemaker, 98 Tex. 451, 84 S. W. 1049 (1905)). The falling of material in the street from a building where seven different contractors employed 250 men, furnished no evidence against any particular contractor (Wolf v. Amer. Tract. Co., 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241 (1900)). The mere finding of a torpedo on the track by children without discretion (Obertoni v. Boston, etc. R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422 (1904)).

⁴⁹ Zemp v. Wilmington, etc. R. Co., 9 Rich. Law, 84. Compare Cooper v. Chicago, etc. R. Co., 44 Iowa, 134; Ohio, etc. R. Co. v. Hammersley, 28 Ind. 371, Firkins v. Chicago, etc. R. Co., 61 Minn. 31, 63 N. W. 172; Baltimore, etc. R. Co. v. State, 81 Md. 371, 32 Atl. 201, as to injured person's declarations made at any time, being admissible, as against interest. The fact that the person killed had warned others against committing the act which caused his death, is admissible to prove contributory negligence (Lehigh Valley Coal Co. v. Jones, 86 Pa. St. 432), and so are warnings given to the deceased (Central R. Co. v. Sears, 59 Ga. 436).

⁵⁰ Keller v. Sioux, etc. R. Co., 27 Minn. 178, 6 N. W. 486.

⁵¹ Stillwell v. N. Y. Central R. Co., 34 N. Y. 29. Compare Louisville, etc. R. Co. v. Richardson, 66 Ind. 43; Fitzgerald v. Weston, 52 Wis. 354.

⁵² Luby v. Hudson Riv. R. Co., 17 N. Y. 131; Hamilton v. N. Y. Central, etc. R. Co., 51 Id. 100; Butler v. Manhattan R. Co., 143 Id. 417, 38 N. E. 454. Declarations of defendant's servant, at the time of the accident, that plaintiff was not to blame (Lane v. Bryant, 9 Gray, 245), or made afterwards as to cause of the accident (Alabama, etc. R. Co. v. Hawk, 72 Ala. 112; Aldridge v. Midland Furnace Co., 78 Mo. 559; McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682), are inadmissible. But what was said by defendant's foreman when the accident was reported to him has been held competent as *res gestæ* (Wabash Western R. v. Brow, 13 C. C. A. 222, 65 Fed. 941). Declarations and admissions of a public officer are inadmissible to bind a municipal corporation of which he is the agent, unless they are part of the *res gestæ* (Cortland Co. v. Herkimer Co., 44 N. Y. 22; Clapper v. Waterford, 131 Id. 382).

⁵³ Declarations of the injured person made at the time of the injury or immediately afterwards, are admissible as part of the *res gestæ* (Stein v. Grand Ave. R. Co., 10 Phil. 440; Friedman v. Railroad Co., 7 Id. 202; Lund v. Tyngsborough, 9 Cush. 36; Brownell v. Missouri Pac. R. Co., 47 Mo. 239; Entwistle v. Feighner, 60 Id. 214; Bass v. Chicago, etc.

they must have been substantially simultaneous with the transaction.⁵⁴ Dying declarations are not admissible in

R. Co., 42 Wis. 654). Plaintiff's contemporaneous declarations as to the *nature and extent* of his injury, are admissible (*Werely v. Persons*, 28 N. Y. 344; *Gardner v. Bennett*, 38 N. Y. Super. 197; *Will v. Mendon*, 108 Mich. 251, 66 N. W. 58). But it is error to permit the nurse and physician to testify that plaintiff told them, some time after the accident, that a piece of nail had come out of his knee, and to permit the physician to point out the scar of the hole out of which the plaintiff had told him the nail had come, as such matters are mere hearsay (*Boston, etc. R. Co. v. O'Reilly*, 158 U. S. 334, 15 S. Ct. 830). See *Atlanta, etc. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48. On an issue, however, as to whether plaintiff's injuries were temporary or permanent, physicians may testify as to plaintiff's utterances and exclamations when undergoing physical examination during two years, and the fact that plaintiff is a competent witness does not alter the rule (*Northern Pacific R. Co. v. Urlin*, 158 U. S. 271, 15 S. Ct. 840). To same effect, *East Tennessee, etc. R. Co. v. Smith*, 94 Ga. 580, 20 S. E. 127; *Jackson Co. v. Nichols*, 139 Ind. 611, 38 N. E. 526. It is what transpires at a given time that determines rights and liabilities. The facts that thus transpire are the principle or primary facts of the case. This collection of facts is called the *res gestæ* and all such facts are admissible in evidence. But the term is often used in a wider sense as embracing all relevant facts, though they may be attendant or explanatory, or preliminary or subsequent to the occur-

rence, and have happened at the same or a different place, and even when done by others. Cp. 16 Cyc. pp. 1148-1155. "Its development," said the Supreme Court of New Hampshire, speaking of the doctrine of *res gestæ* "has been promoted, in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not now, how little, but how much, logically competent proof is admissible" (*Murray v. Boston, etc. Ry. Co.*, 72 N. H. 32, 54 Atl. 289, 61 L. R. A. 495 (1903).

⁵⁴Declarations made afterwards (even within half an hour) and constituting merely a narrative of a past transaction, are not part of the *res gestæ*, and not admissible as such (*Waldele v. N. Y. Central R. Co.*, 95 N. Y. 275; *Martin v. New Haven, etc. R. Co.*, 103 Id. 626; *Cleveland, etc. R. Co. v. Mara*, 26 Ohio St. 185; *Illinois Central R. Co. v. Sutton*, 42 Ill. 438; *Galena, etc. R. Co. v. Fay*, 16 Id. 558; *Fitzgerald v. Weston*, 52 Wis. 354; *Schillinger v. Verona*, 88 Id. 317, 60 N. W. 272; *Shaw v. Boston, etc. R. Co.*, 8 Gray, 45; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Mobile, etc. R. Co. v. Ashcroft*, 48 Ala. 16; *Roach v. Western, etc. R. Co.*, 93 Ga. 785, 21 S. E. 67 [declaration made twenty minutes after accident, at a distance from the scene]; *Cleveland, etc. R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174 [ten minutes]. Declarations by the engineer and fireman of a train, made within ten minutes after a collision, and while the injured persons were

being taken from the wreck, are admissible (East St. Louis R. Co. v. Allen, 54 Ill. App. 27); and so are statements made by the general manager of the road when he had come to the wreck, immediately after the accident, as to its cause (Krogg v. Atlanta, etc. R. Co., 77 Ga. 202). See also Springfield Consolidated R. Co. v. Welsch, 155 Ill. 511, 40 N. E. 1034. Evidence that others were killed in an explosion has been held admissible as showing violence of the explosion and tending to show negligence (Stearns Coal Co. v. Evans' Admr., 33 Ky. Law Rep. 755, 111 S. W. 308 (1908). Where the plaintiff charged that he was knocked off the steps of the car by the negligent closing of the vestibule by the defendant's servants, the question being on the admissibility of the plaintiff's own statement made ten minutes after the accident, the Court of Civil Appeals of Texas said: "Appellant insisted that this statement constituted part of the *res gestæ*, and as such was admissible. This doctrine is based on the presumption that declarations made at the time of the act or transaction or the event to which they relate, evoked by it, without premeditation, are part of the act or transaction or event. In order to be admissible as part of the *res gestæ* it is not necessary that the declarations be precisely concurrent in point of time with the principal transaction. It should appear, however, that the declarations were evoked by the transaction, and that they were without premeditation; that they spring out of it, are voluntary and spontaneous, and made at a time so near as to preclude the idea of deliberate design. Where the circumstances of the case render it probable that a statement offered as *res gestæ* is the result of premeditation or deliberate design, to effect a certain purpose, it should not be received. So far as shown in the bill of exception, to which the ruling relates, there is nothing to indicate that appellant's statements were spontaneous declarations evoked by the transaction, nor do the circumstances exclude the idea of premeditation, and we are not prepared to disapprove the court's ruling in question (Malone v. Texas & Pac. Ry. Co., 109 S. W. 430 (1908). But plaintiff's statements made to witness, the first person to reach the scene of the accident, ten or twelve minutes after it occurred and when he was apparently suffering great bodily pain and mental distress, held admissible (Missouri, etc. Ry. Co. v. Williams, 109 S. W. (Tex. App.) 1126 (1908). Where a brakeman claimed to have been thrown from the top of the car by a violent jerk, evidence that on being told of it immediately afterwards the engineer said, "That is the way whenever I get mad, I either hurt or kill somebody," held admissible (Cincinnati, etc. Ry. Co. v. Evans' Admr., *supra*. Statements of motorman as to the cause of the accident, made seven or eight minutes after the collision, held not admissible (Kimie v. San Jose Gatos Ry. Co., 159 Cal. 379, 104 Pac. 986 (1909). Declarations of bystanders are admissible in some cases as a part of the *res gestæ*, as their outcries at the time of a threatened collision, when a passenger jumped from the car. They tend to describe the occurrence and to show reasonableness of apprehension of danger (Pennsylvania Co. v. McCaffery, 173 Ill. 169, 50 N. E. 713 (1898); Lissak v. Croker Est. Co., 119 Cal. 442, 51 Pac. 688 (1898); Richstain v. Washington Mills Co., 157 Mass. 538, 32 N. E. 908 (1893); Foster v. Missouri

civil actions in favor of the declarant.⁵⁵

§ 60b. Other similar accidents. — The fact that premises or appliances have been used for many years by many persons, without injury, or that no evidence was produced that any other person than the plaintiff had been injured, being a strong circumstance in disproof of negligence in the use of such premises or appliances,⁵⁶ evidence is admissible of previous accidents from pre-

Pacific Ry. Co., 139 Mo. 272, 40 S. W. 932, 7 Am. & Eng. Ry. Cas. (N. S.) 700. Subsequent statements, at any time, made to physician of present pain and suffering, are admissible (Birmingham, etc. Ry. Co. v. Hale, 90 Ala. 8, 8 So. 142 (1891); Broyles v. Prisock, 97 Ga. 643, 25 S. E. 389 (1896); Block v. Milwaukee, etc. Ry. Co., 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365 (1895); Greinke v. Chicago City Ry. Co., 234 Ill. 564, 85 N. E. 327 (1908). Must be spontaneous (Pittsburgh, etc. Ry. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022 (1909); Georgia, etc. Ry. Co. v. Gilliland, 133 Ga. 621, 66 S. E. 944 (1909). But not admissible when made for the purpose of qualifying physician as a witness for the plaintiff (Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 577 (1892); Conroe Tr. Co. v. Lambertson, 60 N. J. Law, 452, 38 Atl. 638, 9 Am. & Eng. R. Cas. (N. S.) 355. Declarations made subsequent to the injury can only be received where they have a tendency to show condition at the time of injury (Clack v. Kansas City Elec., etc. Co., 138 Mo. App. 205, 119 S. W. 1014 (1909). See Corcoran v. Albuquerque, 103 Pac. (N. M.) 645 (1909); Gulf, etc. Ry. Co. v. Fowler, 122 S. W. (Tex. App.) 593 (1909); Joyce v. Black, 226 Pa. 408, 75 Atl. 602 (1910). In Alabama the exceptional rule prevails that statements by party injured of present pain and suffering, whenever, and to whomsoever, made, extending to those made months or years after the injury and even to such as are made after suit is brought are admissible. At the time of its origin this Alabama rule had for an excuse the then prevailing common-law rule rendering parties incompetent as witnesses, and it was avowedly rested on the ground of the necessity of the case; there is no excuse for its perpetuation except too blind an adherence to the unsupported precedent established in Phillips v. Kelly, 29 Ala. 628 (1857); Western Steel Co. v. Bean, 50 So. (Sup. Ct. Ala.) 1012 (1909).

⁵⁵ Waldele v. N. Y. Central, etc. R. Co., 95 N. Y. 275, 287; Spatz v. Lyons, 55 Barb. 476; Marshall v. Chicago, etc. R. Co., 48 Ill. 475.

⁵⁶ Lafflin v. Buffalo, etc. R. Co., 106 N. Y. 136, 12 N. E. 599; Dougan v. Champlain Transportation Co., 56 N. Y. 1; Loftus v. Union Ferry Co., 4 Id. 455; Burke v. Witherbee, 98 Id. 562; McCaldin v. Parke, 142 Id. 564, 37 N. E. 622. Where an act of a brakeman in mounting a car was not, *per se*, negligent, it is competent to show that, under the same circumstances, experienced brakemen perform the same act as he did (Prosser v. Montana Central R. Co., 17 Mont. 372, 43 Pac. 81).

cisely the same cause at the same place,⁵⁷ or from a precisely similar cause at another place.⁵⁸ But in the latter

⁵⁷ *Wooley v. Grand Street, etc. R. Co.*, 83 N. Y. 121 [plaintiff's sleigh upset by striking a street-railroad switch]; *Quinlan v. Utica*, 11 Hun, 217, *aff'd* 74 N. Y. 603; *Morse v. Minneapolis, etc. R. Co.*, 30 Minn. 465, 16 N. W. 358 [defective switch]; *Higley v. Gilmer*, 3 Mont. 90; *Todd v. Rowley*, 8 Allen, 51; *Donnelly v. Fitch*, 136 Mass. 558; *Hogan v. Northfield*, 56 Vt. 721. In an action for an injury to plaintiff's trees caused by escaping gas, evidence as to the condition of other trees in that vicinity after the construction of defendant's gas line is competent (*Evans v. Keystone Gas Co.*, 148 N. Y. 112, 42 N. E. 513). To same effect, see *District of Columbia v. Armes*, 107 U. S. 519 [sidewalk]; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812 [machine]; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 11 N. E. 43 [sidewalk]; *Colorado Mortg. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42 [elevator]; *Hanrahan v. Manhattan R. Co.*, 53 Hun, 420, 6 N. Y. Supp. 395 [railroad platform]; *Larkin v. O'Neill*, 48 Hun, 591 [stairway]; *Aurora v. Brown*, 12 Bradw. 122 [sidewalk]; *Calkins v. Hartford*, 33 Conn. 57 [same]; *Kent v. Lincoln*, 32 Vt. 591; *Wooley v. Grand St. R. Co.*, 83 N. Y. 121; *Collins v. Dorchester*, 6 Cush. 396. So held, where horses were frightened by an obstruction (*Crocker v. McGregor*, 76 Me. 282; *Gordon v. Boston, etc. R. Co.*, 58 N. H. 396; *House v. Metcalf*, 27 Conn. 631. Compare *Cleveland, etc. R. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118). The fact that no accident ever before happened in the mine where plaintiff was injured is inadmissible to show the mine was a safe place to work in (*Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501). Nor is the fact that a large number of persons had passed over a footway without accident, competent evidence that the footway was not a nuisance (*Temperance Hall Assn. v. Giles*, 33 N. J. Law 260). s. p., *Bauer v. Indianapolis*, 99 Ind. 56.

⁵⁸ *Brady v. Manhattan R. Co.*, 15 Daly, 272; limited to this, 127 N. Y. 46. The occurrence of other accidents at the same place and from the same cause is admissible (*McGinn v. Platt*, 177 Mass. 125, 58 N. E. 175 (1900)). When the action was for setting fire to property, evidence that sparks and flames were seen at other times issuing from the defendant's factory chimney, held admissible (*Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322 (1872)). That sparks so escaping had previously set fire to other property (*Carpenter v. Laswell*, 23 Ky. L. Rep. 686, 63 S. W. 609 (1901)). That other butter of same kind and under same circumstances was injured in defendant's cold storage plant, admissible (*Rudell v. Grand Rapids Cold Storage Co.*, 136 Mich. 528, 99 N. W. 756 (1904)). That other stones in the cornice were rotten when the one that hit plaintiff could not be identified, held admissible (*Rose v. City of St. Louis*, 152 Mo. 602, 54 S. W. 440 (1899)). Evidence of other accidents from the same defect in defendant's elevator (*Auld v. Manhattan Life Ins. Co.*, 165 N. Y. 610, 68 N. E. 1085, *aff'g* 34 App. Div. 491, 54 N. Y. Supp. 222 (1900)).

instance, the evidence must show not only that both places were under defendant's control, but also that all conditions were, in every material respect, precisely the same.⁵⁹ It has been held in one case, that this evidence is only competent for the purpose of proving constructive notice, and therefore that evidence of *subsequent* accidents is inadmissible.⁶⁰ But this decision stands alone; and it is quite inconsistent with the reasoning in other cases of superior authority, which treat this evidence as material, if not even necessary, to prove a thing dangerous, which is usually not so.⁶¹

§ 60c. Subsequent repairs. — The defendant's voluntary conduct, subsequent to an accident, in respect to a structure or appliance in connection with which an accident happened, such as making alterations or repairs, or taking other precautionary measures to prevent the occurrence of similar accidents, may be proved, as tending to show the defendant's control of the property,⁶² and his responsibility for its repair;⁶³ if that is disputed. But such evidence is inadmissible by itself to show that the

⁵⁹ *Brady v. Manhattan R. Co.*, 127 N. Y. 46; *rev'g s. c.*, 15 Daly, 272, 6 N. Y. Supp. 533. On the question whether a certain act or omission which caused the injury was negligence, it may be shown that, *under substantially the same circumstances*, the same act or omission had produced similar injuries on former occasions (*Morse v. Minneapolis, etc. R. Co.*, 30 Minn. 465, 16 N. W. 358; *Hunt v. Lowell Gas Co.*, 8 Allen, 169; *Emerson v. Lowell Gas Co.*, 3 Id. 410; *Hodgkins v. Chappell*, 128 Mass. 197; *Griffin v. Auburn*, 58 N. H. 121; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424). Vicious habits of a horse may be shown by proving cases of like misbehavior both before and after the act in question (*Magie v. Cutts*, 123 Mass. 535; *Chamberlain v. Enfield*, 43 N. H. 356; *cf. Whitney v. Leominster*, 136 Mass. 25).

⁶⁰ *Johnson v. Manhattan R. Co.*, 52 Hun, 111, 4 N. Y. Supp. 848.

⁶¹ See particularly cases cited in *Quinlan v. Utica*, 11 Hun, 217; *aff'd* 74 N. Y. 603; also *Sullivan v. Syracuse*, 77 Hun, 440, 29 N. Y. Supp. 105.

⁶² *Morrell v. Peck*, 88 N. Y. 398; *Bateman v. N. Y. Central, etc. R. Co.*, 47 Hun, 429; *Lafayette v. Weaver*, 92 Ind. 477.

⁶³ *Readman v. Conway*, 126 Mass. 374; *Woods v. Missouri, etc. R. Co.*, 51 Mo. App. 500; *Ferrari v. Beaver Hill Coal Co.*, (Ore.) 102 Pac. 1016 (1909).

former condition was unsafe, and that defendant was negligent in so maintaining it;⁶⁴ for such subsequent improvements might be taken from excessive precaution; and the effect of admitting such testimony would obviously be to discourage improvement and punish careful and considerate persons. Evidence of such repairs having been made under the order, or even the request, of a

⁶⁴ *Hammargren v. St. Paul*, 69 N. Milwaukee R. Co., 69 Wis. 401, 34 W. 470. The best statement of this rule, and the reasons for it, is in *R. Co.*, 76 Iowa, 67, 40 N. W. 92; *Morse v. Minneapolis, etc. R. Co.*, 30 Minn. 465, 16 N. W. 358. The rule has been repeatedly enforced in New York, although never with a statement of reasons approaching to the clearness of Judge Mitchell's opinion in the Minnesota case. See *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1 [boarding up unprotected gang-space in steamboat]; *Baird v. Daly*, 68 N. Y. 547 [reducing rate of speed after accident]; *Dale v. Delaware, etc. R. Co.*, 73 Id. 468; *Corcoran v. Peekskill*, 108 Id. 151. The same rule is now the law of New Hampshire (*Aldrich v. Concord, etc. R. Co.*, 29 Atl. (N. H.) 408; overruling *Martin v. Towle*, 59 N. H. 31). It has also been adopted in most other States. See *Menard v. Boston, etc. R. Co.*, 150 Mass. 386, 23 N. E. 214 [railroad gates]; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; *Couch v. Watson Coal Co.*, 46 Iowa, 17; *Hudson v. Chicago, etc. R. Co.*, 59 Id. 581; *Cramer v. Burlington*, 45 Id. 627; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. 423 [defendant supplied elevator with an air cushion, to prevent injury from similar falls]; *Terre Haute, etc. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965; *Anderson v. Chicago, etc. R. Co.*, 87 Wis. 195, 58 N. W. 79 [reducing rate of speed]; *Heucke v. N. W. 243*; *Kuhns v. Wisconsin, etc. R. Co.*, 76 Iowa, 67, 40 N. W. 92; *Day v. Akeley Lumber Co.*, 54 Minn. 522, 56 N. W. 243 [repairing saw-dust burner, after fire caused by emission of sparks]; *Gulf, etc. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336 [subsequently enlarging culvert]; *Holt v. Spokane, etc. R. Co.*, — Idaho, —, 35 Pac. 39 [filling up a well, after child had fallen in it]; *Denver, etc. R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345; *St. Louis, etc. R. Co. v. Weaver*, 35 Kans. 412, 11 Pac. 408 [increasing capacity of waterway]; but *compare Atchison, etc. R. Co. v. McKee*, 37 Kans. 592, 15 Pac. 484 [subsequent repair of machine]. It is also the law in England (*Hart v. Lancashire, etc. R. Co.*, 21 Law Times, N. S., 261). The rule is otherwise in Pennsylvania (*Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *McKee v. Bidwell*, 74 Id. 218 [defendant, after accident, placed a light at the opening of cellar]). It is not an infringement of this rule to admit proof that, after the breaking of an appliance, a substitute therefor which was on hand at the time of the accident and could have then been used, was in fact thereafter used for successfully working the appliance (*Miller v. Ocean Steamship Co.*, 118 N. Y. 190, 23 N. E. 462; *Merrigan v. Boston, etc. R. Co.*, 154 Mass. 189,

public authority, is admissible, as a practical concession that they ought to have been made before.⁶⁵

28 N. E. 149 [railroad gates]. See 358. But the mere fact of such an ordinance having been passed and
Daniels v. Staten Is., etc. R. Co., 125 N. Y. 407, 26 N. E. 466). notice thereof given to the defendant

⁶⁵ This is extremely well put by is incompetent (West Jersey R. Co. Mitchell, J., in Morse v. Minneapolis, v. Paulding, 58 N. J. Law, 178, 33
etc. R. Co., 30 Minn. 465, 16 N. W. Atl. 381).

CHAPTER VI.

CONTRIBUTORY NEGLIGENCE.

- | | |
|--|---|
| <p>§ 61. General rule.</p> <p>62. Contributory negligence under statutory claims.</p> <p>63. Reason of rule.</p> <p>64. When no defence.</p> <p>65. Fault must be that of injured party or his agent.</p> <p>65a. Doctrine of imputed negligence.</p> <p>66. Identification.</p> <p>66a. Stranger's contributory fault no excuse for plaintiffs.</p> <p>67. Husband and wife.</p> <p>68. Knowledge of principal, when imputed to agent.</p> <p>69. Knowledge of agent, when imputed to principal.</p> <p>70. Contributory negligence of children.</p> <p>71. Negligence of parents in parent's action.</p> <p>72. Parents must be actually in fault.</p> <p>72a. Contributory negligence in case of children.</p> <p>73. Degree of care required from children.</p> <p>73a. Age of discretion.</p> <p>74. Imputation of parent's negligence; New York rule.</p> <p>75. New York rule criticised.</p> <p>76. Imputed negligence; Illinois rule.</p> <p>77. Identification of child and custodian.</p> <p>78. True rule; no imputation of parental negligence.</p> <p>79. No imputed negligence, if child careful.</p> <p>80. Imputed negligence; limitations of rule.</p> | <p>§ 81. Imputed negligence; parent must be acting as such.</p> <p>82. Imputed negligence; parent must be negligent in fact.</p> <p>83. Imputed negligence; age of child.</p> <p>84. Imputed negligence; lunatics, etc.</p> <p>85. Acts in emergencies, plaintiff not prejudiced unless actually in fault.</p> <p>85a. Danger to life—where the life of the plaintiff or his bodily injury is threatened.</p> <p>85b. Danger incurred to save the life of another.</p> <p>85c. Neither the discharge of a high moral duty, nor the exercise of a legal right can be made the basis of contributory negligence.</p> <p>85d. When property is imperiled by defendant's negligence.</p> <p>86. Plaintiff not prejudiced by want of more than ordinary care.</p> <p>87. Ordinary care defined.</p> <p>88. Care required of infirm, etc.</p> <p>89. Travelers suffering from mental or physical infirmity.</p> <p>90. Duty of looking and listening.</p> <p>91. Effect of defendant's advice or invitation.</p> <p>92. Plaintiff not bound to anticipate negligence.</p> <p>93. Plaintiff's fault must contribute to injury.</p> |
|--|---|

- | | |
|---|--|
| <p>§ 94. Plaintiff's fault must proximately contribute to injury.</p> <p>94a. Degree of contribution.</p> <p>95. Negligence increasing damages only, no bar.</p> <p>96. Plaintiff's fault need not be cause of injury.</p> <p>97. Effect of technical trespass.</p> <p>98. Technical trespass no bar.</p> <p>99. Where the injury could have been avoided by the defendant notwithstanding plaintiff's prior negligence.</p> <p>100. Illustrations of rule.</p> <p>101. Plaintiff last in fault.</p> <p>102. Comparative negligence.</p> <p>103. Rule in Georgia, Florida, Tennessee, Kansas and Wisconsin.</p> | <p>§ 104. Plaintiff's violation of statute.</p> <p>105. Plaintiff's fault in representative capacity.</p> <p>106. Burden of proof; conflict of decisions.</p> <p>107. Burden of proof on plaintiff.</p> <p>108. Burden of proof on defendant.</p> <p>109. Burden ought to be on defendant.</p> <p>110. Presumption against negligence.</p> <p>111. What proof of care sufficient.</p> <p>112. Inference from circumstances.</p> <p>113. Pleading; absence of fault.</p> <p>114. Questions of fact and law.</p> <p>114a. Where the defendant's negligence is willful or wanton.</p> |
|---|--|

§ 61. **General rule.** — As the case of *Butterfield v. Forrester*¹ is the earliest reported English case distinctly announcing the general doctrine of Contributory Negligence, so, too, it remains the most reliable of the early cases to which reference may still be made for a clear statement of the rule. The defendant had negligently placed a pole so that it projected into the street; the plaintiff, not observing the obstruction, negligently rode against it. There was space for his free passage along the street. There was a verdict for the defendant. The whole text of Lord Elenborough's opinion on an application to set it aside was as follows: "A party is not to cast himself upon an obstruction which has been left by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's

¹ 11 East, 60 (1809).

using ordinary care for himself. Two things must concur to support the action, an obstruction in the road, by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.”

One who, through the mere negligence of another,² suffers an injury which would not have happened,³ but for his own or his agent's⁴ wrongful act⁵ or omission

² This rule applies only to cases of mere negligence (*Sanford v. Ry. Co. v. Stevens*, 3 Kans. App. 176, 43 Pac. 438 (1896); *Baltimore Con. Eighth Ave. R. Co.*, 23 N. Y. 343, 762 (1899); *Pim v. St. Louis Tr. Co.*, 108 Mo. App. 713, 84 S. W. 155 *post*).

³ *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Railroad Co. v. Jones*, 95 U. S. 439; *Woods v. Jones*, 34 La. Ann. 1086; *Murphy v. Deane*, 101 Mass. 455; *Hickey v. Boston, etc. R. Co.*, 14 Allen, 429; *Thomas v. Kenyon*, 1 Daly, 132; *Tuff v. Warman*, 5 C. B. N. S. 573; *aff'g s. c.*, 2 Id. 740; *Central R. Co. v. Moore*, 24 N. J. Law, 824; *Runyon v. Central R. Co.*, 25 Id. 556; *Moore v. Central R. Co.*, 24 Id. 268; *Telfer v. Northern, etc. R. Co.*, 30 Id. 188; *Pennsylvania, etc. R. Co. v. Langdon*, 92 Pa. St. 21; *Northern Central R. Co. v. State*, 31 Md. 357; *Paducah, etc. R. Co. v. Hoehl*, 12 Bush, 41; *Covington v. Bryant*, 7 Id. 248; *Kentucky, etc. R. Co. v. Thomas*, 79 Ky. 160; *Houston, etc. R. Co. v. Clemmons*, 55 Tex. 88; *Colorado, etc. R. Co. v. Holmes*, 5 Colo. 197. It is not necessary that the plaintiff's negligence should have amounted to more than a careless exposure of his person or property to the risk of injury. See *Hughes v. Muscatine*, 44 Iowa, 672; *Trouselair v. Pacific Coast S. S. Co.*, 80 Cal. 521, 22 Pac. 258. This will appear from the great majority of cases hereafter cited (*St. Louis, etc.*

Ry. Co. v. Stevens, 3 Kans. App. 176, 43 Pac. 438 (1896); *Baltimore Con. Ry. v. Rifeowitz*, 89 Md. 338, 43 Atl. 762 (1899); *Pim v. St. Louis Tr. Co.*, 108 Mo. App. 713, 84 S. W. 155 (1904); *McDonald v. Montgomery St. Ry. Co.*, 110 Ala. 161, 20 So. 317 (1896); *S. Covington, etc. Ry. Co. v. Nelson*, 89 S. W. 200, 28 Ky. L. R. 28 (1905); *Louisville, etc. N. Ry. Co. v. Clark's Admr.*, 105 Ky. 584, 49 S. W. 323 (1898); *Atoka Coal, etc. Co. v. Miller*, (Ind. T.) 104 S. W. 555 (1908); *Chesapeake & O. Ry. Co. v. Conley*, (Ky.) 124 S. W. 861 (1910). See *Thompson on Negligence*, § 178.

⁴ *Terry v. N. Y. Central R. Co.*, 22 Barb. 574; *Roulston v. Clark*, 3 E. D. Smith, 366. Therefore, where the plaintiff rode upon defendants' locomotive, with notice that it was contrary to defendants' orders to the engineer, he cannot recover for injuries received through the defendants' negligence, while on the locomotive (*Robertson v. N. Y., etc. R. Co.*, 22 Barb. 91). This rule was applied in *Waterbury v. New York Cent., etc. R. Co.*, 21 Blatchf. 314, and *Austin v. Great Western, etc. R. Co.* (L. R. 2 Q. B. 442). Compare *Carter v. Louisville, etc. R. Co.*, 98 Ind. 552. So a conductor of a train, having control of its speed, who suffers it to run at a rate of speed above that

⁵ See §§ 65-86, *post*.

amounting to a want of ordinary care,^{5a} proximately con-

allowed by the rules of the company, or is careless in "the make-up" of the train, and runs backward, is guilty of such contributory negligence as will prevent his recovery for a resulting injury (St. Louis, etc. R. Co. v. Morgart, 45 Ark. 318; Sutherland v. Troy, etc. R. Co., 125 N. Y. 737, 26 N. E. 609 (killing of locomotive engineer by collision would not have occurred but for his running train contrary to company's rules). So a passenger who jumps from a moving train, against the remonstrance of the trainmen (Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147; Jewell v. Chicago, etc. R. Co., 54 Wis. 610; Burrows v. Erie R. Co., 63 N. Y. 556); or rides in a baggage car, contrary to the rules of the company (Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160; Houston, etc. R. Co. v. Clemmons, 55 Tex. 88) even with the consent of the conductor (Pennsylvania R. Co. v. Langdon, *supra*), or upon a freight train (Houston, etc. R. Co. v. Moore, 49 Tex. 31; Eaton v. Delaware, etc. R. Co., 57 N. Y. 382; Sherman v. Hannibal, etc. R. Co., 72 Mo. 62), or on hand-cars, in violation of the company's rules (Hoar v. Maine Central R. Co., 70 Me. 65; McQueen v. Central Branch R. Co., 30 Kans. 689; Pool v. Chicago, etc. R. Co., 53 Wis. 657), is willfully negligent. As to riding on the roof of a freight car, see Indianapolis, etc. R. Co. v. Horst (93 U. S. 291). If a passenger is received on a freight train, though against the rule of the company, and pays his fare, the relation of carrier and passenger is established, and he may recover (Edgerton v. N. Y. &

Harlem R. Co., 39 N. Y. 227; Creed v. Pennsylvania, etc. R. Co., 86 Pa. St. 139; Ryan v. Cumberland Iron Co., 23 Id. 384; O'Donnell v. Allegheny Valley R. Co., 59 Id. 239; Dunn v. Grand Trunk R. Co., 58 Maine, 187; Murch v. Concord R. Co., 29 N. H. 9; Gillshannon v. Stoney Brook R. Co., 10 Cush. 228; Lawrenceburg, etc. R. Co. v. Montgomery, 7 Ind. 476; Arnold v. Illinois, etc. R. Co., 83 Ill. 273; Chicago, etc. R. Co. v. Hazzard, 26 Id. 375; Lucas v. Milwaukee, etc. R. Co., 33 Wis. 41; Sheerman v. Toronto, etc. R. Co., 34 Upper Canada, Q. B. 451; Graham v. Toronto, etc. R. Co., 23 Id. C. P. 541). For further illustrations of passengers' contributory negligence, see § 519, *post*.

^{5a} Wilds v. Hudson River R. Co., 24 N. Y. 430 [looking and listening, at railway crossing]; Johnson v. Hudson River R. Co., 20 Id. 65; Button v. Hudson River R. Co., 18 Id. 248; Gleason v. Boehm, 58 N. J. Law, 475; 34 Atl. 886 [descending strange stairway without light]; Runyon v. Central R. Co., 25 N. J. Law, 556; Graham v. Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151; Ohio, etc. R. Co. v. Gullett, 15 Ind. 487; Evansville, etc. R. Co. v. Lowdermilk, Id. 120; McGrath v. Bloomer, 73 Wis. 29, 40 N. W. 585; Cummins v. Syracuse, 100 N. Y. 637, rev'g 29 Hun, 144 [walking needlessly in darkness, in dangerous place]; Countryman v. East Tennessee, etc. R. Co., 89 Ga. 835, 16 S. E. 84 [railway servant did not carry lamp, in crossing yard at night]; Ft. Worth, etc. R. Co. v. Mackney, 83 Tex. 410, 18 S. W. 949 [fireman on one of two colliding trains failed to keep a lookout];

tributing thereto,⁶ cannot recover at common law ' any

O'Donnell v. Patton, 117 Mo. 13, 22 S. W. 903 [plaintiff undermined a pile of shavings which he was hauling away]. See cases cited under § 87 *et seq.*, *post*. Ordinary care (Flannagan v. St. Paul City Ry. Co., 68 Minn. 300, 71 N. W. 379 (1897); Gulf, etc. Ry. Co. v. Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538 (1895); Chicago, etc. Ry. Co. v. Bailey, 66 Kans. 115, 71 Pac. 246 (1903); Northern Pac. Ry. Co. v. Jones, 144 Fed. 47, 75 C. C. A. 205 (1906); McDonnell v. Henry Elias Brewing Co., 44 N. Y. Supp. 652, 16 App. Div. 223 (1897); City of Spring Valley v. Gavin, 182 Ill. 232, 54 N. E. 1035 (1892); San Antonio, etc. Ry. Co. v. Lester, 99 Tex. 215, 89 S. W. 752 (1905); Newport News, etc. Ry. Co. v. Bradford, 99 Va. 117, 37 S. E. 807 (1901); Normile v. Wheeling Tr. Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901 (1905); Washington Mills v. Cox, 157 Fed. 634 (1907); Morrison v. Lee, 16 N. D. 377, 113 N. W. 1025 (1907); Webster v. Atlantic, etc. Ry. Co., 81 S. C. 46, 61 S. E. 1080 (1908); Louisiana, etc. Lbr. Co. v. Brown, 109 S. W. (Tex. App.) 950 (1908); Buchman v. Jeffery, 135 Wis. 448, 115 N. W. 372 (1908); Stearns v. Boston, etc. Ry. Co., 75 N. H. 40, 71 Atl. 21 (1908); Dickson v. Geo. B. Swift Co., 238 Ill. 62, 87 N. E. 59 (1909); Frost v. McCarty, 200 Mass. 415, 86 N. E. 918 (1909); Shamp v. Lambert, 121 S. W. (Mo. App.) 1014 (1910); Krieger v. Aurora, etc. Co., 242 Ill. 544, 90 N. E. 266 (1909).

⁶To make it a defence, the plaintiff's fault must be a *proximate* cause of his injury (Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 S. Ct. 679; Plant Inv. Co. v. Cook, 20 C. C. A. 625, 74 Fed. 503). "Contribute" is the word used in most of the decisions. See Wilds v. Hudson River R. Co., 24 N. Y. 430; Johnson v. Hudson River R. Co., 20 Id. 65, 73; Button v. Hudson River R. Co., 18 Id. 248; Munger v. Tonawanda R. Co., 4 Id. 349; New Haven Steamboat Co. v. Vanderbilt, 16 Conn. 420; Knowles v. Crampton, 55 Id. 336, 11 Atl. 593; Winship v. Enfield, 42 N. H. 197; Norris v. Litchfield, 35 Id. 271; Briggs v. Guilford, 8 Vt. 264; Drake v. Mount, 33 N. J. Law, 441; Drake v. Philadelphia, etc. R. Co., 51 Pa. St. 240; Connor v. Electric Tr. Co., 173 Id. 602, 34 Atl. 238; Cleveland, etc. R. Co. v. Terry, 8 Ohio St. 570; Ohio, etc. R. Co. v.

⁷In a court of common law, the same rule is applied to cases of maritime collisions as to any other (Arctic Ins. Co. v. Austin, 69 N. Y. 470; Dowell v. General Steam Nav. Co., 5 El. & Bl. 195; Gen. Steam Nav. Co. v. Mann, 14 C. B. 127; Wright v. Brown, 4 Ired. N. C. Law, 95; Union S. S. Co. v. New York, etc. S. S. Co., 24 How. U. S. 307; The Farmer v. McCraw, 26 Ala. 189; Broadwell v. Swigert, 7 B. Mon. 39).

The common-law rule has been altered by statute in some States, as in Kentucky, Tennessee and Georgia, where the admiralty rule is adopted in some cases. See Miller v. Smythe, 95 Ga. 288, 22 S. E. 532; Western, etc. R. Co. v. Roberson, 9 C. C. A. 646, 61 Fed. 592; Knoxville, etc. R. Co. v. Acuff, 92 Tenn. 36, 20 S. W. 348; Byrne v. Kansas City, etc. R. Co., 9 C. C. A. 666, 61 Fed. 605.

Gullett, 15 Ind. 487; Toledo, etc. R. Co. v. Goddard, 25 Id. 185; Ohio, etc. R. Co. v. Hecht, 115 Id. 443, 17 N. E. 297; Dougherty v. Missouri R. Co., 97 Mo. 647, 11 S. W. 251; Callahan v. Warne, 40 Mo. 131; Michigan, etc. R. Co. v. Leahey, 10 Mich. 193; Griggs v. Fleckenstein, 14 Minn. 1; Chicago, etc. R. Co. v. Chambers, 15 C. C. A. 327, 68 Fed. 148; Witherley v. Regent's Canal Co., 12 C. B. N. S. 2; Dowell v. Gen. Steam Nav. Co., 5 El. & Bl. 195; Ellis v. Southwestern R. Co., 2 Hurlst. & N. 424. Sometimes the language used is, that the plaintiff cannot recover if his own negligence *concurred* (Hance v. Cayuga, etc. R. Co., 26 N. Y. 428; Button v. Hudson River R. Co., 18 Id. 248; Cook v. Champlain, etc. R. Co., 1 Den. 91; Heil v. Glanding, 42 Pa. St. 493; Pennsylvania R. Co. v. Aspell, 23 Id. 147; Woods v. Jones, 34 La. Ann. 1086), or *co-operated* in producing the injury (Terry v. N. Y. Central R. Co., 22 Barb. 574; Timmons v. Central Ohio R. Co., 6 Ohio St. 105; Kerwhacker v. Cleveland, etc. R. Co., 3 Id. 172). "It is not the contributing act, but contributory negligence, that defeats recovery" (Guichard v. New, 84 Hun. 54, 31 N. Y. Supp. 1080). See Schmidt v. Cook, 30 Abb. N. C. 285. In other cases, it is said simply that the plaintiff must be without fault (Spencer v. Utica, etc. R. Co., 5 Barb. 337; Brown v. Maxwell, 6 Hill, 592), or that, as between the parties, the injury must be caused *solely* by the defendant's fault (Grippen v. N. Y. Central R. Co., 40 N. Y. 34; Bigelow v. Reed, 51 Me. 325), or that he cannot recover if the injury is the result of the want of ordinary care on the part of both parties (Reeves v. Delaware, etc. R. Co., 30 Pa. St. 454; Williams v. Michigan Central R. Co., 2 Mich. 259; Duggins v. Watson, 15 Ark. 118), or that the plaintiff cannot recover if by the use of ordinary care he might have avoided the injury (Beers v. Housatonic R. Co., 19 Conn. 566; Beatty v. Gilmore, 16 Pa. St. 463; Runyon v. Central R. Co., 25 N. J. Law, 556; Hassa v. Junger, 15 Wis. 662; Central R. Co. v. Lanier, 83 Ga. 587, 10 S. W. 279). In Scotland the same principle has been expressed in various forms (M'Naughton v. Caledonian R. Co., 21 Dunlop, 160; Davidson v. Monkland R. Co., 17 Dunlop, 1038; O'Neile v. Neilson, 20 Dunlop, 427). These variations of language are of no practical importance, as it will be found that the meaning of the court was substantially the same in each case, and the decisions all stand on one principle, which is, however, best expressed in the word "contributing," though it has been criticised as "much too loose," and as "a very unsafe word" (Crompton, J., Tuff v. Warman, 5 C. B. N. S. 573, 584). Undoubtedly it is a word which should not be used in charging a jury, without explanation. As qualified in the text, we believe it to be entirely proper and intelligible. Proximately contributing (Zumault v. Kansas City, etc. Ry. Co., 175 Mo. 288, 74 S. W. 1015 (1903); Western Union Tel. Co. v. Baker, 140 Fed. 315, 72 C. C. A. 87 (1905); Memphis, etc. Ry. Co. v. Martin, 131 Ala. 269, 30 So. 827 (1901); Brewster v. Elizabeth City, 137 N. C. 392, 49 S. E. 885 (1905); Boyce v. Wilbur Lbr. Co., 119 Wis. 642, 97 N. W. 563 (1903); Maxwell v. Wilmington City Ry. Co., 1 Marv. 199, 40 Atl. 945 (1899); Southern Ry. Co. v. Davis,

compensation⁸ for such injury, unless its more proximate cause is the omission of the other party, after having notice of the danger⁹ to use due care to prevent in-

34 Ind. App. 377, 72 N. E. 1053 ton Knitting Mills, 154 Ala. 565, 45 (1905); Chicago, etc. Ry. Co. v. So. 702 (1908); Abney v. Indiana, etc. Bailey, 66 Kans. 115, 71 Pac. 246 Tr. Co., (Ind. App.) 85, N. E. 387 (1903); Factors, etc. Ins. Co. v. (1908); Feille v. San Antonio Tr. Werlein, 42 La. Ann. 1046, 8 So. Co., 107 S. W. (Tex. App.) 367 435, 11 L. R. A. 361 (1891); Cos- (1908); Pilmer v. Boise Tr. Co., 14 grove v. Kennebec Light, etc. Co., Idaho, 327, 94 Pac. 432, 15 L. R. A. 98 Me. 473, 57 Atl. 841 (1904); Lore (N. S.) 254 (1908); Fitzgerald v. v. Amer. Mfg. Co., 59 Neb. 233, 80 International Flax Twine Co., 104 N. W. 809 (1899); Schweinfurth v. Minn. 138, 116 N. W. 475 (1908); Cleveland, etc. Ry. Co., 60 Ohio St. Chicago, etc. Ry. Co. v. Baldwin, 164 217, 54 N. E. 89 (1906); Lebeau v. Fed. 836 (1908); Brown v. Rome Dyerville Mfg. Co., 26 R. I. 34, 57 Machinery, etc. Co., 5 Ga. App. 42, Atl. 1092 (1904); Anderson v. 62 S. E. 720 (1908); Chicago, etc. Southern Ry. Co., 70 S. C. 490, 50 Ry. Co. v. Donnelly, 235 Ill. 35, 85 S. E. 202 (1905); Martin v. Texas, N. E. 233 (1907); Bourrett v. Chi- etc. Ry. Co., 87 Tex. 117, 26 S. W. cago, etc. Ry. Co., 121 N. W. (Ia.) 1052 (1894); Hone v. Mammoth 380 (1909); Stone v. Forest City Min. Co., 27 Utah, 168, 75 Pac. 381 Ex. Co., 105 Me. 237, 74 Atl. 23 (1904); Mauch v. Hartford, 112 Wis. (1909); Norton v. Columbia Elec. 40, 87 N. W. 816 (1901); Merchants St. Ry. Co., 83 S. C. 26, 64 S. E. Staple of England v. Bank of Eng- 962 (1909); Lehman v. Chicago, etc. land, 21 Q. B. D. 106, 52 J. P. 580, Ry. Co., 140 Wis. 497, 122 N. W. 57 L. J. Q. B. 418; Reaves v. Annis- 1059 (1909).

⁸In the absence of special statutes (such as those of Kentucky, Tennessee and Georgia), it is a complete bar to any claim, as all the cases show, unless it only served to increase the damage, and not to produce the injury (*Stebbins v. Central Vt. R. Co.*, 54 Vt. 464; *Hunt v. Lowell Gas Co.*, 1 Allen, 343; *Sherman v. Fall River Iron Co.*, 2 Id. 524; *Hibbard v. Thompson*, 109 Mass. 286; *Chase v. N. Y. Central R. Co.*, 284 Barb. 273; *Gould v. McKenna*, 86 Pa. St. 297; *Wright v. Illinois, etc. Tel. Co.*, 20 Iowa, 195; *Matthews v. Warner*, 29 Gratt. 570; *Secord v. St. Paul, etc. R. Co.*, 5 McCrary, 515; *Fay v. Parker*, 53 N. H. 342; *Lawrence v. Housatonic R. Co.*, 29 Conn. 390; *Borschart v. Tuffte*, 59 Id. 1,

21 Atl. 929, and cases cited under § 62, *post*). A party was not bound to take legal measures to restrain the continuance of reckless blasting on adjoining property before he sustained as much damage as he did (*Berg v. Parsons*, 84 Hun, 60, 31 N. Y. Supp. 1091). The English rule is, that the defendant is liable, if at all, for the whole damage (*Greenland v. Chaplin*, 5 Exch. 243), except where the effect of the plaintiff's negligence is plainly separable from that of the defendant (*Nitro-Phosphate, etc. Co. v. London, etc. Docks*, L. R. 9 Ch. Div. 503).

⁹See § 99, *post*; *Barker v. Savage*, 45 N. Y. 191; *Brown v. Lynn*, 31 Pa. St. 510; *Northern, etc. R. Co. v. Price*, 29 Md. 420; *Lock v. First Div.*,

jury.¹⁰ This rule applies to all cases of *mere* negligence, no matter how gross it may be.¹¹ Special occasion exists

etc. R. Co., 15 Minn. 350; *Nelson v. Atlantic*, etc. R. Co., 68 Mo. 593; *Scoville v. Hannibal*, etc. R. Co., 81 Id. 434; *Zimmerman v. Hannibal*, etc. R. Co., 71 Id. 476; *Price v. St. Louis*, etc. R. Co., 72 Id. 414; *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539, 10 S. E. 233; *Factor*, etc. Ins. Co. v. *Werlein*, 42 La. Ann. 1046, 8 So. 435.

¹⁰ *Davies v. Mann*, 10 Mees. & W. 546. In that case, the plaintiff having fettered the forelegs of his donkey, turned him out on the highway to graze. The defendant, driving recklessly, ran over the donkey. The plaintiff having obtained a verdict, a rule for a new trial was refused. See § 99, *post*, for a larger discussion of this doctrine. The following by the Supreme Court of the United States is an accurate and comprehensive statement of the law in universally accepted formula: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained, if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years, that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence" (*Grand Trunk Ry. Co. v. Ives*, 144 U. S. 429). And the same court in *Railroad Co. v. Jones*, 95 U. S. 439, said: "One who by his negligence has

brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such case is:

(1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not." For other definitions see *Beach on Contributory Negligence*, § 7; *Wastl v. Montana*, etc. Ry. Co., 24 Mont. 159, 61 Pac. 9 (1900); *St. Louis Ry. Co. v. Cassidy*, 92 Tex. 525, 50 S. W. 125 (1899); *Plant Inv. Co. v. Cook*, 74 Fed. 503, 20 C. C. A. (1896); *Woodell v. West Va. Imp. Co.*, 38 West Va. 23, 17 S. E. 386 (1893); *Du Bois v. Decker*, 4 N. Y. Supp. 768; *Hubbard v. N. Y.*, etc. Ry. Co., 72 Conn. 24, 43 Atl. 550 (1899); *Houston*, etc. Ry. Co. v. *Patterson*, 20 Tex. App. 255, 48 S. W. 747 (1899); *Jones v. Carey*, 9 *Houst. (Del.)* 214, 31 Atl. 976 (1895); *Briant v. Detroit*, etc. Ry. Co., 104 Mich. 307, 62 N. W. 365 (1895); *McLamb v. Wilmington*, etc. Ry. Co., 122 N. C. 862, 29 S. E. 894 (1898); *Duncan v. Greenville County*, 73 S. C. 254, 53 S. E. 367 (1906).

¹¹ See § 64, *post*.

for carefully noting the meaning of these terms, proximate and remote in this relation, owing to the danger of its being overlooked unless emphasized. It is not for every act or omission of the plaintiff that is contributory to the injury or damage inflicted that he is to be affected with the disability which will prevent recovery against another, but only for such acts or omissions as are negligent, that import some wrongdoing, that are not naturally produced by the original negligence, are in violation of some duty owing to the defendant, to the class of persons to which he belongs, or to the social order, — including the duty to exercise such care for his own safety as a person of reasonable or ordinary prudence would do under the circumstances — and which, being of this kind or character, naturally and proximately contribute to his injury. To constitute contributory negligence, exempting the defendant from liability, it is as necessary that the plaintiff's negligence should be a proximate and not a remote cause, efficiently contributing to the injury or damage, as it is that defendant's primary negligence, to impose liability, should be a proximate and efficient cause. Conditions are liable to be confounded with causes. If the act or omission of the defendant has no natural tendency to expose him to injury, it is a condition merely and not a cause.

§ 62. Contributory negligence under statutory claims.—The rule forbidding a recovery for negligence where a plaintiff has contributed to the injury by his own fault, is generally held applicable to causes of action given by statute.¹² Under a statute giving a right of action for

¹² In *Caswell v. Worth* (5 El. & Bl. Wis. 665, and cases *infra*. See, however, remarks of Pigott, B., in *Britton v. Gt. West. Cotton Co.*, L. R. 7 Exch. 130, 139; *Gartin v. Meredith*, 153 Ind. 16, 53 N. E. 936 (1899); *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117 (1905); *Newcomb v. Newnolds v. Hindman*, 32 Iowa, 146; *York, etc. Ry. Co.*, 160 Mo. 409, 69 Curry v. Chicago, etc. R. Co., 43 S. W. 348 (1902); *Schutt v. Adair*,

all damages sustained or injury suffered " by reason " or " in consequence " of neglect to do some act, the ordinary rule as to contributory negligence is not excluded from the operation of the statute. In such case, the practical construction given to the statute is that the injury is not suffered by reason or in consequence of the defendant's neglect, but rather in consequence of the plaintiff's want of ordinary care to avoid exposure to the injury. Thus, where a statute requires railroad companies to ring bells when approaching a highway crossing, or keep a flagman stationed there, or use other means to warn travelers, and making them liable to another person who suffers injury by reason of their omission to use such means, contributory negligence is a good defence.¹³ But where

99 Minn. 7, 108 N. W. 811 (1906), (statutes imposing duties will not be construed as excluding the defense of contributory negligence unless so required by their terms).

¹³ Where the statute does not otherwise provide, the rule requiring the plaintiff to show that at the time of the injury he was in the exercise of due care governs. (Thompson v. Bridgewater, 7 Pick. 187; Munn v. Reed, 4 Allen, 431; Plumley v. Birge, 124 Mass. 57; Taylor v. Carew Mfg. Co., 143 Id. 470, 10 N. E. 308; Passamaneck v. Louisville, etc. R. Co., 98 Ky. 195, 32 S. W. 620). *s. p.*, Pakalinsky v. N. Y. Central R. Co., 82 N. Y. 424; McGrath v. N. Y. Central R. Co., 62 Id. 522; Stevens v. Oswego, etc. R. Co., 18 Id. 422; Field v. Chicago, etc. R. Co., 14 Fed. 332; Telfer v. Northern, etc. R. Co., 30 N. J. Law, 188; Reeves v. Dubuque, etc. R. Co., 92 Iowa, 32, 60 N. W. 243; Purl v. St. Louis, etc. R. Co., 72 Mo. 168; Holman v. Chicago, etc. R. Co., 62 Id. 562; Payne v. Chicago, etc. R. Co., 129 Id. 405, 31 S. W. 885; Pzolla v. Michigan Central R. Co., 54 Mich. 273; Memphis v. Cope-

land, 61 Ala. 376; Peoria, etc. R. Co. v. Siltman, 88 Ill. 529; Ransom v. Chicago, etc. R. Co., 62 Wis. 178, 22 N. W. 147. The failure of a railway company to maintain signboards at crossings, as required by statute, is not negligence as to persons who in fact know of the existence and location of the crossing (Haas v. Grand Rapids, etc. R. Co., 47 Mich. 401; Shaber v. St. Paul, etc. R. Co., 23 Minn. 103; Cincinnati, etc. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892; Louisville, etc. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Chicago, etc. R. Co. v. Crisman, 19 Colo. 30, 34 Pac. 286; Laney v. Chesterfield County, 29 S. C. 140, 7 S. E. 56 [action under Gen. St. § 1087, against county for injuries from defective highway]). Mr. Beach has collected a great number of cases in support of the general proposition that a plaintiff, guilty of contributory negligence, cannot recover on the ground that the defendant's negligence is a violation of some statutory obligation (Contrib. Neg., 2d ed., § 49). "That a person guilty of contributory negligence

a statute gives an absolute right of action for injuries suffered, where certain precautions are not taken, without qualifying the liability, so as to confine it to injuries suffered "by reason" or "in consequence" of such neglect, this rule does not apply, and contributory negligence is no defence. Thus, where a statute requires railroad companies to fence their roads, and declares that, if they omit to do so, they shall be liable to the owners of all cattle which may be injured by trains running on such unfenced roads, contributory negligence is (generally speaking) no defence.¹⁴

§ 63. Reason of rule.—The reason of the rule which denies relief to an injured party who has contributed to

should not recover even when injury arises from neglect to observe statutory duty is not only reasonable, but clear law" (Beven on Negligence, p. 337, 3d ed., 1908). The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. "There can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law. The action, however, must be subject to the rules of common law, and one of these is that a want of ordinary care, or willful misconduct on the part of the plaintiff is an answer to the action" (Caswell v. Worth, 5 El. & Bl. 849). See, also, Britton v. Great Cotton Co., L. R. 7 Ex. 130; Queen v. Dayton Coal & Iron Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935 (1895); O'Donnell v. Providence & Worcester Ry. Co., 6 R. I. 211. The rule that the injured person must be without fault contributing to his own injury to enable him to recover, is subject to no exception unless the injury is willfully inflicted (Quinn v. Chicago, etc. Ry. Co., 162 Ind. 442, 70 N. E.

526 (1904). See, also, Lopes v. Sahuque, 114 La. 1004, 38 So. 810 (1905); Burnett v. Ft. Worth Light & Power Co., 102 Tex. 31, 112 S. W. 1040, 19 L. R. A. (N. S.) 104 (1908).

¹⁴Shepard v. Buffalo, etc. R. Co., 35 N. Y. 641; Corwin v. N. Y. & Erie R. Co., 13 Id. 42; Jeffersonville, etc. R. Co. v. Ross, 37 Ind. 545; Louisville, etc. R. Co. v. Whitesell, 68 Id. 297; Lloyd v. St. Louis, etc. R. Co., 128 Mo. 595, 29 S. W. 153. In Flint, etc. R. Co. v. Lull, 28 Mich. 510, Cooley, J., said: "If contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated; for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large, or even on his grounds, in the vicinity of the road, so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since the neglect alone rendered the conduct of

the injury by his own fault has been variously stated. Perhaps the majority of opinions are in favor of basing it upon the other rule, confining liability to the party who is the proximate cause of an injury;¹⁵ and it is said that, where the plaintiff's negligence has contributed to his injury, his act is the proximate cause thereof and not the act of the defendant. But there are innumerable cases in which contributory negligence has been held to bar a recovery, where such negligence was certainly no more a proximate cause of the injury than the negligence of the defendant, if even as much so. It has, therefore, been asserted that the reason of the rule is that the defendant is not liable for an injury of which his negligence was not

the plaintiff negligent." So held under Tennessee Code, § 1167, declaring company's liability for all damages resulting from failure to keep a lookout on locomotives (*Nashville, etc. R. Co. v. Nowlin*, 1 Lea, 523; *Railroad Co. v. Walker*, 11 Heisk, 383; *Nashville, etc. R. Co. v. Carroll*, 6 Id. 347; *Chesapeake, etc. R. Co. v. Foster*, 88 Tenn. 671, 13 S. W. 694). So, under a similar statute in Georgia (*Bacon, etc. R. Co. v. Davis*, 27 Ga. 113; *Winn Case*, 26 Id. 250; *Atlanta, etc. R. Co. v. Ayres*, 53 Id. 12). So, in New York, in an action for death by "wrongful act," under Code Civ. Pro., § 1902 (*Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89 [decendent shot by defendant]). So, in Kentucky, under a statute (Gen. Stat., ch. 57, § 3) providing for the recovery of punitive damages in certain cases where death results from defendant's "willful negligence" (*Jones v. Louisville, etc. R. Co.*, 82 Ky. 610). See *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434, 15 S. W. 665; *Louisville, etc. R. Co. v. Coniff* (Ky.) 27 S. W. 865; *Chesapeake, etc. R. Co. v. Yost* (Ky.), 29 S. W. 326.

So, under Illinois statute giving a right of action for injuries occasioned by willful neglect to fence coal mine shafts (*Catlett v. Young*, 143 Ill. 74, 32 N. E. 447). So, under Wisconsin statute requiring railroads to fence their right of way (*Quackenbush v. Wisconsin, etc. R. Co.*, 71 Wis. 472; 37 N. W. 834). So, under Tennessee statute, forbidding employment of boys in mines. (*Queen v. Dayton Coal Co.*, 95 Tenn. 458, 32 S. W. 460). In *Rowell v. Railroad Co.*, 57 N. H. 132, under a statute giving railway companies an insurable interest in the property along the line of their road, the plaintiff's contributory negligence was held no defense to an action for the negligent communication of fire. Under a similar statute in Missouri, no negligence short of fraud will bar plaintiff's right to recover (*Mathews v. St. Louis, etc. R. Co.*, 121 Mo. 298; 24 S. W. 591). See *Baddeley v. Granville*, 19 Q. B. Div. 423 [absence of banksman, while miner was ascending shaft; *Coal Miners' Act*, 1872].

¹⁵ Wharton, Negligence, § 300.

the sole cause.¹⁶ But this is plainly not true, since the concurring negligence of a stranger is no defence;¹⁷ and, even allowing for that error in the definition, it still remains incorrect, unless the rule lying at the foundation of the famous case of *Davies v. Mann*,¹⁸ now recognized by every court, both in England and America, with one or two exceptions, is to be ignored. We think that the Supreme Court of California has stated the exact truth in holding that the reason of the rule is simply the impossibility in most cases of equitably apportioning the damages between the parties in a common-law action,¹⁹ and that, where this impossibility does not exist, the rule itself ought not to apply.²⁰

§ 64. When no defence.—The rule excluding a recovery in cases of contributory negligence is of course only applicable to actions founded upon negligence. It is universally conceded that the greatest contributory fault, including a willful trespass, is no defence in an action for willful injuries.²¹ Thus a trespasser upon a

¹⁶ *Grippen v. N. Y. Central R. Co.*, shooting]; *Welch v. Wesson*, 6 Gray, 40 N. Y. 34. See *Philadelphia*, etc. 505; *Steele v. Burkhardt*, 104 Mass. Co. v. *Boyer*, 97 Pa. St. 91; *New* 59; *Banks v. Highland St. R. Co.*, Jersey Express Co. v. *Nichols*, 33 136 Id. 485; *Steinmetz v. Kelly*, 72 N. J. Law, 434; *Toledo*, etc. Co. v. Ind. 442; *Salem v. Goller*, 76 Id. 291; *Goddard*, 25 Ind. 185; *Mississippi*, Chicago, etc. R. Co. v. *Bills*, 118 etc. R. Co. v. *Mason*, 51 Miss. 234. Ind. 221, 20 N. E. 775 [ejection from train]; *Birge v. Gardner*, 19 Conn.

¹⁷ See § 66, *post*.

¹⁸ 10 Mees. & W., 546. See § 99, 507; *Williams v. Michigan*, etc. R. Co., 2 Mich. 259; *Chicago*, etc. R. Co. v. *Smith*, 46 Id. 504; *Cincinnati*, etc. R. Co. v. *Waterson*, 4 Ohio St. 424; *Pittsburgh*, etc. R. Co. v. *Smith*, 26 Id. 124; *Tanner v. Louisville*, etc. R. Co., 60 Ala. 621; *Gothard v. Alabama*, etc. R. Co., 67 Id. 114; *Central R. Co. v. Newman*, 94 Ga. 560, 21 S. E. 219; *Bunting v. Central*, etc. R. Co., 16 Nev. 277; *Holstine v. Oregon*, etc. R. Co. 8 Ore. 163; *Hector Min. Co. v. Robertson*, 22 Colo. 491, 45 Pac. 406; *Alaska*

post.
¹⁹ *Needham v. San Francisco*, etc. R. Co., 37 Cal. 409. See, also, to similar effect, *Simpson v. Hand*, 6 Whart. 311; *Heil v. Glandin*, 42 Pa. St. 493, 499; *Railroad Co. v. Norton*, 24 Id. 469; *Kerwhacker v. Cleveland*, etc. R. Co., 3 Ohio St. 172.

²⁰ *Needham v. San Francisco*, etc. R. Co., 37 Cal. 409.

²¹ *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Kain v. Larkin*, 56 Hun, 79, 9 N. Y. Supp. 89 [willful

railroad train, or street car, who is pushed off,²² or forced,²³ or frightened,²⁴ into jumping off, while the train

Min. Co. v. Whelan, 64 Fed. 462, 12 C. C. A. 225; Southern Ry. Co. v. Yancey, 141 Ala. 246, 37 So. 341 (1904); Brendle v. Spencer, 125 N. C. 474, 34 S. E. 634 (1899); La Fitte v. Southern Ry. Co., 73 S. C. 467, 53 S. E. 755 (1906); Bolin v. Chicago, etc. Ry. Co., 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911 (1900); Birmingham, etc. Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906); Anderson v. Minneapolis, etc. Ry. Co., 103 Minn. 224, 114 N. W. 1123 (1908); Central Ry. Co. v. Moore, 5 Ga. App. 562, 63 S. E. 642 (1909); Goodwin v. Atlantic, etc. Ry. Co., 82 S. C. 321, 64 S. E. 242 (1909); Birmingham Light, etc. Co. v. Jung, 49 So. (Ala.) 434 (1909); Kramm v. Stockton Elec. Ry. Co., 10 Cal. App. 271, 101 Pac. 914 (1909); Hawks v. Slusher, 104 Pac. (Ore.) 883 (1909); Southern, etc. Ry. Co. v. Svensden, 108 Pac. (Ariz.) 262 (1910); Florida Ry. Co. v. Dorsey, 52 So. (Fla.) 963 (1910); Murphy v. Wabash Ry. Co., 128 S. W. (Mo.) 481 (1910); Mills v. Atlantic, etc. Ry. Co., 85 S. C. 463, 67 S. E. 565, 69 S. E. 97 (1910); Western Ry. Co. v. Wallace, 54 So. (Ala.) 533 (1911); Southern Ry. Co. v. Wiley, 71 S. E. (Ga. App.) 11 (1911).

²² Barre v. Reading R. Co., 155 Pa. St. 170, 26 Atl. 99; Thurman v. Louisville, etc. R. Co. [Ky.], 34 S. W. 893 [trespasser ejected from train]. Though a carrier has the right to eject from his vehicle a person unlawfully there, he is bound, in doing so, to use no unnecessary violence, and not to subject the trespasser to the hazard of serious personal injury (Sanford v. Eighth Ave. R. Co., 23 N. Y. 343; Hoffman

v. N. Y. Central R. Co., 87 N. Y. 25; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365; Holmes v. Wakefield, 12 Allen, 580; Meyer v. Pacific R. Co., 40 Mo. 151; Kline v. Central Pacific R. Co., 37 Cal. 400; Louisville, etc. R. Co. v. Dunkin, 92 Ind. 601; Carter v. Louisville, etc. Co., 98 Id. 552).

²³ Biddle v. Hestonville, etc. R. Co., 112 Pa. St. 551, 4 Atl. 485; s. c. again, 16 Id. 488. While a mere order to quit the train, given while it is in motion, may not always be equivalent to force, as to an adult (see Benton v. Chicago, etc. R. Co., 55 Ia. 496, 8 N. W. 330), it is, in the case of a mere child (Chicago, etc. R. Co. v. West, 125 Ill. 320, 17 N. E. 788), and in the case of any young person (*e. g.*, 16 years), the question is for the jury (Benton v. Chicago, etc. R. Co., *supra*; Kline v. Central Pac. R. Co., 37 Cal. 400).

²⁴ Clarke v. N. Y., Lake Erie, etc. R. Co., 40 Hun, 605. In Planz v. Boston, etc. R. Co., 157 Mass. 377, 32 N. E. 356, where plaintiff was stealing a ride on a freight train, was ordered off while it was stationary, refused to obey, and was then driven off while it was in motion, his contributory negligence was held to be fatal to his recovery. This decision was clearly wrong. In Marion v. Chicago, etc. R. Co., 59 Ia. 428, 13 N. W. 415, it was held that, while the company would be liable for such an act on the part of a conductor, it was not liable for the act of a brakeman (and see Towanda Coal Co. v. Heeman, 86 Pa. St. 418). But this decision was also wrong, in relieving from liability for the brakeman's act. See the conclusive reasoning in Hoffman v.

is in motion, is not debarred from recovery by his own fault, either in originally entering the car, or in quitting it, while in motion. Contributory negligence is as good a defence to a claim founded upon gross negligence as to any other;²⁵ except where such negligence is so wanton and reckless as to imply a willingness to injure, or entire indifference to consequences.²⁶ Yet this, after all, is only another form of stating the well-known rule in *Davies v. Mann*, that is, that even a trespasser can recover for any want of ordinary care in avoiding injury to him, after his presence is known to the defendant.²⁷

N. Y. Central R. Co., 87 N. Y. 25; 472, 6 So. 910; Florida So. R. Co. s. P., *Bayley v. Manchester*, etc. R. Co., L. R. 8 C. P. 148. Texas, etc. Ry. Co. v. *Buch*, 101 Tex. 200, 102 S. W. 124 (1907), (where a child ten years old was injured by jumping from a ladder on the side of the car to which he had been hanging, it has been held that though it was the recognized custom and duty for brakemen to put trespassers off trains, the threatening language of the brakeman frightening the child and causing him to jump, was not such obvious negligence as would authorize the trial court to assume such conduct negligent and that the question should have been left to the jury).

²⁵ *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; rev'g 33 Barb. 503; *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34, 51; *Neal v. Gillett*, 23 Conn. 437; *Rowen v. New Haven R. Co.*, 59 Id. 364, 21 Atl. 1073; *New Jersey Express Co. v. Nichols*, 33 N. J. Law, 434; *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Cunningham v. Lyness*, 22 Wis. 236; *Maumus v. Champion*, 40 Cal. 121; *Carroll v. Minnesota*, etc. R. Co., 13 Minn. 30; *Griggs v. Fleckenstein*, 14 Id. 81; *Ruter v. Foy*, 46 Ia. 132; *Carrington v. Louisville*, etc. R. Co., 88 Ala.

v. *Hirst*, 30 Fla. 1, 11 So. 506; *International*, etc. R. Co. v. *Kuehn*, 11 Tex. Civ. App. 21, 31 S. W. 322. "The doctrine that any degree of negligence which may be gross on the part of the defendant will enable the plaintiff to recover, notwithstanding his own negligence, is unsound in principle" (*McDonald v. International*, etc. Ry. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803 (1893)).

²⁶ *Lake Shore*, etc. R. Co. v. *Bodemer*, 139 Ill. 596, 29 N. E. 692; *Louisville*, etc. R. Co. v. *Watson*, 90 Ala. 68, 8 So. 249. In *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398, it was held that the fault of one killed in a personal encounter, in not avoiding the conflict, was no defense to an action for his wrongful death, the doctrine of negligence having no application to the case, a man's right to personal security being absolute. *McGhee v. Campbell*, 101 Fed. 936, 42 C. C. A. 95 (1900); *Birmingham Light*, etc. Co. v. *Selhorst*, 51 So. (Ala.) 568 (1910); *Dixon v. New York*, etc. Ry. Co., 207 Mass. 126, 92 N. E. 1030 (1910). *Contra*, *Denver*, etc. Ry. Co. v. *Buffher*, 30 Colo. 27, 69 Pac. 582 (1902).

²⁷ See § 99, *post*. In some cases it

§ 65. Fault must be that of injured party or his agent.—It is only the contributory fault of the injured party, or of some one whose fault is imputable to him, that can excuse the defendant. The fault of a mere stranger, however much it may contribute to the injury, is no defence for one whose negligence was its proximate cause.²⁸ For convenience, we speak of the injured party

is said that a trespasser can only recover for willful injuries (*Wright v. Boston, etc. R. Co.*, 129 Mass. 440; *Moore v. Pennsylvania R. Co.*, 99 Pa. St. 301; *Mulherrin v. Delaware, etc. R. Co.*, 81 Id. 366; *Pittsburgh, etc. R. Co. v. Collins*, 87 Id. 405; *Illinois Central R. Co. v. Godfrey*, 71 Ill. 501; *Bresnahan v. Michigan Central*, 49 Mich. 410; *Chicago, etc. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801; *Mason v. Missouri Pac. R. Co.*, 27 Kans. 83). But this is erroneous, and overruled everywhere. Nor was it necessary to the decision of any case.

²⁸ *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Webster v. Hudson River R. Co.*, 38 N. Y. 161; *Barrett v. Third Ave. R. Co.*, 45 Id. 628; *Paulmier v. Erie R. Co.*, 34 N. J. Law, 151; *Sullivan v. Philadelphia, etc. R. Co.*, 30 Pa. St. 234; *Eaton v. Boston, etc. R. Co.*, 11 Allen, 505; *Warren v. Fitchburg, etc. R. Co.*, 8 Id. 227; *Ingalls v. Bills*, 9 Metc. 1; *Cayzer v. Taylor*, 10 Gray, 274; *Churchill v. Holt*, 127 Mass. 165; *Harrison v. Great Northern R. Co.*, 3 Hurlst. & C. 231; *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161, 174; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327. See § 32, *ante*, and §§ 94, 122, *post*. For a full discussion of this principle, see *Cooley on Torts*, 132. A gas pipe laid in a street leaked, and the leaks were not stopped by the gas company when complaint was made to it. It was held that this

negligence of the company was the proximate, not the remote cause of an explosion, and the fact that the city contractor, in building a sewer, had disturbed and broken the pipe, had no effect to shift the cause (*Oil City Gas Co. v. Robinson*, 99 Pa. St. 1). A gas company supplied plaintiff with a defective service pipe to convey gas from its main to his meter; and the gas, leaking, exploded through the negligence of a gas-fitter employed by plaintiff. The cause of action was held to be the negligence of the company, from the consequences of which the intermediate negligence of a person not in plaintiff's service could not relieve it (*Burrows v. Marsh Gas Co.*, L. R. 5 Exch. 67). A person tripped by another's stepping on the end of a plank laid lengthwise in a walk, which, being unsupported, gives way and throws up the opposite end, is not guilty of contributory negligence (*Rockford v. Hollenbeck*, 34 Ill. App. 40). Both may be liable (*Muller v. Hale*, 138 Cal. 163, 71 Pac. 81 (1902); *Siegel, etc. Co. v. Treka*, 115 Ill. App. 56, *aff'd* 218 Ill. 550, 75 N. E. 1053, 109 Am. St. Rep. 302, 2 L. R. A. (N. S.) 647 (1905); *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726 (1905); *Venbuve v. LaFayette Worsted Mills*, 27 R. I. 89, 60 Atl. 770 (1905); *Howard v. Harris, etc. Plumbing Co.*, 154 N. C. 224, 70 S. E. 285 (1911); *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50

as the plaintiff; but it is, of course, to be understood that, in an action for injuries causing death, contributory fault of the deceased person is a bar to the action, to precisely the same extent as if he were the plaintiff of record,²⁹

(1909); *Moore v. Kopplin*, 135 S. W. 105; *Indianapolis, etc. R. Co. v. Boston, etc. Ry. Co.*, 207 Mass. 27, 92 N. E. 1026 (1910); *Flanagan v. Wells Co.*, 237 Ill. 82, 86 N. E. 609, 127 Am. St. Rep. 315 (1908).

²⁹In an action for injuries causing death, the sole test on the question of contributory negligence is whether the decedent himself was so far free from fault as to have entitled him to maintain an action had he lived (*Dennick v. Railroad Co.*, 103 U. S. 11; *Scheffer v. Washington, etc. R. Co.*, 105 Id. 249; *Packet Co. v. McCue*, 17 Wall. 508; *Witherley v. Regents' Canal Co.*, 12 C. B. N. S. 2; *Batchelor v. Fortescue*, L. R. 11 Q. B. Div. 474; *Wigmore v. Jay*, 5 Exch. 354; *Mansfield Coal, etc. Co. v. McEnergy*, 91 Pa. St. 185; *Gay v. Winter*, 34 Cal. 153; *Cleveland, etc. R. Co. v. Crawford*, 24 Ohio St. 631; *Carey v. Berkshire R. Co.*, 1 Cush. 475; *Bancroft v. Boston, etc. R. Co.*, 97 Mass. 275; *State v. Manchester, etc. R. Co.*, 52 N. H. 528; *Bradbury v. Furlong*, 13 R. I. 15; *Nickerson v. Harriman*, 38 Me. 277; *State v. Maine Central R. Co.*, 60 Id. 490; *Telfer v. Northern, etc. R. Co.*, 30 N. J. Law, 188; *Cumberland, etc. R. Co. v. Fazenbaker*, 37 Md. 156; *Rowland v. Cannon*, 35 Ga. 105; *Berry v. Northeastern R. Co.*, 72 Id. 137; *Atlanta, etc. R. Co. v. Ayers*, 53 Id. 12; *Nashville, etc. R. Co. v. Smith*, 6 Heisk. 174; *Hill v. Louisville, etc. R. Co.*, 9 Id. 823; *Hubgh v. New Orleans, etc. R. Co.*, 6 La. Ann. 495; *Knight v. Pontchartrain R. Co.*, 23 Id. 462; *Lofton v. Vogles*, 17 Ind. 105; *Indianapolis, etc. R. Co. v. Stout*, 53 Id. 143; *Toledo, etc. R. Co. v. Moore*, 77 Ill. 217; *Schmidt v. Chicago, etc. R. Co.*, 83 Id. 405; *Chicago, etc. R. Co. v. Triplett*, 38 Id. 482; *Ewen v. Chicago, etc. R. Co.*, 38 Wis. 613; *Walters v. Chicago, etc. R. Co.*, 41 Ia. 71; *Shoemaker v. Lacey*, 38 Id. 277; *Weymire v. Wolfe*, 52 Id. 533; *Elliott v. St. Louis, etc. R. Co.*, 67 Mo. 272; *Kansas, etc. R. Co. v. Salmon*, 11 Kans. 83; *Clark v. Louisville, etc. Ry. Co.*, 101 Ky. 34, 39 S. W. 840, 36 L. R. A. 123 (1897); *Cameron v. Great Northern Ry. Co.*, 8 N. D. 618, 80 N. W. 885 (1899); *Pittsburg, etc. Ry. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28 (1909); *Cincinnati, etc. Ry. Co. v. Lowell's Admr.*, 141 Ky. 249, 132 S. W. 569 (1910); *Perkins v. Oxford Paper Co.*, 71 Atl. (Md.) 476 (1908); *Palmer v. Oregon, etc. Ry. Co.*, 34 Utah, 466, 98 Pac. 689 (1908); *Driver's Admr. v. Southern Ry. Co.*, 103 Va. 650, 49 S. E. 1000 (1905); *Brown v. West Riverside Coal Co.*, 143 Ia. 662, 120 N. W. 732 (1909); *Hudson v. Lynn, etc. Ry. Co.*, 185 Mass. 510, 71 N. E. 66 (1904); *Cincinnati, etc. Ry. Co. v. Lovell's Admr.*, 141 Ky. 249, 132 S. W. 569 (1910); *Slaterry v. New York, etc. Ry. Co.*, 203 Mass. 453, 89 N. E. 622 (1909); *Newton v. Wabash Ry. Co.*, 152 Mo. App. 167, 132 S. W. 1195 (1911); *Weatherly v. Nashville, etc. Ry. Co.*, 166 Ala. 575, 51 So. 959 (1910).

while the contributory fault of the actual plaintiff in such an action would be no defence, except conceivably in some extraordinary case which has never yet occurred.³⁰ And, where the action is brought by a parent or master, for the loss of service caused by an injury to a child or servant, the negligence of either the plaintiff of record or of the person actually injured is to be deemed the negligence of the plaintiff, within the meaning of this chapter.³¹ The plaintiff is responsible for the contributory fault of his agent in the affair,³² on the same principles and under the same conditions as he would be if he were sued upon such fault.

§ 65a. Doctrine of imputed negligence. — The doctrine of imputed negligence is that in certain relations there shall be visited upon the plaintiff the negligence of another concurring with that of the defendant so as to defeat the action. It is peculiar to contributory negligence and can be invoked only where the negligence of another, for which the plaintiff is responsible, besides that of the defendant, proximately contributes to the injury. The ethical proposition at the basis of the legal theory is that the person to whom the negligence of another is imputed, owing to the relation between them, ought to be held responsible for the conduct of such other in respect to the cause of the injury. The relation must, therefore,

³⁰ In such an action, the contributory negligence of the plaintiff of record or of any other person interested in the recovery is not an available defense (*Button v. Hudson R. Co.*, 18 N. Y. 248; *Wilds v. Hudson R. R. Co.*, 24 Id. 430; *Cleveland etc. R. Co. v. Crawford*, 24 Ohio St. 631).

³¹ See §§ 70-86, *post*. As to husband and wife, see § 67, *post*.

³² *Louisville, etc. R. Co. v. Stom-*

mel, 126 Ind. 35, 25 N. E. 863; *Miner v. Connecticut River R. Co.*, 153 Mass. 398, 26 N. E. 994; *La. Riviere v. Pemberton*, 46 Minn. 5, 48 N. W. 406. See *Eaton v. Boston, etc. R. Co.*, 11 Allen, 500; *Stevens v. Armstrong*, 6 N. Y. 435. Owner of team, riding in it, allowed a companion to take the reins. Held, liable for latter's contributory fault (*Stafford v. Oskaloosa*, 57 Ia. 749, 11 N. W. 668).

be one either invoking the principles of agency, or the parties must be co-operating in a common or joint enterprise, or the relation between the injured plaintiff and such third person, whose negligence co-operating with that of the defendant has caused the injury, must have given the plaintiff the legal right to control his action.³³

³³ Negligence of one under the plaintiff's control is imputed to him on an equal footing (*Koplit v. St. Minster v. Citizens' Ry. Co.*, 53 Mo. App. 276; *Seaman v. Koehler*, 126 N. Y. 625, 25 N. E. 353 (1890); *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378, 83 N. E. 924 (1908); *Young v. Madison County*, 115 N. W. (Ia.) 23 (1909). Where plaintiff is free from fault the negligence of his fellow servant cannot be imputed to him for the benefit of a stranger whose negligence contributed to the injury (*Gray v. Philadelphia, etc. Ry.*, 24 Fed. 168, 22 Am. & Eng. Ry. Cas. 351). Where the master is chargeable with negligence the concurrent negligence of a fellow servant of the plaintiff constitutes no defense (*Chicago, etc. Ry. Co. v. Swett*, 45 Ill. 197; *Paulmier v. Erie Ry. Co.*, 34 N. J. Law, 151; *Crutchfield v. Richmond, etc. Ry. Co.*, 76 N. C. 320; *Cayser v. Taylor*, 10 Gray, 207; *Ft. Worth, etc. Ry. Co. v. Mackney*, 83 Tex. 410, 18 S. W. 949 (1891). "The negligence of a superior is not attributable to an inferior working under his control, although the inferior participates in the act, if he does so by order of such superior, and therefore such negligence cannot be charged upon the inferior as contributory negligence so as to defeat him in an action brought for injuries occasioned by such act of negligence" (*Hoben v. Burlington, etc. Ry. Co.*, 20 Ia. 562). Where two or more are engaged in a joint or common enterprise the contributory negligence of one is imputable to all if they stand on an equal footing (*Koplit v. St. Paul*, 86 Minn. 378, 90 N. W. 794 (1902); *Louisville, etc. Ry. Co. v. Armstrong*, 32 Ky. L. Rep. 252, 105 S. W. 473 (1907); *Contos v. Jamison*, 81 S. C. 488, 62 S. E. 867 (1908). Neglect of engineer to give signals not imputable to conductor in action against a stranger (*Central Ill., etc. Co. v. Lloyd*, 134 Ill. App. 494 (1907). Neglect of engineer to give signals not imputable to hirer, who is, however, responsible for his own neglect (*Wilson v. Puget Sound Ry.*, 52 Wash. 522, 101 Pac. 50 (1909). Conductor and engineer of train held joint enterprisers (*Alabama, etc. Ry. Co. v. Hanbury*, 49 So. (Ala.) 467 (1909). Neglect of railway not imputable to passenger (*Gulf, etc. Ry. Co. v. Barnes*, 48 So. 823 (1909). Neglect of driver not imputable to one riding in conveyance (*Illinois Southern Ry. Co. v. Hamill*, 226 Ill. 88, 80 N. E. 745 (1907); *Eckels v. Muttschall*, 230 Ill. 462, 82 N. E. 872 (1907); *Read v. New York Cent., etc. Ry. Co.*, 104 N. Y. Supp. 1068, 123 App. Div. 228 (1908); *Burleigh v. St. Louis Tr. Co.*, 112 Mo. App. 724, 102 S. W. 621 (1907); *Ward v. Brooklyn Heights Ry. Co.*, 104 N. Y. Supp. 95, 119 App. Div. 487, 190 N. Y. 559, 83 N. E. 1134 (1908); *Paducah Tr. Co. v. Sine*, 33 Ky. L. Rep. 792, 111 S. W. 356 (1907); *City of Baltimore v. State of Maryland*, 66 Fed. 641, 92 C. C. A.

Conversely, the negligent conduct of another will not be imputed to the plaintiff if he neither authorized nor participated in it, nor had the right or power or duty to control his conduct in that regard.³⁴ The doctrine is not recognized by the courts of Illinois and was repudiated at an early date in Ohio.³⁵

§ 66. Doctrine of "identification." — As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defence.³⁶ But, in the famous case of *Thorogood v. Bryan*,³⁷ an English court invented a new application of the old Roman doctrine of identification, and held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions, we devoted much space to the refutation of this doctrine of "identification." But it is needless to do so any longer, since the entire doctrine has, since our first edition, been exploded in every court, beginning with New York and

335 (1908); *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563 (1909). When driver is experienced and plaintiff not, negligence of former not imputable (*Chadbourne v. Springfield St. Ry.*, 199 Mass. 574, 85 N. E. 737 (1908). Plaintiff liable for his own negligence in permitting driver without objection to drive in front of moving locomotive (*Davis v. Chicago, etc. Ry. Co.*, 159 Fed. 10 (1907).
³⁴ Cp. 29 Cyc., p. 543.
³⁵ *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 (1891); *New York, etc. Ry. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130 (1902).
³⁶ See cases cited under § 65, *ante*, and § 122, *post*.
³⁷ 8 C. B. 115.

ending with Pennsylvania.³⁸ It was finally overruled in

³⁸ *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, where the question was fully and ably discussed. Applied to case of wagon driven by plaintiff's brother (*Lapsley v. Union Pac. R. Co.*, 50 Fed. 172; *aff'd*, 51 Id. 174, 2 C. C. A. 149, 4 U. S. App. 542). So in *New York* (*Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Bartlett v. Third Ave. R. Co.*, 45 Id. 628; *Sheridan v. Brooklyn R. Co.*, 36 Id. 39; *Phillips v. N. Y. Central, etc. R. Co.*, 127 Id. 657, 27 N. E. 978). So held, as to persons accepting an invitation to ride with the driver in fault (*Robinson v. N. Y. Central, etc. R. Co.*, 66 N. Y. 11; *Dyer v. Erie R. Co.*, 71 Id. 228; *Masterson v. N. Y. Central, etc. R. Co.*, 84 Id. 247; *Strauss v. Newburgh R. Co.*, 6 N. Y. App. Div. 264, 39 N. Y. Supp. 998). Negligence of a street-car driver is not imputable to the conductor (*Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. 353). So in *Alabama* (*Otis v. Thom*, 23 Ala. 469; *Georgia Pacific R. Co. v. Hughes*, 87 Id. 610, 6 So. 413; *Elyton Land Co. v. Mingea*, 89 Ala. 521, 7 So. 666); *California* (*Hillman v. Newington*, 57 Cal. 56; *Tompkins v. Clay St. R. Co.*, 66 Id. 163, 4 Pac. 1165); *Georgia* (*East Tennessee, etc. R. Co. v. Markens*, 88 Ga. 60, 13 S. E. 855 [public hack]; *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601, 16 S. E. 118 [private conveyance]; *Illinois* (*Wabash, etc. R. Co. v. Shacklet*, 105 Ill. 364; *Carmi v. Ervin*, 59 Ill. App. 555; *compare Toledo, etc. R. Co. v. Miller*, 76 Id. 278); *Indiana* (*Albion v. Hetick*, 90 Ind. 545; *Pittsburgh, etc. R. Co. v. Spencer*, 98 Id. 186; *Brannan v. Kokomo, etc. R. Co.*, 115 Id. 115, 17 N. E. 202 [intoxicated driver running a toll-gate]; *Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452; *Louisville, etc. R. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481; *Lake Shore, etc. R. Co. v. Boyts*, 16 Ind. App. 640, 43 N. E. 667, and other cases); *Iowa* (*Nesbit v. Garner*, 75 Ia. 314, 39 N. W. 516; *Larkin v. Burlington, etc. R. Co.*, 85 Ia. 492, 52 N. W. 480; overruling *Artz v. Chicago, etc. R. Co.*, 34 Ia. 153; *Payne v. Chicago, etc. R. Co.*, 39 Id. 523); *Kansas* (*Leavenworth v. Hatch*, 57 Kans. 57; 45 Pac. 65 [plaintiff driven by servant of owner of carriage on latter's invitation]); *Kentucky* (*Louisville, etc. R. Co. v. Case*, 9 Bush, 728; *Danville, etc. Turnp. Co. v. Stewart*, 2 Metc. [Ky.] 119; *Cahill v. Cincinnati, etc. R. Co.*, 92 Ky. 345, 18 S. W. 2 [ride on invitation]); *Maine* (*State v. Boston, etc. R. Co.*, 80 Me. 430, 15 Atl. 36); *Maryland* (*Philadelphia, etc. R. Co. v. Hogeland*, 66 Md. 149, 7 Atl. 105); *Massachusetts* (*Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046; *Randolph v. O'Riordon*, 155 Mass. 331, 29 N. E. 583 [hired carriage]); *Michigan* (*Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32; *Malmsten v. Marquette, etc. R. Co.*, 49 Mich. 94, 13 N. W. 373); *Minnesota* (*McMahon v. Davidson*, 12 Minn. 357; *Griggs v. Fleckenstein*, 14 Id. 81; *Follman v. Mankato*, 35 Minn. 522, 29 N. W. 317; *Flaherty v. Minneapolis, etc. R. Co.*, 39 Minn. 328; 40 N. W. 160); *Mississippi* (*Alabama, etc. R. Co. v. Davis*, 69 Miss. 444, 13 So. 693); *Missouri* (*Becke v. Missouri Pac. R. Co.*, 102 Mo. 544, 13 S. W. 1053 [stage coach]; *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, 16 S. W. 381 [stage coach]); *Kuttner v. Lindell R. Co.*, 29 Mo. App. 502; [street-car]); *New Hampshire* (*Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. 690 [riding on invitation of owner in carriage driven by his ser-

England a few years ago.⁸⁹ The only remnant of this

vant]); *New Jersey* (Bennett v. New Jersey, etc. Trans. Co., 36 N. J. Law, 225; N. Y., Lake Erie, etc. R. Co. v. Steinbrenner, 47 Id. 161 [hired carriage]); *North Dakota* (Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676 [plaintiff requested a ride in another's carriage]); *Ohio* (Covington Transfer Co. v. Kelly, 36 Ohio St. 86; St. Clair St. R. Co. v. Eadie, 43 Id. 91, 1 N. E. 519 [negligence of a father driving his daughter not to be imputed to her]); *Texas* (Galveston, etc. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Markham v. Houston, etc. Navigation Co., 73 Tex. 247, 11 S. W. 131; Johnson v. Gulf, etc. R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274); *Virginia* (New York, etc. R. Co. v. Cooper, 85 Va. 939, 9 S. E. 321). *Pennsylvania* held out until 1891, when its highest court, in *Bunting v. Hogsett*, 139 Pa. St. 363, 21 Atl. 31, unanimously overruled its own decision in *Lockhart v. Lichtenhaler*, 46 Pa. St. 151, and *Phila., etc. R. Co. v. Boyer*, 97 Id. 91, in which *Thorogood v. Bryan* had been followed. *Baltimore, etc. Ry. Co. v. Friel*, 77 Fed. 126, 23 C. C. A. 77 (1896), (railway company liable to street car passenger notwithstanding negligence of the latter); *Baltimore, etc. Ry. Co. v. Adams*, 10 App. D. C. 97 (1897), (railway company to bailee of public conveyance, merely giving directions as to destination); *Chicago, etc. Ry. Co. v. Hines*, 183 Ill. 482, 56 N. E. 177 (1899), (though the injury would not have happened but for the contributory negligence of the street car employees); *London v. Chicago, etc. Ry. Co.*, 92 Ill. App. 216 (omnibus); *Bird Transfer Co. v. Krug*, 30 Ind. App. 602, 65 N. E. 309 (1902); *Baltimore, etc. Ry. Co. v. Kleespies*, 39 Ind. App. 151, 76 N. E. 1015 (rehearing denied), 78 N. E. 252 (1906); *Louisville, etc. Ry. Co. v. Mulligan*, 25 Ky. L. Rep. 1287, 77 S. W. 704 (1903); *Louisville, etc. Ry. Co. v. Molloy's Admr.*, 122 Ky. 219, 91 S. W. 685 (1906); *Barnes v. Inhabitants of Rumford*, 96 Me. 315, 52 Atl. 844 (1902), (passenger in a public carriage held responsible for driver's knowledge of defect in highway, but not for his failure to give notice); *Illinois, etc. Ry. Co. v. McLeod*, 78 Mass. 334, 29 So. 76, 84 Am. St. Rep. 630, 52 L. R. A. 954 (1901), (one riding in a hired carriage held, under the circumstances, to have acquiesced in contributory negligence of the driver); *O'Rourke v. Lindell Ry. Co.*, 142 Mo. 342, 44 S. W. 254 (1898); *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 640, 5 L. R. A. (N. S.) 186 (1905); *Lewis v. Long Island Ry. Co.*, 32 App. Div. 627, 53 N. Y. Supp. 1107, rev'd, 167 N. Y. 52, 56 N. E. 548 (1900), (bailee of tallyho coach and horses, with pleasure party, exercising no control over the driver except to give directions as to destination); *Meenah v. Buckmaster*, 26 App. Div. 451, 50 N. Y. Supp. 85 (1898), (general rule of non-imputability qualified by duty of ordinary care to learn of danger and avoid it); *Crampton v. Irie*, 124 N. C. 591, 32 S. E. 968 (1899); *Bradley v. Ohio, etc. Ry. Co.*, 126 N. C. 735, 36 S. E. 181 (1900); *Atlantic, etc.*

⁸⁹ *Mills v. Armstrong*, L. R. 13 App. Cas. 1; aff'g s. c., *sub nom*; *The Bernina*, L. R. 12 Prob. Div. 58.

doctrine which remains in sight anywhere is the theory that one who rides in a *private* conveyance thereby makes

Ry. Co. v. Ironmonger, 95 Va. 625, 799 (1904), (two in a boat, and one left to do all the rowing, getting in owner or driver of private vehicle is path of steamer, the other is chargeable with his contributory negligence); Pyle v. Clark, 79 Fed. 744, 25 C. A. 190 (1897); Fisher v. City of Mount Vernon, 41 App. Div. 293, 58 N. Y. Supp. 499 (1899); Little v. Central District, etc. Co., 213 Pa. 229, 62 Atl. 848 (1906); Hydes v. Ferry, etc. Co., 108 Tenn. 428, 67 S. W. 69 (1902); Hot Springs St. Ry. Co. v. Hildreth, 72 Ark. 572, 82 S. W. 245 (1904); Farley v. Wilmington, etc. Ry. Co., 3 Pennw. 581, 52 Atl. 543 (1902); West Chicago, etc. Ry. Co. v. Dougherty, 110 Ill. App. 204, aff'd, 209 Ill. 241 70 N. E. 586 (1903); Noonan v. Consolidated Tr. Co., 64 N. J. Law, 579, 46 Atl. 770 (1900); Robinson v. Metropolitan St. Ry. Co., 179 N. Y. 593, 72 N. E. 1150, aff'd 91 App. Div. 158, 86 N. Y. Supp. 442 (1904); Missouri, etc. Ry. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956 (1897). Master held affected by negligence of his servant in driving him (Read v. City, etc. Ry. Co., 115 Ga. 366, 41 S. E. 629 (1902); Markowitz v. Metropolitan St. Ry. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389 (1904); Crampton v. Ivie, 126 N. C. 894, 36 S. E. 351 (1900). Applying the prevailing rule (Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215 (1905). Bush v. Union Pac. Ry. Co., 62 Kan. 709, 64 Pac. 624 (1901), (where two are driving for pleasure, and the plaintiff is looking out for herself with equal opportunity of seeing danger, she may be guilty of contributory negligence); Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799 (1904), (two in a boat, and one left to do all the rowing, getting in path of steamer, the other is chargeable with his contributory negligence); Holden v. Missouri, etc. Ry. Co., 177 Mo. 456, 76 S. W. 973 (1903), (where one seated beside the driver sees him carelessly driving into danger and does nothing to prevent it, he is himself guilty of contributory negligence), see March v. Kansas City, etc. Ry. Co., 104 Mo. 577, 78 S. W. 284 (1904). Applying general rule (Zimmerman v. Union Ry. Co., 28 App. Div. 445, 51 N. Y. Supp. 1 (1898); Bergold v. Nassau Elec. Ry. Co., 30 App. Div. 438, 52 N. Y. Supp. 11 (1898); Anderson v. Metropolitan St. Ry. Co., 30 Misc. 104, 61 N. Y. Supp. 899 (1899); Reed v. Metropolitan St. Ry. Co., 58 App. Div. 87, 68 N. Y. Supp. 539 (1901), (where the proprietress of a school owning a bus hired a driver and horse by the month to take the children to and fro between the school and their homes, the negligence of the driver is imputable to her). Applying general rule (Penna. v. Interurban St. Ry. Co., 48 Misc. 647, 96 N. Y. Supp. 208 (1905); Wheeling, etc. Ry. Co. v. Suhrwiar, 22 Ohio Cir. Ct. 560, O. C. D. 809 (1901); Shearer v. Town of Buckley, 31 Wash. 370, 72 Pac. 76 (1903); Illinois, etc. Ry. Co. v. Hamill, 128 Ill. App. 152, aff'd, 226 Ill. 88, 80 N. E. 745 (1907); Eckels v. Muttschall, 230 Ill. 462, 82 N. E. 872 (1907); Nonn v. Chicago City Ry. Co., 232 Ill. 378, 83 N. E. 924 (1908); Zalotuchin v. Metropolitan St. Ry. Co., 127 Mo. App. 577, 106 S. W. 548 (1908); Noakes v. New York, etc. Ry. Co.,

the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood v. Bryan*, was invented in Wisconsin, and sustained by a process of elaborate reasoning;⁴⁰ and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed, with some similar reasoning, in *Montana*;⁴¹ and in *Nebraska*,⁴² without any reasoning whatever; which last is certainly the best method of reaching a conclusion, directly opposed to common sense and to the decisions of twenty other courts. The notion that one is the "agent" of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected,⁴³ except in the three States mentioned, and it must soon be abandoned even there.

§ 66a. Stranger's contributory fault no excuse for plaintiff's.—In the natural reaction against the false

121 App. Div. 716, 106 N. Y. Supp. Tr. Co., 87 N. E. (Ind. App.) 694
522 (1907). *Gulf, etc. Ry. Co. v.* (1908), (negligence of the servant
Barnes, 48 So. (Miss.) 823 (1909), driving is imputable to master riding). Applying general rule (*City of Baltimore v. State of Maryland*, 166 Fed. 641, 92 C. C. A. 335 (1908). See note 45, § 66a, *post*.
kin); *Potter v. Fort Wayne, etc.*

⁴⁰ *Prideaux v. Mineral Point*, 43 Elev. Ry. Co., 192 Mass. 386, 78 N. E. 513; followed, *Otis v. Janesville*, 47 Wis. 422, 2 N. W. 783; *Whittaker v. Helena*, 14 Mont. 124, 35 Pac. 904.

Lightfoot v. Winnebago Tr. Co., 123 Wis. 479 (1905), (the negligence of the driver of a private vehicle is imputable to one riding therein); *Omaha, etc. R. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 569.

Lauson v. Town of Fond du Lac, 141 Wis. 57, 123 N. W. 629 (1909). *Even in Pennsylvania, the Wisconsin theory was always repudiated* (*Carlisle v. Brisbane*, 113 Pa. St. 544, 6 Atl. 372; *Mann v. Weiland*, 81 Pa. St. 243).

So held also in *Evensen v. Lexington, etc. Ry. Co.*, 187 Mass. 77, 72 N. E. 355 (1904); *Kane v. Boston*

doctrine of "identification," attempts have been made to excuse a plaintiff from using care to avoid injury, by showing that he relied upon a stranger to do so for him. But such excuses have always failed. No one can be allowed to shut his eyes to danger, in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care.⁴⁴ And one who needlessly entrusts himself to the control of one whom he knows to be incompetent, contributes thereby, in some degree, to injuries which result from such incompetency.⁴⁵ Whether such negligence *proximately* con-

"A person riding in a wagon with another, who is conscious of danger and risk assumed by the driver, and makes no objection or effort to avoid it, is chargeable with the neglect of such driver (*Donnelly v. Brooklyn R. Co.*, 109 N. Y. 16, 15 N. E. 733; *Brickell v. N. Y. Central, etc. R. Co.*, 120 N. Y. 290, 24 N. E. 449; *Griffith v. Baltimore, etc. R. Co.*, 44 Fed. 574; *Brannen v. Kokomo, etc. R. Co.*, 115 Ind. 115, 17 N. E. 202; *Miller v. Louisville, etc. R. Co.*, 128 Ind. 97, 27 N. E. 339). But the degree of care to be exercised varies with the circumstances and emergencies, and a wife's failure to seize the reins, jump out or protest against her husband driving across the track does not constitute negligence as matter of law. It is a question for the jury (*Hoag v. N. Y. Central, etc. R. Co.*, 111 N. Y. 199, 18 N. E. 648). And a passenger in a public hack is under no duty to supervise the driver at a railroad crossing, nor to look or listen for approaching trains, unless she has some reason to distrust the diligence of the driver (*East Tennessee, etc. R. Co. v. Markens*, 88 Ga. 60, 13 S. E. 855); *City of Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315 (1902), (one riding

with another at reckless speed along an unlighted street, on a dark night, cannot recover for injury from collision with a hydrant in its proper place); *Abbitt v. Lake Erie Ry. Co.*, 150 Ind. 498, 50 N. E. 729 (1898), (where by agreement one employee is to look out for the safety of another and give him notice of danger, the negligence of the former is imputable to him, and will defeat his action. Thus where one goes between cars and a co-employee agrees to give him notice of a locomotive's approach and fails to advise him or the engineer of the danger from a locomotive in the service of another company, though the engineer himself is negligent in failing to give notice of the engine's approach by signals, he cannot recover). Note 32, *ante*.

"This qualification is expressly stated in most, if not all, the cases cited under § 66, *ante*. But going in a boat, in charge of a blind man, but able-bodied and familiar with the management of boats, is not of itself contributory negligence (*Harris v. Uebelhoer*, 75 N. Y. 169); *Wilson v. Puget Sound Elec. Ry. Co.*, 52 Wash. 522, 101 Pac. 52 (1909), (not the negligence of the chauffeur, but his own failure to

tributes to the injury depends upon all the circumstances. These principles have thus far been applied only to cases of injuries to passengers in vehicles, managed by negligent persons; but they have a broader application.

§ 67. Husband and wife.—The application of this rule to the case of husband and wife is not free from difficulty, owing to the great changes which have been made in the common law as to their relations. Under the rule of the common law which denied to the wife any right to bring an action, separately from her husband, for damages suffered by her through the negligence of a stranger, it was doubtless proper to hold that the contributory negligence of the husband barred the wife's

do what a person of ordinary prudence would under the circumstances, alone will defeat the right of recovery of one riding in an automobile for hire against a third party causing or contributing to his injury); *Gulf, etc. Ry. Co. v. Barnes*, 48 So. (Miss.) 823 (1909), (failure of the railway company on which plaintiff was a passenger to keep in order an interlocking device at a railway crossing, will not defeat plaintiff's right to recover against another company also negligent); *City of Baltimore v. State*, 166 Fed. 641, 92 C. C. A. 335 (1908); *Lundergon v. New York, etc. Ry. Co.*, 203 Mass. 460, 89 N. E. 625 (1909), (where in approaching a public crossing the master was driving, and the arrangement was that the master should look in one direction for trains and the servant in the other, and the servant was injured by the combined negligence of the master and the railway company, there can be no recovery against the latter); *Gibson v. Bessemer, etc. Ry. Co.*, 226 Pa. 198, 75 Atl. 194 (1910), (the right of

the bailor of a horse to recover against a railway company is not subject to be defeated because of the contributory negligence of the bailee); *Cunningham v. Erie Ry. Co.*, 137 App. Div. 506, 121 N. Y. Supp. 706 (1910), (where the plaintiff's intestate and his companion who was driving were both intoxicated, the plaintiff could not recover for an injury caused by the negligence of both the driver and the railway company, unless his intestate could have known, if sober, that the driver was so intoxicated as that a person of ordinary prudence would not have entrusted his safety to him); *Trauffer v. Detroit, etc. Nav. Co.*, 181 Fed. 256 (the crew of a vessel bears no such relation to the master as to enable the company to defeat their action against it for negligent injury by proof of his negligence); *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774 (1910), (the use of an automobile by two or more persons held a joint enterprise, and the contributory negligence of one imputable to the others); *Reid v. Long Island*

right to recovery, as effectually as it did the husband's.⁴⁶ Even after some change had been made in the common law in relations of husband and wife, yet the form of action remaining the same, it was held that the negligence of a husband, while the wife was under his immediate care, was imputable to the wife, so as to bar her recovery, as much as it would have barred his.⁴⁷ But in New York, Indiana and Missouri and other States, where the change has been radical, and married women have a right to recover in such cases damages for their own separate use, the contributory fault of a husband, while in company with his wife, is not chargeable to her, in such an action.⁴⁸ At common law, a wife's contributory negligence is available against her husband's action for loss of her services.⁴⁹ But it is not so in a State where she has been relieved of all common-law disabilities, and he, of all responsibility for her torts.⁵⁰

Ry. Co., 128 N. Y. Supp. 1074 (1911), Hedges v. Kansas City, 18 Mo. App. 62; Flori v. St. Louis, 3 Id. 231; a railway crossing is not imputable to his passengers); Augustus v. Chicago, etc. Ry. Co., 134 S. W. (Mo. App. 22 (1911)). See note 38, § 66, *ante*.

⁴⁶ Nanticoke v. Warne, 106 Pa. St. 373; Pennsylvania R. Co. v. Good-enough, 55 N. J. Law, 577, 28 Atl. 3; Toledo, etc. R. Co. v. Crittenden, 42 Ill. App. 469.

⁴⁷ Carlisle v. Sheldon, 38 Vt. 440; Yahn v. Ottumwa, 60 Iowa, 429; Peck v. N. Y. & New Haven, etc. R. Co., 50 Conn. 379; Huntoon v. Trumbull, 2 McCrary C. C. 314.

⁴⁸ The contributory negligence of the husband will not bar the wife from recovering for her personal injuries she being free from negligence, though sitting by his side in a wagon driven by him (Platz v. Cohoes, 24 Hun, 101, *aff'd* 89 N. Y. 219; Hoag v. N. Y. Central, etc. R. Co., 111 N. Y. 199, 18 N. E. 648;

⁴⁹ Winner v. Oakland, 158 Pa. St. 405, 27 Atl. 1111. Under the Civil Code of California (§§ 162, 164, 169, 172), damages for personal injuries to the wife being community property and recoverable only in a joint action by husband and wife, it is held that the husband's contributory negligence is a bar to such an action (McFadden v. Santa Ana, etc. R. Co., 87 Cal. 464, 25 Pac. 681). For common-law rule see Newton v. Hatter, 2 Ld. Raym. 1208. It has been changed by the Married Women's Act of 1882.

⁵⁰ Honey v. Chicago, etc. R. Co., 59 Fed. 423. In Texas where the action was for injuries inflicted on the wife by the collision of a railway train at a public crossing with

§ 68. **Knowledge of principal, when imputed to agent.**— Notice to a principal of a danger to his property does not prejudice his right to recover for an injury occasioned by such danger, while his agent, who was not aware of its existence, had exclusive charge of his property, unless the circumstances were such that the principal could and should, in the exercise of ordinary care, have communicated his knowledge to the agent, in time to avoid the injury. For example, if the principal knows of an obstacle in the road, created by the negligence of another, and nothing appears to make it his duty to warn his agent of the special danger caused by such obstacle, and the agent, not knowing the fact, drives his principal's wagon against such obstacle, the principal may, nevertheless, recover from the party in fault.⁵¹ Nor will notice to, or knowledge of, the principal or master be imputed to the agent or servant to defeat the action of the latter for injury caused by the negligence of another.^{51a}

a vehicle driven by the husband, for that reason his negligence would held that the negligence of the husband should be imputed to the wife (Gulf, etc. Ry. Co. v. Greenlee, 62 Tex. 344 (1884). In another case of injury to the wife the court said: "The case was tried below and is presented here upon the assumption that in a suit for personal injuries to the wife the husband's negligence would be imputed to her, and that if he knew of the defects in the brake, or ought to have known, the fact would affect his wife's right to recover to the same extent that it would affect his right had he been injured. He was an employee of the company, she was not," and after reviewing the authorities in other States, "With us the proceeds of a recovery become community property; the recovery is as much for the husband as for the wife, and

for that reason his negligence would affect the right of recovery. Thus we conclude the case was correctly tried on this theory" (Missouri Pac. Ry. Co. v. White, 80 Tex. 202, 15 S. W. 808 (1891). Negligence of husband driving buggy not imputable to wife (Southern Ry. Co. v. King, 128 Ga. 383, 57 S. E. 687, 11 L. R. A. (N. S.) 829 (1907); Cleveland, etc. Ry. Co. v. Dukeman, 134 Ill. App. 396 (1907); Denis v. Lewiston, etc. Ry. Co., 104 Me. 39, 70 Atl. 1047 (1908).

⁵¹ Garmon v. Bangor, 38 Me. 443; Miller v. Rochester Pav. Co., 66 Hun, 634, 21 N. Y. Supp. 651.

^{51a} Siegel, etc. Co. v. Norton, 209 Ill. 201, 70 N. E. 636 (1904); Philip v. Henaty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186 (1904); Martin v. Algona, 49 Ia. 390; St. Louis, etc. Metal Co. v. Dawson, 30 Tex.

§ 69. Knowledge of agent, when imputed to principal. — On the same principle, notice to an agent of the existence of a danger is not necessarily imputable to his principal. In order to charge the principal with contributory negligence in not personally watching for and avoiding danger known to his agent, but not known to him, it must appear that the agent is so far in fault, for not communicating his knowledge, that the principal would have a right of action against him for breach of duty.⁵² But where the master's property, while in charge of his servant, is exposed to a danger of which the servant has notice, the servant's knowledge of the danger of negligence contributing to the injury will be imputed to the master. Thus, in a case where the plaintiff's servant, having plaintiff's team in charge, stopped in the highway, and, leaving the horses unhitched and unattended, engaged in a boisterous altercation with the defendant, which so frightened the horses that they ran away and were injured, it was held that the negligence of the servant in thus exposing the horses unattended on the highway, was a good defense to an action by the master; the test being that the servant was guilty of such negligence as would have precluded him, if he had been the owner of the horses, from maintaining a similar action against the defendant.⁵³

§ 70. Contributory negligence of children. — The application of the rules concerning contributory negli-

App. 261, 70 S. W. 450 (1905); absence of evidence that such instructions had been communicated
Gulf, etc. Ry. Co. v. Barnes, 94 Miss. 484, 48 So. 823 (1909); Houston, etc. Ry. Co. v. Hanks, 124 S. W. 484, 48 So. 823 (1909); Houston, to him).

etc. Ry. Co. v. Hanks, 124 S. W. 484, 48 So. 823 (1909); Galveston, etc. Ry. Co. v. Gartiser, 9 Tex. App. 402; Worsley v. Scarborough, 3 456, 29 S. W. 939 (1895), (the boss of a gang had been instructed in
Atk. 392.

Puterbaugh v. Reasor, 9 Ohio St. 484. To the same effect, Toledo, etc. R. Co. v. Goddard, 25 Ind. 185; Lake Shore, etc. R. Co. v. Miller, 25 Mich. 274.
foggy weather to send out a flagman in approaching sharp curves; held that the plaintiff, one of the gang, was unaffected thereby in the

gence to cases of injuries suffered by small children has been found a matter of considerable difficulty. The obvious hardship of requiring from a little child a degree of care and a soundness of judgment in anticipating and avoiding danger, which are not found in the majority of grown-up persons, and the apparent hardship, on the other hand, of compelling strangers, whose negligence has not contributed any more to the injury of children than the negligence of their own parents or guardians, to compensate for the whole loss, have so embarrassed the courts as to lead to many inconsistent and irreconcilable decisions. Some judges solved the difficulty by holding that even babies are bound in law to use as much care and discretion in avoiding injury, as could be expected from adults. Other judges, shocked at this harsh rule, adopted the equally short method of declaring that the rule of contributory negligence did not apply at all to small children. Still others adopted a midway course, holding that small children were not bound to use any greater care than was usually possessed by children of the same age, but that the negligence of their parents or guardians, in suffering them to be exposed to injury, was to be imputed to them. Under this conflict of opinion, we must attempt to state what seems to us to be the true rule, noting the deflections on one side or the other from that rule, which are supported by authority in the different States.⁵⁴

⁵⁴ See the cases collected and reviewed (Beach, *Contr. Neg.*, 2d ed., §§ 116-142). Negligence of parent not imputable to child (*Atlantic, Pittsburg Ry. Co.*, 219 Pa. 492, etc. *Ry. Co. v. Crosby*, (Fla.) 43 So. 318 (1907); *Atchison, etc. Ry. v. Calhoun*, 18 Okl. 75, 89 Pac. 207 (1907); *Neff v. City of Camerson*, 213 Mo. 350, 111 S. W. 1139 (1908); *Wallace v. Jno. A. Casey Co.*, 116 N. Y. Supp. 394, 132 App. Div. 35 (1909). Parent not precluded by negligence of child five years old when ignorant that it was in the habit of coming into the business part of town unattended (*Saxton v. Conga v. 68 Atl. 1022* (1908); *United Ry. Co. v. Carmeal*, 110 Md. 211, 72 Atl. 771 (1908). Complete defense when action is for parents'.

§ 71. Negligence of parents in parent's action. — It may be as well, in the first place, to eliminate from the discussion a class of cases which have been improperly mingled with the others, thus creating confusion. When a parent or master sues, *for his own benefit*, to recover damages for the technical loss of service caused to him by the injury of a child or servant, the contributory negligence of the actual plaintiff,⁵⁵ or his agent,⁵⁶ is of

benefit (Ill. Cent. Ry. v. Warriner, 229 Ill. 91, 82 N. E. 246 (1907). If child exercises same prudence as adult negligence of parent negatived (Serano v. N. Y. Cent., etc. Ry., 188 N. Y. 156, 80 N. E. 1025 (1907). Where child is driving, his neglect not imputable to parent unless there is voluntary surrender of all care (Peabody v. Haverhill, etc. St. Ry. Co., 200 Mass. 277, 85 N. E. 1051 (1908). A mother whose duties require her attention in the kitchen of an humble home is not necessarily guilty of contributory negligence in allowing three-year-old child to play in street in care of a sister eight years old; all the circumstances are to be considered in determining whether she was negligent in fact (Murry v. Scranton, 36 Pa. Super. Ct. 576 (1908). See also on latter point Fox v. Oakland Consol. St. Ry. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216 (1897); Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108 (1888). Laboring people are required to exercise a reasonable degree of care and control over their infant children, having relation to their condition in life, such

as prudent parents in their circumstances do in fact exercise, but they are not required to do more (Chicago, etc. Ry. Co. v. Gregory, 58 Ill. 226; Weida v. Hanover Tp., 30 Pa. Super. Ct. 424; Chicago v. Hessing, 83 Ill. 204. Notes 58, 60, *post*.

⁵⁵ Of the many authorities in support of this rule, we may cite the following: Leslie v. Lewiston, 62 Me. 468; Daley v. Norwich, etc. R. Co., 26 Conn. 591; Wright v. Malden, etc. R. Co., 4 Allen, 283; Glassey v. Hestonville, etc. R. Co., 57 Pa. St. 172; Philadelphia, etc. R. Co. v. Long, 75 Id. 257; Pennsylvania R. Co. v. Bock, 93 Id. 427; Smith v. Hestonville, etc. R. Co., 92 Id. 450 [plaintiff permitted young son to serve drivers of horse cars with water]; Westerberg v. Kinzua R. Co., 142 Id. 471, 21 Atl. 878; Baltimore, etc. R. Co. v. Fryer, 30 Md. 47; Pratt Coal Co. v. Brawley, 83 Ala. 371, 3 So. 555 [sending child across railroad]; Bamberger v. Citizens' R. Co., 75 Tenn. 18, 31 S. W. 163; Ohio, etc. R. Co. v. Hammersly, 28 Ind. 371 [permitting a boy to serve laborers on a construction train with water]; Jeffersonville, etc. R. Co. v. Bowen, 40 Id. 545, 49

⁵⁶ Pratt Coal Co. v. Brawley, 83 N. Y. Supp. 430 [mother sent young child across street, knowing mother in charge]; Albert v. Albany it to be dangerous].
R. Co., 5 N. Y. App. Div. 544, 39

course a good defence. And in such an action any contributory negligence of the child or servant, which would suffice to bar an action brought in his name, will also preclude a recovery by the parent or master.⁵⁷ It is obvious that decisions in such cases afford no support to the doctrine that the negligence of the parent is to be imputed to the child. Yet they are continually cited for that purpose, both in opinions and digests. The distinction between the two classes of cases is, however, well illustrated in two Ohio decisions. A child brought an action upon his own injuries, and the court held that his father's contributory negligence was no defence.⁵⁸ The father brought another action upon the same injury, to recover for loss of service; and the same court held his contributory negligence to be a complete defense.⁵⁹

Id. 154; Evansville, etc. R. Co. v. Spokane, etc. R. Co. v. Holt, — Wolf, 59 Id. 89; Chicago v. Hesing, Idaho, —, 40 Pac. 56. There is such 83 Ill. 204; Chicago, etc. R. Co. v. practical consensus of opinion on Becker, 84 Id. 483; Hund v. Geier, the subject that the citation of 72 Id. 393; Chicago v. Major, 18 Id. more recent authorities to the same 349; Pekin v. McMahon, 154 Id. effect is superfluous. That the negli- 141, 39 N. E. 484; Isabel v. Hanni- gence of one parent in such case will bal, etc. R. Co., 60 Mo. 475; Koons bar recovery by the other, see v. St. Louis, etc. R. Co., 65 Id. 592; Toner's Admr. v. South Covington O'Flaherty v. Union, etc. R. Co., 45 St. Ry. Co., 109 Ky. 41, 58 S. W. Id. 70; Lynch v. Metropolitan R. 439, 22 Ky. L. R. 564 (1900). Co., 112 Id. 420, 20 S. W. 642;

⁵⁷ Moore v. Pennsylvania R. Co., Citizens' R. Co., 75 Tenn. 18, 31 99 Pa. St. 301; Honegsberger v. S. W. 163.

Second Ave. R. Co., 2 Abb. Ct. App. 378; Burke v. Broadway, etc. R. Co., 49 Barb. 529 [both these cases have been overruled on other points, but not on this]. s. p., Kennard v. Burton, 25 Me. 39; Fitzgerald v. St. Paul, etc. R. Co., 29 Minn. 336; Chicago, etc. R. Co. v. Harney, 28 Ind. 28; Atlanta, etc. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550; Westbrook v. Mobile, etc. R. Co., 66 Miss. 560, 6 So. 321; Bamberger v.

⁵⁸ Bellefontaine, etc. R. Co. v. Snyder, Jr., 18 Ohio St. 399.

⁵⁹ Bellefontaine, etc. R. Co. v. Snyder, Sr., 24 Ohio St. 670; both cases approved in Pratt Iron Co. v. Brawley, *supra*. Western Union Tel. Co. v. Hoffman (80 Tex. 420, 15 S. W. 1048) was a joint action by a father and his minor son for failure to deliver a telegram sent by the mother to a physician to attend the son, whose arm had that day

§ 72. **Parent must be actually in fault.**—Even in an action by the parent or master, however, it is to be remembered that he must be actually in *fault*, in order to bar his recovery on the ground of his contributory fault. This branch of the rule has sometimes been overlooked; but it has been well pointed out and enforced in later cases, especially in Pennsylvania. Where a parent or guardian has done all which can reasonably be expected of one in his circumstances, he is not debarred from recovery by the mere fact that he has not thrown as many restraints around his child for its protection as would be reasonably expected from parents having more means at their command. Thus, a poor woman, earning her daily bread, is not necessarily in fault because she does not restrain her child from wandering in the street. In these and all similar cases, all the circumstances are to be taken into account; and the question to be determined is whether the plaintiff took as much care of his child as reasonably prudent persons of the same class and with the same means ordinarily do.⁶⁰ If the guardian of a child has taken ordinary care of him, and, notwithstanding the use of such care, the child escapes into a dangerous place, there is no negligence on the part of the guardian.⁶¹ Furthermore, the parent's fault is of no

been broken. The telegram was not delivered for nine days, and in the meantime the parents made no further effort to procure a physician until it was too late to save the arm. Held, the father's contributory negligence barred his recovery, but, defendant's negligence being conceded, a judgment for the son was proper.

⁶⁰ Philadelphia, etc. R. Co. v. Long, 75 Pa. St. 257; Pittsburgh, etc. R. Co. v. Pearson, 72 Id. 169; Kay v. Pennsylvania R. Co., 65 Id. 277; Pennsylvania R. Co. v. Lewis, 79 Id. 33; O'Flaherty v. Union, etc. R. Co., 45 Mo. 70; Isabel v. Hannibal, etc. R. Co., 60 Id. 475; Frick v. St. Louis, etc. R. Co., 75 Id. 541; Walters v. Chicago, etc. R. Co., 41 Iowa, 71; Hoppe v. Chicago, etc. R. Co., 61 Wis. 357; Murry v. Scranton, 36 Pa. Super. Ct. 576 (1908); Winter v. Kansas City Ry. Co., 99 Mo. 509, 17 Am. St. Rep. 591 (1889).

⁶¹ Weil v. Dry Dock, etc. R. Co., 119 N. Y. 147, 23 N. E. 487; Huerzeler v. Central, etc. R. Co., 139 N. Y. 490, 34 N. E. 1101; Mangam v. Brooklyn R. Co., 38 N. Y. 455; Railroad Co. v. Stout, 17 Wall, 657; Karr v. Parks, 40 Cal. 188; Mulligan v. Curtis, 100 Mass. 512; Creed

importance, if the child acted with as much prudence as would be required from an adult,⁶² for then it is not a proximate cause of any injury.

§ 72a. Contributory negligence in the case of children. — Though children are held liable for their unintentional injuries to others without reference to their ability to exercise discretion, such is not the rule in the law of contributory negligence. On the contrary their responsibility or irresponsibility for acts or omissions that would constitute contributory negligence on the part of an adult is to be determined by the very inquiry whether they were of sufficiently mature judgment to be able to distinguish between what was prudent and what was imprudent with respect to the particular act or omission charged. Whatever difference of opinion there may be as to soundness of the doctrine of the liability of children for primary negligence, the wisdom and justice of the rule forbidding one who has negligently inflicted an injury on one of them from invoking the rule of contributory negligence, to exempt himself from liability, except where the child had the necessary discretion to distinguish the quality of the act, is probably of universal assent both by jurists and ethicists. The same rule that applies to persons in general, who from their age may

v. Kendall, 156 Id. 291, 31 N. E. 6; question of the parent-plaintiff's
Slattery v. O'Connell, 153 Mass. 94, contributory negligence is for the
26 N. E. 430; Rauch v. Lloyd, 31 jury (Bliss v. South Hadley, 145
Pa. St. 358; Bronson v. Southbury, Mass. 91, 13 N. E. 352; Reilly v.
37 Conn. 199; Baltimore, etc. R. Co. Hannibal, etc. R. Co., 94 Mo. 600, 7
v. State, 30 Md. 47; Pittsburgh, etc. S. W. 407; Platte, etc. Milling Co.
R. Co. v. Bumstead, 48 Ill. 221; v. Dowell, 17 Colo. 376, 30 Pac. 68,
Elgin, etc. R. Co. v. Raymond, 148 and cases, *supra*.

Id. 241, 35 N. E. 729; Illinois Cen- ⁶²Merryman v. Chicago, etc. Ry.
tral R. Co. v. Slater, 129 Ill. 91, 21 Co., 85 Ia. 634, 52 N. W. 545
N. E. 575; Louisville, etc. R. Co. v. (1892); Carson v. Chicago, etc. Ry.
Shanks, 132 Ind. 395, 31 N. E. 1111; Co., 96 Ia. 583, 65 N. W. 831
Weissner v. St. Paul City R. Co., (1896); Serano v. New York, etc.
47 Minn. 468, 50 N. W. 606; Me- Ry. Co., 188 N. Y. 156, 80 N. E.
Guire v. Vicksburg, etc. R. Co., 46 1025 (1907).
La. Ann. 1543, 16 So. 457. The

be assumed to have the necessary discretion to protect themselves by refraining from the acts or omissions that will contribute to their injury, cannot be applied to infants whose immaturity, age, lack of judgment and discretion render them incapable of self-protection. And, as to them, the negligence of another inflicting the injury will fix liability, though the act or omission of such a child, if by an adult or by a child possessing the requisite discretion, would defeat a recovery. It is not the fact of the child's minority that disentitles one who has negligently injured him from claiming exemption from liability in such case, but of his immaturity of judgment and lack of the power or capacity to appreciate the danger to which he exposes himself. To the extent that children are able to appreciate the danger to which they expose themselves, they are responsible for their contributory negligence. The law imposes upon minors the duty of giving such attention to their surroundings, and care to avoid danger, as may fairly or reasonably be expected from persons of their age and capacity.

§ 73. Degree of care required from child. — It is now settled by an overwhelming weight of authority that a child is held, so far as he is personally concerned, only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his immaturity of judgment by reason of age.⁶³ No injustice

⁶³ *Railroad Co. v. Gladmon*, 15 Wall. 401; *Railroad Co. v. Stout*, 17 Id. 657; *Lynch v. Nurdin*, 1 Q. B. 29. In *Railroad Company v. Gladmon*, 15 Wall. 401, Hunt, J., said: "Of an infant of tender years less discretion is required [than of an adult]; and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than one of seven, and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child; and this is to be determined in each case by the circumstances of that case." In *Rauch v. Lloyd*, 31 Pa. St. 358, Woodward, J., said: "Children are to be held responsible only for the discretion of children." In *Thurber v. Harlem, etc. R. Co.*, 60 N. Y. 326, it was held that the degree of care required of a child (in this case a boy of nine) was to be graduated by the age and capac-

is done to the defendant by this limitation of the defense

ity of the individual; and if the jury were of the opinion that the boy had shown the possession and exercised prudence and discretion in as great a degree as could be expected, they were justified in finding a verdict for plaintiff. Acts that in an adult would be contributory negligence, such as would justify a non-suit, in an infant would be properly a question to be left to the jury (*Barry v. N. Y. Central R. Co.*, 92 N. Y. 289; *McGovern v. N. Y. Central R. Co.*, 67 N. Y. 417; *Jones v. Utica, etc. R. Co.*, 36 Hun, 115). A verdict for a boy of seven who was injured in trying to get on a moving train, there being no negligence on the part of train hands, cannot stand (*Chicago, etc. R. Co. v. Stumps*, 69 Ill. 409). See *McMahon v. Northern R. Co.*, 39 Md. 438; *Cram v. Metropolitan R. Co.*, 112 Mass. 38; *Ecliff v. Wabash, etc. R. Co.*, 64 Mich. 196, 31 N. W. 180. It has been said that the presumption that a child of fourteen has capacity to avoid danger can only be overthrown by clear proof of the absence of such discretion (*Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35). But see *Hayes v. Bush Manfg. Co.*, 41 Hun, 407, and *Cincinnati R. Co. v. Wright*, 54 Ohio St. 181, 43 N. E. 688. And in *Haycraft v. Lake Shore R. Co.* (64 N. Y. 636), the question whether a girl, nearly seventeen, whose injury was clearly due to her own carelessness, was guilty of contributory negligence, was left to the jury under an instruction that she was not to be held to so high a degree of care as an older person would be. It is not, as matter of law, negligence to allow a child of four and one-half years to play on the side-walk with her brother, six years of age, in a thickly populated portion of a city, on an August afternoon, but the question is for the jury (*Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; aff'g 41 Hun, 404). The rule stated in the text has been recognized by the courts of the following states: *Alabama* (*Government R. Co. v. Hanlon*, 53 Ala. 70; *Mobile, etc. R. Co. v. Crenshaw*, 65 Id. 566); *California* (*Rosenberg v. Durfree*, 87 Cal. 545, 26 Pac. 793); *Connecticut* (*Birge v. Gardiner*, 19 Conn. 507; *Bronson v. Southbury*, 37 Id. 199); *Georgia* (*Western, etc. R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912. s. c., 83 Ga. 512, 10 S. E. 197; *Central, etc. R. Co. v. Rylee*, 87 Ga. 491, 13 S. E. 584); *Illinois* (*Kerr v. Forgue*, 54 Ill. 482; *Chicago, etc. v. Gregory*, 58 Id. 226; *Chicago, etc. R. Co. v. Murray*, 71 Id. 601; *Rockford, etc. R. Co. v. Delaney*, 82 Id. 198; *Chicago, etc. R. Co. v. Becker*, 76 Id. 25, 84 Id. 483; *Illinois Central R. Co. v. Slater*, 129 Id. 91, 21 N. E. 575); *Indiana* (*St. Louis, etc. R. Co. v. Valirius*, 56 Ind. 511; *Atlas Engine Works v. Randall*, 100 Id. 293); *Iowa* (*McMillan v. Burlington, etc. R. Co.*, 46 Iowa, 231); *Kansas* (*Kansas Pacific R. Co. v. Whipple*, 39 Kans. 531, 18 Pac. 730); *Maryland* (*Baltimore, etc. R. Co. v. State*, 30 Md. 47; *Baltimore, etc. R. Co. v. McDonnell*, 43 Id. 534); *Massachusetts* (*Munn v. Reed*, 4 Allen, 431; *Lynch v. Smith*, 104 Mass. 52; *Plumley v. Birge*, 124 Id. 57; *O'Connor v. Boston, etc. R. Co.*, 135 Id. 352; *Elkins v. Boston, etc. R. Co.*, 115 Id. 190); *Michigan* (*East Saginaw R. Co. v. Bohn*, 27 Mich. 503; *Wright v. Detroit, etc. R. Co.*, 77 Id. 123, 43 N. E. 765);

of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be

Missouri (Boland v. Missouri, etc. R. Co., 36 Mo. 484; O'Flaherty v. Union R. Co., 45 Mo. 70; Hicks v. Pacific, etc. R. Co., 64 Id. 430; Lynch v. Metropolitan, etc. R. Co., 112 Id. 420, 20 S. W. 642; Ridenhour v. Kansas City R. Co., 102 Mo. 270, 14 S. W. 760); *New Jersey* (Traction Co. v. Scott, 58 N. J. Law, 682, 34 Atl. 1094); *New York* (Thurber v. Harlem, etc. R. Co., 60 N. Y. 326; McGovern v. N. Y. Central R. Co., 67 Id. 417; Ihl v. Forty-second St. R. Co., 47 Id. 317; Mangam v. Brooklyn R. Co., 38 Id. 455; Byrne v. N. Y. Central R. Co., 83 Id. 620; Dowling v. N. Y. Central R. Co., 90 Id. 670; Barry v. N. Y. Central R. Co., 92 Id. 289; Weaver v. Bullis, 14 N. Y. Supp. 338; aff'd 128 N. Y. 634 [overruling Honegsberger v. Second Ave. R. Co., 2 Abb. Ct. App. 378, 1 Keyes, 574]; McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812 [boy of 13]); *North Carolina* (Manly v. Wilmington, etc. R. Co., 74 N. C. 655); *Ohio* (Cleveland, etc. Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466; Lake Erie, etc. R. Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980; *Pennsylvania* (Rauch v. Lloyd, 31 Pa. St. 358; Smith v. O'Connor, 48 Id. 218; North Penn. R. Co. v. Mahoney, 57 Id. 187; Gray v. Scott, 66 Id. 345; Philadelphia, etc. R. Co. v. Hassard, 75 Id. 367; see Philadelphia, etc. R. Co. v. Spearen, 47 Id. 300); *South Carolina* (Bridger v. Asheville, etc. R. Co., 27 S. C. 456, 3 S. E. 860); *Tennessee* (Queen v. Dayton, etc. Iron Co., 95 Tenn. 458, 32 S. W. 460); *Texas* (Galveston, etc. R. Co. v. Moore, 59 Tex. 64; Houston, etc. R. Co. v. Simpson, 60 Id. 103); *Ver-*
mont (Robinson v. Cone, 22 Vt. 715); *Washington* (Roth v. Union Depot Co., 13 Wash. St. 525, 43 Pac. 641); *Wisconsin* (Schmidt v. Milwaukee, etc. R. Co., 23 Wis. 186; Meibus v. Dodge, 38 Id. 300; Reed v. Madison, 83 Id. 171, 53 N. W. 547). *Denver City Tram. Co. v. Nichols*, 35 Colo. 462, 84 Pac. 813 (1906); *Rohloff v. Fair Haven, etc. Ry. Co.*, 76 Conn. 689, 58 Atl. 5 (1904); *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069 (1905); *Tully v. Philadelphia, etc. Ry. Co.*, 2 Pennw. (Del.) 537, 47 Atl. 1019, 82 Am. St. Rep. 25, and 3 Pennw. 455, 50 Atl. 95 (1900); *Western, etc. Ry. Co. v. Rogers*, 104 Ga. 224, 30 S. E. 804 (1898); *Herrington v. City of Macon*, 125 Ga. 58, 54 S. E. 71 (1906); *Elmwood Elec. St. Ry. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535 (1900); *Pittsburgh, etc. Ry. Co. v. Moore*, 110 Ill. App. 304 (1903); *Illinois Cent. Ry. Co. v. Johnson*, 221 Ill. 42, 77 N. E. 592, (1906); *Fishburn v. Burlington, etc. Ry. Co.*, 127 Ia. 483, 103 N. W. 481 (1905); *Harper v. Kopp*, 21 Ky. L. Rep. 234, 73 S. W. 1127 (1903); *Mitchell v. Illinois Cent. Ry. Co.*, 110 La. 630, 34 So. 714, 98 Am. St. Rep. 472 (1903); *Young v. Small*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457 (1905); *Slattery v. Lawrence Ice Co.*, 190 Mass. 79, 76 N. E. 459 (1906); *Lehman v. Eureka Iron, etc. Wks.*, 114 Mich. 260, 72 N. W. 183 (1897); *Rogers v. Meyerson Printing Co.*, 103 Mo. App. 683, 78 S. W. 79 (1903); *Heinzle v. Metropolitan St. Ry. Co.*, 182 Mo. 528, 81 S. W. 848 (1904); *Lafferty v. Third Ave. Ry. Co.*, 176 N. Y. 594,

made liable, if he has not been himself in fault.⁶⁴ Thus where one is driving a horse with ordinary care, at a rate of speed suited to the locality, he is of course not liable for an injury by the horse to a child who suddenly throws himself in the way, and is run over before the driver can prevent it.⁶⁵ So, if a child, proceeding in reckless haste, however natural to his age, should rush against a railroad car while in motion, the driver of the car or engineer of the train not seeing him, it is obvious that his own act is the sole cause of his injury; and even

68 N. E. 1118 (1903); *Dubiver v. City, etc. St. Ry. Co.*, 44 Ore. 227, 75 Pac. 693; s. c., 74 Pac. 915 (1904); *Parker v. Washington Elec. St. Ry. Co.*, 207 Pa. 438, 56 Atl. 1001 (1904); *Missouri, etc. Ry. Co. v. Scarborough*, 29 Tex. App. 194 (1902); *Houston, etc. Ry. Co. v. Bulger*, 35 Tex. App. 478, 80 S. W. 557 (1904); *Smith's Admr. v. National Coal, etc. Co.*, 117 S. W. (Ky.) 280 (1909); *Batchelor v. Degnon Co.*, 115 N. Y. Supp. 93, 131 App. Div. 136 (1909); *Texas, etc. Ry. Co. v. Crump*, 102 Tex. 250, 115 S. W. 653 (1909); *Garrison v. St. Louis, etc. Ry. Co.*, 92 Ark. 437, 123 S. W. 653 (1909); *Cincinnati, etc. Ry. Co. v. Cooke*, 121 S. W. (Ky.) 467 (1909); *Thompson v. Missouri, etc. Ry. Co.*, 93 Mo. App. 548, 67 S. W. 693 (1902), ("A boy may have the knowledge of an adult person in respect to the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which is possessed by the ordinarily prudent person; and therefore it has become a settled rule of law in this State that a child is not negligent if he exercises that degree of care which, under like circumstances would be expected of one of his years and capacity"), (*Gesas v. Oregon, etc. Ry. Co.*, 33 Utah, 156, 93 Pac. 274, 13 L. R. A. (N. S.) 1074 (1907), ("The degree of care required of a child must be graduated to its age, capacity and experience, and must be measured by what might ordinarily be expected from a child of like age, capacity and experience, under similar circumstances"). To the same effect, *Batchelor v. Imp. Co.*, 131 App. Div. 136, 115 N. Y. Supp. 93; *McGee v. Wabash Ry. Co.*, 214 Mo. 530, 114 S. W. 33 (1908); *Seifert v. Schaible*, 81 Kan. 323, 105 Pac. 529 (1909); *Force v. Standard Silk Co.*, 160 Fed. 992 (1908). For varying forms of expression adopted by the courts and collection of cases see 29 Cyc., pp. 535-6, and notes.

⁶⁴ *Felton v. Aubrey*, 20 C. C. A. 436, 74 Fed. 350.

⁶⁵ This was substantially the case in *Hartfield v. Roper* (21 Wend. 615), and the court, therefore, held the defendant free from negligence. The opinion of the court upon all other points has been generally disapproved (see *Rauch v. Lloyd*, 31 Pa. St. 358; *Robinson v. Cone*, 22 Vt. 213), and has been completely overruled, so far as it undertakes to require from a little child the same degree of care as from a grown per-

though he may be entirely free from blame, the most that can be said in his favor is that the case is one of inevitable accident; and the owner of the car is no more responsible for his injury than would have been the owner of a wall against which the child had thoughtlessly struck himself.⁶⁶ It was held in some English cases, that if a child's own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of injury, the latter cannot recover damages.⁶⁷ But these decisions have been condemned in England,⁶⁸ and are directly opposed to the current of American cases.⁶⁹ The law has been settled to the contrary, in America, by the famous series of turn-

son. See *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415; and *Beach*, *Contrib. Negl.*, 2d ed., § 119 *et seq.*

⁶⁶ *Burke v. Broadway R. Co.*, 49 Barb. 529. The *dicta* of the court, in that case, upon the general question of the care required from a child, have been overruled, and are of no authority; but upon this particular point, assuming that the facts were as above stated, the decision was correct. *S. P.*, *Felton v. Aubrey*, 20 C. C. A. 436, 74 Fed. 350; *Baker v. Flint, etc. R. Co.*, 68 Mich. 90, 35 N. W. 836. In *Chicago, etc. R. Co. v. McLaughlin* (47 Ill. 265), it was held not to be the duty of a railroad company to guard its cars so as to prevent children from climbing over them.

⁶⁷ *Hughes v. Macfie*, 2 Hurlst. & C. 744; *Mangan v. Atterton*, L. R. 1 Ex. 239, 4 Hurlst. & C. 388.

⁶⁸ *Clark v. Chambers*, L. R. 3. Q. B. Div. 327, 339. See *Beven on Negligence* (3d ed.), pp. 161-3-6-170.

⁶⁹ *Birge v. Gardiner*, 19 Conn. 507. In that case, the defendant negligently hung a gate, and the plaintiff, who was six or seven years old,

shook the gate, which fell upon him. The jury having found, in respect to the age, condition and circumstances of the plaintiff, that he was guilty of no negligence, it was held that even if the plaintiff was a trespasser, he could recover. In *Kunz v. Troy* (104 N. Y. 344, rev'g 36 Hun, 615), it was held that a boy less than six years old could recover for injuries caused by his pulling down upon himself a bar-counter, which had been negligently suffered by the city to obstruct a sidewalk. So in *McGuinness v. Butler* (159 Mass. 233, 34 N. E. 259), it was held that a child who, in play with other boys, interfered with marble slabs resting on private property, and participated in throwing the stones over on himself, could not recover for his injuries, though defendant may have been negligent in leaving the slabs where he did, and though the child's conduct was such as might reasonably have been expected of him. The duty owing to children incapable of contributory negligence, in such cases, is treated in this work under the headings *Land and Structures*, *Railroad Injuries to Persons*.

table cases, in which railroad companies were held liable by the Federal Supreme Court, as well as by several State courts of last resort, for injuries suffered by little children, in consequence of their own acts in meddling with railroad turn-tables, which were left open to public access, unfastened and unguarded, although, of course, perfectly harmless if let alone.⁷⁰ When such turn-tables

⁷⁰ *Railroad Co. v. Stout*, 17 Wall. Minn. 207); *Missouri* (Koons v. 657, aff'g 2 Dill. 294. These turn-table cases were unfavorably noticed by Miller, J., in *McAlpin v. Powell* (70 N. Y. 126), where a boy of ten years was not allowed to recover for injuries received from a defective fire-escape. But they have been followed in *California* (*Meeks v. Southern*, etc. R. Co., 56 Cal. 513; *Barrett v. Southern Pacific R. Co.*, 91 Id. 296, 27 Pac. 666; *Callahan v. Eel River*, etc. R. Co., 92 Cal. 89, 28 Pac. 104); *Georgia* (*Ferguson v. Columbus*, etc. R. Co., 77 Ga. 102); *Kansas* (*Union Pacific R. Co. v. Dunden*, 37 Kans. 1, 14 Pac. 501; *Kansas*, etc. R. Co. v. *Fitzsimmons*, 22 Kans. 686); *Kentucky* (*Bransom v. Labrot*, 81 Ky. 638 [lumber piled loosely in defendant's yard]); *Louisiana* (*Westerfield v. Levis*, 43 La. Ann. 63, 9 So. 52 [boy got on a street-roller left uncared for in street]; but compare *O'Connor v. Illinois Central R. Co.*, 44 La. Ann. 339, 10 So. 678 [cars stored in an enclosed lot]); *Massachusetts* (*Gay v. Essex*, etc. R. Co., 159 Mass. 238, 34 N. E. 186 [cars left standing in street with unfastened brakes, likely to attract children]; but compare *Daniels v. N. Y. & New England R. Co.*, 154 Mass. 349, 28 N. E. 283); *Michigan* (*Powers v. Harlow*, 53 Mich. 507, a dynamite case); *Minnesota* (*O'Malley v. St. Paul*, etc. R. Co., 43 Minn. 289, 45 N. W. 440; *Keffe v. Milwaukee*, etc. R. Co., 21 Co., 34 Utah, 423, 98 Pac. 311

are kept in a place not readily accessible and where children could not be reasonably expected to enter,⁷¹ or if they were properly fastened or guarded,⁷² the companies

- (1908); *San Antonio, etc. Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28 (1898) [peculiarly attractive]; *Missouri, etc. Ry. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825 (1896) [obviously dangerous]; *Isbell v. Haywood Lbr. Co.*, 47 Tex. App. 345, 105 S. W. 211 (1907); *Fitzmaurice v. Connecticut Ry. Co.*, 78 Conn. 406, 62 Atl. 620, 112 Am. St. Rep. 159, 3 L. R. A. (N. S.) 149 (1905) [known to owner]; *Chicago, etc. Ry. Co. v. Fox*, *supra*; *Biggs v. Consolidated Barb-wire Co.*, 60 Kans. 217, 56 Pac. 4, 44 L. R. A. 655 (1899); *Chicago, etc. Ry. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920 (1902); *Marcantis v. Murray*, 63 App. Div. 119, 71 N. Y. Supp. 418; *Cooper v. Overton*, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 561 (1909); *Ollis v. Houston, etc. Ry. Co.*, 31 Tex. App. 601, 73 S. W. 30 (1903); *Nashville Lbr. Co. v. Busbee*, 139 S. W. (Ark.) 301 (1911); *Thompson v. Cumberland, etc. Tel. Co.*, 138 Ky. 109, 127 S. W. 531 (1910); *Blum v. Weatherford*, 121 La. 298, 46 So. 317 (1908); *Marchek v. Klute*, 133 Mo. App. 280, 113 S. W. 654 (1908); *Snare, etc. Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369 (1909). Generally, *Consolidated Elec. Light Co. v. Healy*, 65 Kans. 798, 70 Pac. 884 (1902); *McAllister v. Jung*, 112 Ill. App. 138; *American Advertising Co. v. Flannigan*, 100 Ill. App. 452; *Biggs v. Consolidated Barb-wire Co.*, 60 Kans. 217, 56 Pac. 4, 44 L. R. A. 655 (1899); *Stollery v. Cicero, etc. Ry. Co.*, 243 Ill. 290, 90 N. E. 709 (1910); *Linnberg v. Rick Island, etc. Ry. Co.*, 136 Ill. App. 495; *Lewis v. Cleveland, etc. Ry. Co.*, 42 Ind. App. 337, 84 N. E. 23 (1908); *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619 (1907); *Palmer v. Oregon, etc. Ry. Co.*, 34 Utah, 466, 98 Pac. 689 (1908); *Olsen v. Gill, etc. Invest. Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884 (1910). *Contra*, *Mayfield Water, etc. Co. v. Webb*, 129 Ky. 395, 111 S. W. 712, 130 Am. St. Rep. 469, 18 L. R. A. (N. S.) 179 (1908) [electric wires that could only be reached by climbing a pole, held not attractive]; *McEachern v. Boston, etc. Ry. Co.*, 150 Mass. 515, 23 N. E. 231 (1890); *Ryan v. Tower*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310 (1901); *Delaware, etc. Ry. Co. v. Reich*, 61 N. J. L. 635, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831 (1898); *Paolino v. McKendall*, 24 R. I. 431, 53 Atl. 268, 96 Am. St. Rep. 736, 60 L. R. A. 133 (1901); *Reid v. Harmon*, 161 Mich. 51, 125 N. W. 761 (1910); *Zeigler v. Iron Works*, 70 Misc. 553, 127 N. Y. Supp. 457; *Bottum's Admr. v. Hawks*, 79 Atl. (Vt.) 858 (1911).
- ⁷¹ *St. Louis, etc. R. Co. v. Bell*, 81 Ill. 76; *Schmidt v. Kansas Distilling Co.*, 90 Mo. 284, 1 S. W. 865.
- ⁷² *Bates v. Nashville, etc. R. Co.*, 90 Tenn. 36, 15 S. W. 1069; *Haesley v. Winona, etc. R. Co.*, 46 Minn. 233, 48 N. W. 1023; *Kolsti v. Minneapolis, etc. R. Co.*, 32 Minn. 133. For peculiar cases, in which defendant was held liable to children. see *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156 [hot ashes on lot]; *Gunderson v. Northwestern*

are not thus liable. In that case there would be no negligence on the part of the companies.

§ 73a. Age of discretion.—Everywhere, it would seem, a person of over fourteen years of age is presumed to be capable of using some reasonable degree of care for his own protection;⁷³ and in New York this line has been once drawn at twelve years.⁷⁴ This, however, is a mere presumption, at all events, up to eighteen years, if not to twenty-one; and the question is for the jury.⁷⁵ It has been held that the division line, between responsible and irresponsible age, is not for the jury, but must be decided by the court,⁷⁶ but the weight of authority is otherwise.^{76a} In analogy to the rule which

Elevator Co., 47 Minn. 161, 49 N. W. 694 [machinery started]; and for cases in which children could not recover, see *Rodgers v. Lees*, 140 Pa. St. 475, 21 Atl. 399 [machinery in motion from unknown cause]; *Missouri, etc. R. Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430 [child of eight, disobeying orders to quit]; *Robinson v. Oregon, etc. R. Co.*, 7 Utah, 493, 27 Pac. 689 [unguarded handcar].

⁷³ See *Pratt Iron Co. v. Brawley*, 83 Ala. 371, 3 So. 555.

⁷⁴ *Tucker v. N. Y. Central, etc. R. Co.*, 124 N. Y. 308, 26 N. E. 916. This case, so far as it held a boy of twelve bound to as much care as an adult, is clearly overruled by the superior authority of *Swift v. Staten I. R. Co.*, 123 N. Y. 645, 25 N. E. 378.

⁷⁵ At eighteen years a full degree of care is required (*Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753); but not at sixteen (*Kucera v. Merrill Lumber Co.*, 91 Wis. 637, 65 N. W. 374); or at fifteen (*Swift v. Staten Island R. Co.*, 123 N. Y. 645, 25 N. E. 378; *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119).

⁷⁶ In the case of a boy between fourteen and fifteen years of age, *Paxson, J.*, in *Nagle v. Allegheny, etc. R. Co.*, 88 Pa. St. 35, said: "At what age must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would give us a mere shifting standard affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury, but of law for the court." *s. p.*, *Deitrich v. Baltimore, etc. R. Co.*, 58 Md. 347. But compare many cases elsewhere cited, apparently to the contrary.

^{76a} Whether a child has sufficient capacity to understand the danger is ordinarily a question for the jury, unless the child is of such tender years that its incapacity is a matter of which the court can take notice as of common knowledge (*Denver City Tramway Co. v. Nicholas*, 35 Colo. 462,

holds a child under seven years of age incapable of crime, some courts have also considered them incapable of negligence;⁷⁷ but it is generally held that this is not to be conclusively presumed.⁷⁸ Juries may be depended upon not to overrule this presumption, except in perfectly clear cases. Some degree of care may justly be required, even from children of six or seven years. But such a child is everywhere *presumed* to be incapable of contributory negligence.⁷⁹ In nearly all the cases, the

84 Pac. 813 (1906); *Gerber v. Boorstein*, 113 App. Div. 808, 99 N. Y. Supp. 1091; *Penny v. Rochester Ry. Co.*, 7 App. Div. 595, 40 N. Y. Supp. 172, *aff'd*, 154 N. Y. 770, 49 N. E. 1101; *Dynes v. Bromley*, 208 Pa. St. 633, 57 Atl. 1123 (1906); *Edgington v. Burlington, etc. Ry. Co.*, 116 Ia. 410, 90 N. W. 95, 57 L. R. A. 561 (1902); *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871 (1900); *Berry v. St. Louis, etc. Ry. Co.*, 214 Mo. 593, 114 S. W. 27 (1908); *Birmingham, etc. Ry. Co. v. Mattison*, 166 Ala. 602, 52 So. 49 (1910); *Johnston v. New Omaha, etc. Elec. Light Co.*, 86 Neb. 165, 125 N. W. 153 (1910); *Gulf, etc. Ry. Co. v. Coleman*, 51 Tex. App. 415, 112 S. W. 690 (1908).

⁷⁷ It has been said that a child of four years (*Hamilton v. Morgan's Co.*, 42 La. Ann. 824, 8 So. 586; *Barnes v. Shreveport R. Co.*, 47 La. Ann. 1218, 17 So. 782; *Erie, etc. R. Co. v. Schuster*, 113 Pa. St. 412; *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61), or less than six (*Schnur v. Citizens' Tr. Co.*, 153 Pa. St. 29, 25 Atl. 650; *Dicken v. Liverpool Salt Co.*, 41 W. Va. 511, 23 S. E. 582 [child under three]; *Bay Shore, etc. R. Co. v. Harris*, 67 Ala. 6), is incapable of negligence. In Alabama, the rule is said to be, that negli-

gence cannot be imputed to a child under seven; while a child between seven and fourteen is presumed to be incapable of it (*Pratt Iron Co. v. Brawley*, 83 Ala. 371, 3 So. 555). ⁷⁸ *Chicago R. Co. v. Wilcox*, 138 Ill. 370, 24 N. E. 419 [question always for jury; error in charging that child of six was not responsible]; *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484 [child over seven may be responsible]; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282 [boy of five and one-half]; *Erwin v. St. Louis, etc. R. Co.*, 96 Mo. 290, 9 S. W. 577 [boy of eleven]. From the nature of the case, it is impossible to prescribe a fixed period when a child becomes *sui juris*, some reaching the point earlier than others, according to natural capacity, physical conditions, training, habits of life and surroundings. Unless the court can safely decide the fact in the case of a child of very tender years (*e. g.* seven) it is a question for the jury (*Stone v. Dry Dock, etc. R. Co.*, 115 N. Y. 104, 21 N. E. 712; *rev'g* 46 Hun, 184). A child under *two* years is clearly not responsible (*Bottoms v. Seaboard R. Co.*, 114 N. C. 699, 19 S. E. 730).

⁷⁹ *Stone v. Dry Dock, etc. R. Co.; supra*; *Johnson v. Chicago, etc. R. Co.*, 56 Wis. 274; *Westbrook v. Mobile, etc. R. Co.*, 66 Miss. 560, 6 So.

question of the power and duty of any child, between three and twelve years of age, to exercise care for its own protection, is held to be for the jury.⁸⁰ But in Massa-

- 321 [at five years, presumed not responsible]. Age at which want of discretion will be conclusively presumed (United States Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081, 113 Ill. App. 435, (1902); South Covington, etc. Ry. Co. v. Herrklotz, 104 Ky. 400, 47 S. W. 265, 20 Ky. L. Rep. 750 (1898); Reliance Textile, etc. Wks. v. Mitchell, 24 Ky. L. Rep. 1286, 71 S. W. 425 (1903); Birmingham Ry., etc. Co. v. Jones, 146 Ala. 277, 41 So. 146 (1906); Illinois Cent. Ry. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88 (1902); Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583, 123 Ill. App. 550, (1906); Fink v. City of Des Moines, 115 Ia. 641, 89 N. W. 28 (1902); Indianapolis St. Ry. Co. v. Bordenschecker, 33 Ind. App. 138, 70 N. E. 995 (1904); Missouri Pac. Ry. Co. v. Prewitt, 59 Kan. 734, 54 Pac. 1067 (1898); Rice v. Crescent City Ry. Co., 51 La. Ann. 108, 24 So. 791 (1899); Carney v. Concord St. Ry. Co., 72 N. Y. 364, 57 Atl. 218 (1903); Wise v. Morgan, 110 Tenn. 273, 48 S. W. 971, 48 L. R. A. 548 (1898); Ollis v. Houston, etc. Ry. Co., 31 Tex. App. 601, 73 S. W. 30 (1903); City of Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791 (1899); Eskildsen v. City of Seattle, 29 Wash. 583, 70 Pac. 64 (1902); O'Brien v. Wisconsin Cent. Ry. Co., 119 Wis. 7, 96 N. W. (1903); Shellabarger v. Fisher, 143 Fed. 937, 75 C. C. A. 9, 5 L. R. A. (N. S.) 250 (1906); Hebert v. Hudson R. Elec. Co., 120 N. Y. Supp. 672, 136 App. Div. 107, (1909); Snare, etc. Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369 (1909); Miles v. Brondum, 50 So. (Miss.) 97 (1909). Age at which rebuttal inference arises of incapacity (Chicago, etc. Tr. Co. v. McGinnis, 112 Ill. App. 177 (1903). But the capacity of a minor may be so apparent as, under the circumstances, to authorize or require a peremptory instruction for the defendant in like manner as in case of an adult (Henry v. Missouri, etc. Ry. Co., 141 Mo. App. 351, 125 S. W. 794 (1910); Ritscher v. Orange, etc. Ry. Co., 75 Atl. (N. J.) 209 (1910); Cusimano v. City of New Orleans, 123 La. 565, 49 So. 195 (1909).
- ⁸⁰Spillane v. Missouri Pac. R. Co., 111 Mo. 555, 20 S. W. 293; Louisville, etc. R. Co. v. Sears, 11 Ind. App. 654, 38 N. E. 837 [eight years]; Avey v. Galveston, etc. R. Co., 81 Tex. 243 [ten years]; Bridger v. Asheville, etc. R. Co. 25 S. C. 24, 3 S. E. 860 [eleven years]; Fehnrich v. Michigan Cent. R. Co., 87 Mich. 606, 49 N. W. 890 [boy of fourteen, question of contributory negligence for the jury]; McCann v. Sixth Ave. R. Co., 117 N. Y. 505, 23 N. E. 164 [boy of thirteen]. The court properly left it to the jury to say whether a bright, intelligent child, aged seven years and accustomed to being out in the street, was or was not *sui juris*. (Kitchell v. Brooklyn R. Co., 6 N. Y. App. Div. 99, 39 N. Y. Supp. 741); s. p., Penny v. Rochester R. Co., 7 N. Y. App. Div. 595, 40 N. Y. Supp. 172; Bennett v. Brooklyn R. Co., 1 N. Y. App. Div. 205, 37 N. Y. Supp. 447 [eight years]; Guichard v. New, 9 N. Y. App. Div. 485, 41 N. Y. Supp. 456 [boy of eight years,

chusetts the question has been taken away from the jury in the case of a child of eight years⁸¹ and even five years and a half.⁸² And in New York a child over seven has been held responsible as matter of law for willful disobedience of proper orders.⁸³ The true rule would seem to be that the court should take the question away from the jury, where the clear weight of evidence shows that the child had a capacity for self-protection, which it culpably omitted to use, in face of a danger which it

warned of danger]; *Payne v. Chicago, etc. R. Co.*, 129 Mo. 405, 31 S. W. 885 [colored boy of eleven years, crossing track]; *Savannah, etc. R. Co. v. Smith*, 93 Ga. 742, 21 S. E. 157 [boy of nine years]. "Whether the injury might have been avoided by the exercise of that care and discretion which was reasonably to be looked for in a boy of his years" (*Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372) is for the jury to determine (*Johnson v. Chicago, etc. R. Co.*, 49 Wis. 529, 56 Id. 274; *Ewen v. Chicago, etc. R. Co.*, 38 Id. 614; *Townley v. Chicago, etc. R. Co.*, 53 Id. 626; *Vickers v. Atlanta, etc. R. Co.*, 64 Ga. 306; *Wynn v. City, etc. R. Co.*, 91 Id. 344, 17 S. E. 649; *Nagle v. Missouri, etc. R. Co.*, 75 Mo. 653; *Paducah, etc. R. Co. v. Hoehl*, 12 Bush, 41; *Reynolds v. N. Y. Central R. Co.*, 58 N. Y. 248; *Ihl v. Forty-second St. R. Co.*, 47 Id. 317; *Connolly v. Knickerbacker Ice Co.*, 114 Id. 104, 21 N. E. 101; *Mulligan v. Curtis*, 100 Mass. 512; *Bliss v. South Hadley*, 145 Id. 91, 13 N. E. 352; *Dealey v. Muller*, 149 Mass. 432, 21 N. E. 763, and cases *supra*. See § 114, *post*). The jury found specially that plaintiff, seven years old, was ordinarily bright, knew the danger of crossing before an approaching train, did not see it, but would have seen it if he had looked in the proper direction. General verdict for plaintiff sustained (*Baker v. Flint, etc. R. Co.*, 68 Mich. 90, 35 N. W. 836).

⁸¹ *Messenger v. Dennie*, 137 Mass. 197 [boy dropping from rear of sleigh].

⁸² A boy five and one-half years of age, with his mother's permission, started to go across a street, darted quickly from the curb, and was struck by defendant's horse; when he started he could have been but a few feet from him. The accident occurred in broad daylight. Held, that plaintiff failed to exercise the care which ordinarily careful boys of his age would exercise, and could not recover (*Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282).

⁸³ A boy of seven, who willfully runs in front of a train, in spite of warnings and efforts to restrain him, cannot recover damages (*Wendell v. N. Y. Central R. Co.*, 91 N. Y. 420). That case, however, was tried upon the assumption that the boy was old enough to justify his parents in allowing him to go out freely. In *Twist v. Winona, etc. R. Co.*, 39 Minn. 164, 39 N. W. 402, a boy over ten who, in disobedience of parental warning, interfered with a turn-table, was held responsible.

knew and sufficiently appreciated;⁸⁴ but not otherwise.⁸⁵ Subject to these qualifications, a child is responsible for that degree of care, and that only, which could reasonably be expected from him, considering his age, capacity and experience.⁸⁶ Where the fiction of imputed parental

⁸⁴ *Wendell v. N. Y. Central, etc. R. Co.*, 91 N. Y. 420; *Reynolds v. N. Y. Central, etc. R. Co.*, 58 Id. 248; *Hooper v. Johnstown, etc. R. Co.*, 59 Hun, 121, 13 N. Y. Supp. 151 [girl of eleven on familiar path]; *Sheets v. Connolly St. R. Co.*, 54 N. J. Law, 518, 24 Atl. 483 [intelligent girl of ten]. A boy of thirteen, knowing the danger which he assumed, is responsible (*Merryman v. Chicago, etc. R. Co.*, 85 Ia. 634, 52 N. W. 545); *Wallace v. New Haven, etc. R. Co.*, 165 Mass. 236, 42 N. E. 1125 [girl of thirteen going between sections of train].

⁸⁵ *Brown v. Sherer*, 155 Mass. 83, 29 N. E. 50 [girl of six skipping in front of horse]; *O'Shaughnessy v. Suffolk Brewing Co.*, 145 Mass. 569, 14 N. E. 779 [girl of eight struck by wagon, while sitting on curb, with feet in gutter]; *Hepfel v. St. Paul, etc. R. Co.*, 49 Minn. 263, 51 N. W. 1049 [boy of twelve stealing ride]; *Guichard v. New, 84 Hun*, 54, 31 N. Y. S. 1080 [boy of eight, peering into elevator]; *McGuire v. Chicago, etc. R. Co.*, 37 Fed. 54 [boy of ten struck by train]; see *Lynch v. Metropolitan R. Co.*, 112 Mo. 420, 20 S. W. 642 [boy of ten run over by car]. It is not enough that a boy should know that his act was wrong, if he does not know that it is dangerous (*Bridger v. Asheville, etc. R. Co.*, 25 S. C. 24). s. p., *McCahill v. Detroit R. Co.*, 96 Mich. 156, 55 N. W. 668 [disobedience of father; but no proof of comprehension of danger].

⁸⁶ The law demands the exercise of care and prudence equal to plaintiff's

actual capacity, age, knowledge and experience; no less (*Van Natta v. People's R. Co.*, 133 Mo. 13, 34 S. W. 505; *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 32 S. W. 460; *Louisville, etc. R. Co. v. Webb*, 99 Ky. 332, 35 S. W. 1117); and no more (*Cons. Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. 1094; *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616 [boy of ten]; *Norton v. Volzke*, 158 Ill. 402, 41 N. E. 1085). So held, as to boys of seven years (*Springfield R. Co. v. Welsh*, 155 Ill. 511, 40 N. E. 1034; *Kentucky Hotel Co. v. Camp [Ky.]*, 30 S. W. 1010; *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721; *Stone v. Dry Dock, etc. R. Co.*, 115 N. Y. 104, 21 N. E. 712); and even sixteen (*Kucera v. Merrill Lumber Co.*, 91 Wis. 637, 65 N. W. 374). *Pittsburg, etc. Ry. Co. v. More*, 110 Ill. App. 304 (1903); *Illinois, etc. Ry. Co. v. Johnson*, 77 N. E. 562, 221 Ill. 42, affirming judgment, 123 Ill. App. 300 (1906); *Herrington v. City of Macon*, 125 Ga. 58, 54 S. E. 37 (1906); *Weldon v. Philadelphia, etc. Ry. Co.*, 2 Pennw. 1, 43 Atl. 146 (1899); *Rohloff v. Fairhaven, etc. Ry. Co.*, 76 Conn. 689, 58 Atl. 5 (1904); *Denver City Tramway v. Nicholas*, 35 Colo. 462, 84 Pac. 813 (1906); *Rogers v. Meyerson, etc. Co.*, 103 Mo. App. 683, 78 S. W. 79 (1903); *Lafferty v. Third Ave. Ry. Co.*, 176 N. Y. 594, 68 N. E. 1118, aff'g 85 App. Div. 592, 83 N. Y. Supp. 405 (1903); *Dubiver v. City, etc. Ry. Co.*, 44 Ore. 227, 75 Pac. 693, 74 Pac. 915 (1904); *Christensen v. Oregon, etc. Ry. Co.*, 29 Utah, 192,

negligence still lingers (as in Massachusetts) a child, allowed by its parents to go alone, in public places, is

80 Pac. 746 (1906); *Smith v. Pittsburg, etc. Ry. Co.*, 90 Fed. 783 (1898); *Goldstein v. People's Ry. Co.*, 5 Pennw. 306, 60 Atl. 975 (1905); *Rachmel v. Clark*, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 959 (1903); *Citizens' Elec. Light Co. v. Bell*, 26 Ohio Cir. Ct. Rep. 691, 70 Ohio St. 482, 74 N. E. 1155 (1903); *Slattery v. Lawrence Ice Co.*, 190 Mass. 79, 76 N. E. 459 (1906); *Spillane v. Misouri, etc. Ry. Co.*, 135 Mo. 414, 37 S. W. 198, 58 Am. St. Rep. 580 (1896); *Houston, etc. Ry. Co. v. Bulger*, 36 Tex. App. 478, 80 S. W. 557 (1904); *Smith v. North Jersey St. Ry. Co.*, 73 N. Y. S. 295, 67 Atl. 753 (1906); *Gesas v. Oregon Short Line Ry. Co.*, 93 Pac. (Utah) 274, 13 L. R. A. (N. S.) 1074 (1907); *Bice v. Wheeling Elec. Co.*, 59 S. W. (W. Va.) 626 (1907); *Erie Ry. Co. v. Weinstein*, 166 Fed. 271, 92 C. C. A. 189 (1909); *Smith's Admr. v. National, etc. Co.*, 117 S. W. (Ky.) 280 (1909); *Batchelor v. Degnon, etc. Co.*, 131 App. Div. 136, 115 N. Y. Supp. 93 (1909); *Ardolino v. Reinhardt*, 130 App. Div. 119, 114 N. Y. Supp. 508 (1909); *Baker v. Seaboard, etc. Ry. Co.*, 150 N. C. 562, 64 S. E. 506 (1909); *Rastetter v. Peoria Ry. Co.*, 142 Ill. App. 417 (1908); *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56 (1909); *Smith v. Rochester Ry. Co.*, 133 App. Div. 847, 118 N. Y. Supp. 133 (1909); *Cecchi v. Lindsey*, 75 Atl. (Del.) 376 (1910); *Wyman v. Berry*, 106 Me. 43, 75 Atl. 123 (1909); *Birmingham, etc. Ry. Co. v. Mattison*, 52 So. (Ala.) 49 (1910); *Swanson v. Chicago, etc. Ry. Co.*, 148 App. Div. 135, aff'd, 90 N. E. 210 (1910); *Shortridge v. Scarritt Est. Co.*, 130 S. W. (Mo. App.) 126 (1910); *St. Louis, etc. Ry. Co. v. Bolen*, 129 S. W. (Tex. App.) 860 (1910); *German Am. Lbr. Co. v. Hannah*, 53 So. (Fla.) 516 (1910); *Virginia, etc. Ry. Co. v. Clawson's Admr.*, 68 S. E. (Va.) 1003 (1910); *Slattery v. Lawrence Ice Co.*, 190 Mass. 79, 76 N. E. 459 (1906), (plaintiff, a child six years old, was sitting on the curb, and by direction of the iceman moved out of his way and again sat down, but as he stepped on the curbing he gave the cake of ice a twitch so that it fell, striking her; held, she was old enough to go on the streets without negligence being conclusively imputed to her parents. "It has often been said by this court that the standard of care on the part of an infant plaintiff, if found capable of going on the public ways unattended, depends upon his age and intelligence" (*Aiken v. Holyoke St. Ry. Co.*, 180 Mass. 8, 61 N. E. 557; *McDermott v. Boston Elev. Ry. Co.*, *supra*). "Upon her statement of the manner in which the accident happened she also could have been found to have exercised the degree of care required of a reasonably careful adult" (*Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 451; *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257). "* * * the circumstances are not so extraordinary as not reasonably to have been foreseen, and hence should have been guarded against by those in charge of defendant's business" (citing *Powell v. Deveney*, 3 Cruch. 300, 50 Am. Dec. 738; *Manning v. West End St. Ry. Co.*, 166 Mass. 230, 44 N. E. 135; *Flynn v. Butler*, 75 N. E. (Mass.) 730 (1906).

charged with such capacity as such a child ought to have, before being allowed to do so.⁸⁷ In other courts no such rule prevails.⁸⁸ In actions brought by parents, etc., for their damage through injuries to their children, the question whether they were negligent in permitting children to encounter danger by going out alone, involves much the same consideration of age, intelligence and capacity; and the requirement of parental watchfulness and restraint varies, in inverse proportion, according to the age of the child. Reference must be made to the reported cases.⁸⁹

⁸⁷ *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282. The truth is that the defendant in that case was not in fault; and that was the proper ground of decision. *Young v. Snall*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457 (1905), (where a child, nine years old was playing in the street while returning from school, and without giving any attention to the use of the street by others, but absorbed in her game, without looking to see if there were passing teams, ran across the street and was struck by the horse of defendant's team and knocked down, held, conceding she had reached an age of sufficient maturity to be allowed to go to and from school without negligence being imputed to her parents, "yet she was required to exercise such a degree of care as reasonably was to be expected of a child of her years"). *McDermott v. Boston Elev. Ry. Co.*, 184 Mass. 126, 68 N. E. 34, 100 Am. St. Rep. 548 (* * * Such conduct, judged by the ordinary standard of care shown by children of her age, must be deemed to have been negligent, and precludes recovery). *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295; *Mullen v. Springfield St. Ry. Co.*, 164 Mass. 450, 41 N. E. 664; *Morey v. Gloucester St. Ry. Co.*,

171 Mass. 164, 50 N. E. 530; *Sewell v. New York, etc. Ry. Co.*, 171 Mass. 302, 50 N. E. 541; *Murphy v. Boston Elev. Ry. Co.*, 188 Mass. 8, 73 N. E. 1018 ("No consideration of the due care of the defendant's servant is required, as this negligence on her part is sufficient to sustain the ruling under which a verdict was ordered for the defendants.")

⁸⁸ *Cincinnati R. Co. v. Wright*, 54 Ohio St. 181, 42 N. E. 688 [boy of fourteen]; *compare Chicago, etc. R. Co. v. Eininger*, 114 Ill. 79, 29 N. E. 196, in which boy's age did not appear.

⁸⁹ It has been held not negligence, as *matter of law*, for the parents of a child six or seven years old to allow him to go into the streets unattended. The question of negligence in such case must be left to the jury (*Oldfield v. Harlem R. Co.*, 14 N. Y. 310). The same ruling was made in the case of children of seven (*Riley v. Salt Lake Tr. Co.*, 10 Utah, 428, 37 Pac. 681), eight (*Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49); nine (*Sheridan v. Brooklyn, etc. R. Co.*, 36 Id. 39), and ten years of age (*Karr v. Parks*, 40 Cal. 188). Nor, in the case of a child eleven years old, is it necessarily negligent to allow him to go out alone,

§ 74. Imputation of parent's negligence.* New York rule. — The Supreme Court of New York, in the leading

even after dark (*Lovett v. Salem*, etc. R. Co., 9 Allen, 557). But it has been held negligence, as matter of law, to allow a child of about two years (*Hartfield v. Roper*, 21 Wend. 615), two years and four months (*Callahan v. Bean*, 9 Allen, 401), seventeen months (*Kreig v. Wells*, 1 E. D. Smith, 74), four years (*Glassey v. Hestonville*, etc. R. Co., 57 Pa. St. 172; see *Lehman v. Brooklyn*, 29 Barb. 234), five (*Clinton v. Boston Beer Co.*, 164 Mass. 514, 41 N. E. 1070), or even six years of age (*Chicago v. Starr*, 42 Ill. 174), to go thus unattended, in the absence of some explanation. See, however, to the contrary, as to a child about two years old, *Boland v. Missouri R. Co.*, 36 Mo. 484; as to one less than four years old, *Robinson v. Cone*, 22 Vt. 213, and as to a child of four, *Chicago v. Major*, 18 Ill. 349; *McVee v. Watertown*, 92 Hun, 306. And, in *Karr v. Parks*, 40 Cal. 188, it was held not necessarily negligent to let a child of five years go alone upon an unfrequented street. See, also, *Schierhold v. North Beach*, etc. R. Co., 40 Cal. 447. Very slight explanations were held sufficient to send the case to a jury where a boy four and two-thirds years old was allowed to go alone in the vicinity of railroad tracks (*Lederman v. Pennsylvania R. Co.*, 165 Pa. St. 118, 30 Atl. 725); or where a child escapes from control (*Weil v. Dry Dock R. Co.*, 119 N. Y. 147, 23 N. E. 487 [two years old]; *Marsland v. Murray*, 148 Mass. 91, 18 N. E. 680 [less than five]; *Chicago*, etc. R. Co. v. Logue, 158 Ill. 621; 42 N. E. 53 [twenty-one months]. See *Chrystal v. Troy*, etc. R. Co., 105 N. Y. 164, 11 N. E. 380 [seventeen months]; *Bamberger v. Citizens' R. Co.*, 95 Tenn. 18, 31 S. W. 163). Where a child of three years was sent out under the charge of his sister, aged nine and a half, held, that the question must be left to jury (*Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317). s. p., *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376, 35 Atl. 140 [child four and one-half years in charge of another, eight years]; *Harkins v. Pittsburgh*, etc. Tr. Co., 173 Pa. St. 146, 33 Atl. 1044 [custodian a boy of fourteen]. So as to children, both under six years (*Strutzel v. St. Paul Ry. Co.*, 47 Minn. 543, 50 N. W. 690). Permission by the parent of a child three years old to play in the street, accompanied by another child seven years older, is not such negligence as to prevent a recovery (*Stafford v. Reubens*, 115 Ill. 196). When a child eighteen months old strays on the track and is injured, while *prima facie*, negligence is imputable to the parent, still the question is for the jury (*Gibbons v. Williams*, 135 Mass. 333; *McGeary v. Eastern R. Co.*, Id. 363; compare *O'Connor v. Boston*, etc. R. Co., Id. 352). The modern cases generally will, it is believed, be found responsive to the general rule that in determining the contributory negligence of the parent all the circumstances are to be taken into consideration, and if the parent took as much care of the child as

* For the latest treatment of the doctrine of imputing negligence to children, see 18 L. R. A. (N. S.) 320.

case of *Hartfield v. Roper*,⁹⁰ invented a rule that where a child, so young as not to be held responsible for the exercise of such care as is required from persons of full age, fails to exercise that care, the negligence of his parents or other lawful custodians is to be imputed to the child, in the same manner as if they were acting under his direction, instead of his acting under theirs. Some of the decisions put this doctrine on the ground that the parent must in law be deemed the agent of the child;⁹¹ while in other decisions the courts refused to consider the question as one of agency, and put their rule upon the ground that the child is identified with its guardian:⁹² a legal

reasonably prudent persons of the same class in the same situation in life ordinarily do, then the parent is not to be held guilty of such contributory negligence as will defeat his action (*Winter v. Kansas City Ry. Co.*, 99 Mo. 598, 17 Am. St. Rep. 591; *Fox v. Oakland Cons. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216 (1897). *Ehrman v. Nassau Elec. Ry. Co.*, 25 App. Div. 21, 48 N. Y. Supp. 379 (1897), (not imputable where a child of five was confided to the care of another of fifteen). *Taylor, etc. Ry. Co. v. Warner*, 60 S. W. (Tex. App.) 442 (1900), (where a child of seven was riding with its father and uncle, negligence of the uncle not imputable to parents). *Illinois Cent. Ry. Co. v. Warriner*, 229 Ill. 91, 82 N. E. 246, affirming judgment, 132 Ill. App. 301 (1907), (contributory negligence of parents a complete defense to an action for their benefit). *Tecker v. Seattle Ry. Co.*, 111 Pac. (Wash.) 791 (1910); *Fineman v. Philadelphia Rapid Tr. Co.*, 42 Pa. Sup. Ct. 379 (1910), (what is reasonable care in permitting a child of tender years to go on the street, is to be determined by circumstances, in view of the occupation and financial ability of parents, place of residence, size of family and conditions surrounding the home). *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321 (1901); *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 (1891); *Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449 (1893); *O'Shea v. Lehigh Valley Ry. Co.*, 79 App. Div. 254, 79 N. Y. Supp. 890; *Cleveland, etc. Ry. Co. v. Workman*, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602 (1902); *Berry v. St. Louis, etc. Ry. Co.*, 214 Mo. 593, 114 S. W. 27 (1908); *Simon v. Metropolitan, etc. Ry. Co.*, 231 Mo. 65, 132 S. W. 250 (1910); *Feldman v. Detroit United Ry. Co.*, 162 Mich. 486, 127 N. W. 687 (1910). *Contra*, *Wymore v. Mahaska County*, 178 Ia. 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545 (1889); *Carney v. Concord St. Ry. Co.*, 72 N. H. 364, 57 Atl. 218 (1904).

⁹⁰ 21 Wend. 615; s. c., 34 Am. Rep. 273.

⁹¹ See the cases collected and reviewed on all points covered by this section in *Beach, Contr. Negl.*, 2d ed., §§ 119-130.

⁹² This seems to have been partly

fiction which led to the famous and now exploded decision of *Thorogood v. Bryan*,⁹³ which we have already noticed. For one or the other reason, or no reason, this rule of imputed negligence seems to be at present established in New York,⁹⁴ Maine,⁹⁵ Massachusetts,⁹⁶ Delaware,⁹⁷ Maryland,⁹⁸

the ground of the decision in *Waite v. Northeastern R. Co.*, El., Bl. & El. 719, aff'd, Id. 728. In that case the negligence charged was only a failure to warn P.; and the child could not have understood any warning. The decision was put upon the ground that defendant's implied contract was only to carry the child, subject to proper care on the part of the custodian.

⁹³ 8 C. B. 115; see § 66, *ante*.

⁹⁴ The rule is assumed to be law in *Thurber v. Harlem, etc. R. Co.*, 60 N. Y. 333; *McGarry v. Loomis*, 63 Id. 104; *Ihl v. Forty-second St. R. Co.*, 47 Id. 323; *Cosgrove v. Ogden*, 49 Id. 255; *Mangam v. Brooklyn R. Co.* 38 Id. 455, aff'g 36 Barb. 230; *Honegsberger v. Second Ave. R. Co.*, 2 Abb. Ct. App. 378. The rule is of course followed blindly in all the lower courts (*Williams v. Gardiner*, 58 Hun, 508, 12 N. Y. Supp. 612; *Ames v. Broadway, etc. R. Co.*, 56 N. Y. Superior, 3, 4 N. Y. Supp. 803; *Levine v. Metropolitan St. Ry. Co.*, 78 N. Y. App. Div. 426, 80 N. Y. Supp. 48, aff'd in 177 N. Y. 523, 69 N. E. 1125 (1904); *Wallace v. John A. Casey Co.*, 116 N. Y. Supp. 394, 132 App. Div. 35 (1909); *Manion v. Richmond Ice Co.*, 117 N. Y. Supp. 353, 133 App. Div. 254 (1909).

⁹⁵ *Leslie v. Lewiston*, 62 Me. 468; *Brown v. European, etc. R. Co.*, 58 Id. 384; compare *O'Brien v. McGlinchy*, 68 Id. 552.

⁹⁶ *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Gibbons v. Wil-*

liams, 135 Id. 333; *Mulligan v. Curtis*, 100 Id. 512; *Casey v. Smith*, 152 Id. 294, 25 N. E. 734; *Wright v. Malden, etc. R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Id. 401; *Holly v. Boston Gas Co.*, 8 Gray, 123. In *Coombs v. New Bedford Card Co.*, 102 Mass. 572, however, it was held that a boy of fourteen, who is negligently and improperly sent by his parents to work at dangerous machinery, injured, through the negligence of the proprietor, has a remedy against the proprietor, notwithstanding the parent's negligence. *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 23 Am. St. Rep. 842, 9 L. R. A. 259 (1890). See *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257 (1899); *Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 142 (1894); *Wiswell v. Doyle*, 160 Mass. 42, 35 N. E. 107, 39 Am. St. Rep. 441 (1894).

⁹⁷ *Kyne v. Wilmington, etc. R. Co.*, 8 Del. 185, 14 Atl. 922.

⁹⁸ *McMahon v. Northern, etc. R. Co.*, 39 Md. 439; *Baltimore, etc. R. Co. v. McDonnell*, 43 Id. 534; but limited in the latter case. In *United Ry., etc. Co. v. Carneal*, 110 Md. 211, 72 Atl. 771 (1909) the court, without discussion, sustained the refusal of the trial judge to give a charge imputing the negligence of the mother to a child three years old struck by a street car, but the case appears to have turned on the question whether after discovery of the child's danger the injury could have been averted by the motorman. The

Indiana,⁹⁹ Minnesota,¹⁰⁰ Kansas,¹⁰¹ and California;¹⁰² although there is an increasing disposition in all these States to moderate the stringency of the rule.^{102a} It has not been adopted in England;¹⁰³ and the recent

verdict was for the child and the judgment was affirmed. The court, responding to an objection for alleged error of the trial court in refusing to instruct the jury that the infancy of the plaintiff did not change the degree of care and diligence to be used by the defendant, said, the child was only bound to the exercise of such care as might be expected from one of her age and intelligence, and when such an infant is negligently on the street, and her situation at the street corner is apparent, a correspondingly greater degree of care was demanded of the defendant to avoid accident than would have been required in case of an adult. And that while the prayer as an abstract proposition might be correct, yet it would be misleading if applied in the manner offered to the facts of the case.

⁹⁹ *Jeffersonville, etc. R. Co. v. Bowen*, 40 Ind. 545; *Hathaway v. Toledo, etc. R. Co.*, 46 Id. 25; *Evansville, etc. R. Co. v. Wolf*, 59 Id. 89; *Pittsburgh v. Vining*, 27 Id. 513; *Lafayette, etc. R. Co. v. Huffman*, 28 Id. 287.

¹⁰⁰ *Fitzgerald v. St. Paul, etc. R. Co.*, 29 Minn. 336; *St. Paul v. Kuby*, 8 Id. 166.

¹⁰¹ *Atchison, etc. R. Co. v. Smith*, 28 Kans. 541; *Smith v. Atchison, etc. R. Co.*, 25 Id. 738.

¹⁰² *Meeks v. Southern Pacific R. Co.*, 52 Cal. 602, 56 Id. 513; *Schierhold v. North, etc. R. Co.*, 40 Id. 447; *McQuilken v. Central, etc. R. Co.*, 64 Id. 463, 2 Pac. 46; assumed in *Daly v. Hinz*, 113 Cal. 366, 45 Pac. 693;

Higgins v. Deeney, 78 Cal. 578, 21 Pac. 428.

^{102a} *O'Brien v. McGlinchy*, 68 Me. 552 (entitled to recover notwithstanding parents' negligence if the child exercised such care for its safety as would be required of an adult); *Lynch v. Smith*, *supra*; *McNeil v. Boston Ice Co.*, *supra*; *McGary v. Loomis*, *supra*; *Smith v. City Realty Co.*, 79 App. Div. 441, 79 N. Y. Supp. 1116; *Lafferty v. Third Ave. Ry. Co.*, 85 App. Div. 592, 83 N. Y. Supp. 405, *aff'd*, 176 N. Y. 594, 68 N. E. 1118 (1903) (the doctrine does not apply where the child has reached the age of discretion); *Louisville, etc. Ry. Co. v. Sears*, 11 Ind. App. 654, 38 N. E. 837 (1894). *Chicago, etc. Ry. Co. v. Ryan*, 171 Ill. 474, 23 N. E. 385 (1890), (the defendant will be liable notwithstanding the child's negligence on the doctrine of discovered peril); *United Ry. Co. v. Carneal*, *supra*; *Baltimore, etc. Ry. Co. v. O'Donnell*, *supra*; *Czezewzka v. Benton, etc. Ry. Co.*, 121 Mo. 201, 25 S. W. 911 (1894); *Fox v. Oakland, etc. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216 (1897), (parents are not required by law to keep constant watch over children; whether they have been negligent is a question for the jury). See note 89, § 73a, *ante*.

¹⁰³ *Singleton v. Eastern Cos. R. Co.*, 7 C. B. [N. S.] 287; *Mangan v. Atterton*, L. R. 1 Ex. 239. This is said to be the law of Scotland (*Campbell on Negl.*, § 81). The present state of the question in Eng-

overruling of *Thorogood v. Bryan*¹⁰⁴ and *Mangan v. Atterton*¹⁰⁵ gives some assurance to the hope that it will not be.

§ 75. New York rule criticised.—The rule of imputed negligence, founded upon a *dictum* in *Hartfield v. Roper*,¹⁰⁶ has undoubtedly been affirmed in many cases in New York courts of original jurisdiction; and it has been often mentioned by the Court of Appeals as if it were settled law.¹⁰⁷ But it is a remarkable fact that the question has never been squarely presented to any court of last resort in New York for decision, and apparently the question has never been argued there. In only one case was a decision made upon even a part of that issue; and in that¹⁰⁸ the injured child was twelve years old, and was old enough to know better than to jump off a moving train, but was fairly dragged off by her father. The court assumed, without the slightest discussion, that the parent's negligence was chargeable to the child. But there the father, by almost forcibly carrying off his daughter, was the direct cause of her injury; and if she consented to his act, as she un-

land is shown by the following extract from *Beven on Negligence* (3d ed. 1908), p. 170, treating the point directly, "There remains the case where the absence of control is the cause of the child sustaining the injury. The only reported case on the point is at *Nisi Prius* (*Gardner v. Grace* (1858), 1 F. & F. 359, followed by *Meritt v. Hepenstal*, 25 Can. S. C. R. 150), "Defendant was driving, when the plaintiff, aged three years and a quarter, ran out into the road, was knocked down, and run over. Channel, B., said: "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shown

that the injury was occasioned entirely by his own negligence. The point that there was any such duty on the parent, the neglect of which would disentitle the infant to recover does not seem to have been taken; and there does not appear to be any reported English case in which it has been mooted." Mr. Beven commends the "Vermont" rule.

¹⁰⁴ See § 66, *ante*.

¹⁰⁵ In *Clark v. Chambers*, L. R. 3 Q. B. Div. 327.

¹⁰⁶ 21 Wend. 615.

¹⁰⁷ See last section.

¹⁰⁸ *Morrison v. Erie R. Co.*, 56 N. Y. 302.

doubtedly did, she was old enough to be responsible. The result of our examination of the cases is to satisfy us that the last of the long series of so-called decisions on this point is like the first, a mere *dictum*, uttered without hearing argument and without consideration. The main question is entirely open to review in the Court of Appeals.¹⁰⁹ And, as that court did not hesitate to overrule a decision of the Supreme Court,¹¹⁰ on a point of commercial and statutory law, which had been acted upon for thirty years without question, we can see no good reason why it should not break through the precedents on this important question, and allow it to be argued as new, in accordance with the wise policy of the English Court of Appeal in overruling *Thorogood v. Bryan*, after it had stood for thirty-eight years.

§ 76. Imputed negligence; Illinois rule. — [*Omitted: see § 78*].

§ 77. Identification of child and custodian. — In former editions, we discussed at length the application of the doctrine of "identification" to the case of a child;^{110a} a doctrine which was thus applied in Eng-

¹⁰⁹ *Honegsberger v. Second Ave. child*); *Delaware, etc. Ry. Co. v. R. Co.* (2 Abb. Ct. App. 378, 1 Devore, 114 Fed. 155, 52 C. C. A. Keyes, 574), was an action by the father in his own right; and his negligence was, therefore, a perfectly proper defense. As to the authority of this case, see *Weaver v. Bullis*, 14 N. Y. Supp. 338; aff'd, without opinion, 128 N. Y. 634.

¹¹⁰ *Williams v. Tilt*, 36 N. Y. 319; overruling *Ramsdell v. Morgan*, 16 Wend. 574, and *Keutgen v. Parks*, 2 Sandf. 60.

^{110a} *Metcalfe v. Rochester Ry. Co.*, 12 App. Div. 147, 42 N. Y. Supp. 661 (1896), (negligence of driver with whom child is permitted by the mother to ride is imputable to the child); *Delaware, etc. Ry. Co. v. R. Co.*, 114 Fed. 155, 52 C. C. A. 77 (1902); *Lewin v. Lehigh Valley Ry. Co.*, 52 App. Div. 69, 65 N. Y. Supp. 49, aff'd, 165 N. Y. 667, 59 N. E. 301 (1901), (negligence of the father in driving not imputable to infant child held in the arms of its mother); *Kowalski v. Chicago, etc. Ry. Co.*, 84 Fed. 586, aff'd, 92 Fed. 310, 34 C. C. A. 1 (1899), (negligence of the father in driving not imputable to infant child riding with him); *Foley v. New York, etc. Ry. Co.*, 132 App. Div. 506, 117 N. Y. Supp. 956 (1909), (negligence of driver not imputable to child eight years old). See *Perryman v.*

land,¹¹¹ in Massachusetts,¹¹² and Missouri,¹¹³ but wholly rejected in Ohio,¹¹⁴ Pennsylvania¹¹⁵ and Texas.¹¹⁶ But as this idea is now exploded, and would, upon principle, require that a wife, when submitting to the guidance and conduct of her husband, should be chargeable with his negligence, which is certainly not the law in America, we do not see how this rule is to escape the fate of *Thoroughgood v. Bryan*.

§ 78. True rule: no imputation of parental negligence.— Without further discussion of the supposed "New York" rule, we content ourselves with saying that the Vermont rule, as it may be called, from having been first clearly adjudged in Vermont, commends itself to our judgment, and is abundantly justified by the reasoning of the courts which have adopted it. This rule, which has now been adopted in at least twenty States,¹¹⁷

Chicago, etc. Ry. Co., 242 Ill. 269, s. p., *Collins v. South Boston R. Co.*, 142 Mass. 301.

89 N. E. 980, aff'g 145 Ill. App. Co., 142 Mass. 301. 187 (1909); *Louisville, etc. Ry. Co. v. Calvert*, 54 So. (Ala.) 184 (1911). ¹¹⁴ *Bellefontaine R. Co. v. Snyder*, 18 Ohio St. 399. See all the cases collected in Thompson, 1189-1191.

¹¹¹ *Waite v. Northeastern R. Co.*, El. Bl. & El. 719. For an interesting discussion of this case see Beven on Negligence, pp. 167-8 (3d ed.). ¹¹⁵ *North Penn. R. v. Mahoney*, 57 Pa. St. 187.

¹¹² *Holly v. Boston Gas Co.*, 8 Gray, 132. It is now held, in Massachusetts, that the question whether a parent exercised reasonable care over a child, run over in the street, is for the jury (*Powers v. Quincy*, etc. R. Co., 163 Mass. 5, 39 N. E. 345). See *Clinton v. Boston Beer Co.*, 164 Mass. 514, 41 N. E. 1070. ¹¹³ *Robinson v. Cone*, 22 Vt. 213.

¹¹⁴ *Stillson v. Hannibal, etc. R. Co.*, 67 Mo. 671. In *East Saginaw R. Co. v. Bohn* (27 Mich. 503), it was held that a little child, sent out in charge of an older one, is not deprived of remedy by acts of the older child, which were as prudent as could be expected at his age. ¹¹⁵ *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048. ¹¹⁶ *Robinson v. Cone*, 22 Vt. 213. A boy three years and nine months old, while coasting in the highway, lying upon his breast upon a sled, was run over by a sleigh. It was held that he was not precluded from redress, the court (Redfield, J.,) saying: "We are satisfied that although a child or idiot or lunatic may to some extent have escaped into the highway through the fault or negligence of his keeper, and so be *improperly* there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one knew that such a person is in the highway, or on a

is, that the contributory negligence of a parent, guardian or other person having control of a child is not to be imputed to the child itself and is no defence to the child's action; inasmuch as such guardian is not the agent of the child, and the doctrine of identification is a pure fiction. Such an overwhelming weight of authority, as well as of argument, entitles us to treat the so-called "New York rule" as obsolete.

railway, he is bound to a proportionate degree of watchfulness, and what would be ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child or one known to be incapable of escaping danger." This rule is law in *Alabama* (Government St. R. Co. v. Hanlon, 53 Ala. 70. s. p., Pratt Iron Co. v. Brawley, 83 Ala. 371, 3 So. 555); *Connecticut* (Daley v. Norwich, etc. R. Co., 26 Conn. 591; Bronson v. Southbury, 37 Id. 199; Birge v. Gardiner, 19 Id. 507); *Georgia* (Ferguson v. Columbus, etc. R. Co., 77 Ga. 102); *Illinois* (Chicago R. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, reviewing all the Illinois cases. s. c., 24 N. E. 319, is probably a minority opinion, concurring on this point. The doctrine was reaffirmed in *Daube v. Tennonison*, 154 Ill. 210, 39 N. E. 989; *Iowa* (Wymore v. Mahaska County, 78 Iowa, 396, 43 N. W. 264; Walters v. Chicago, etc. R. Co., 41 Iowa, 71); *Louisiana* (Westfield v. Levis, 43 La. Ann. 63, 9 So. 52); *Michigan* (Shippy v. Au Sable, 65 Mich. 494, 48 N. W. 584, per Champlin, C. J.; Schindler v. Milwaukee, etc. R. Co., 87 Mich. 400, 49 N. W. 670); *Mississippi* (Westbrook v. Mobile, etc. R. Co., 66 Miss. 560, 6 So. 321); *Missouri* (Frick v. St. Louis, etc. R. Co., 75 Mo. 542, 595; Boland v. Missouri, etc. R. Co., 36 Id. 484; see Stillson v. Hannibal, etc. R. Co., 67 Id. 671; Winters v. Kansas City, etc. R. Co., 99 Id. 509, 12 S. W. 652); *Nebraska* (Huff v. Ames, 16 Neb. 139, 19 N. W. 623); *New Hampshire* (Bisailon v. Blood, 64 N. H. 565, 15 Atl. 147 [a very pungent criticism of the supposed New York rule]); *New Jersey* (Newman v. Phillipsburgh R. Co., 52 N. J. Law, 446, 19 Atl. 1102); *Ohio* (Cleveland, etc. R. Co. v. Manson, 30 Ohio St. 451; Bellefontaine, etc. R. Co. v. Snyder, 18 Id. 399; Street R. Co. v. Eadie, 43 Id. 91); *Pennsylvania* (Smith v. O'Connor, 48 Pa. St. 218; North Penn. R. Co. v. Mahoney, 57 Id. 187; Kay v. Pennsylvania R. Co., 65 Id. 269; Philadelphia, etc. R. Co. v. Long, 75 Id. 257; Pittsburgh, etc. R. Co. v. Caldwell, 74 Id. 421); *Texas* (Galveston, etc. R. Co. v. Moore, 59 Tex. 64; Houston, etc. R. Co. v. Simpson, 60 Id. 103; Texas, etc. R. Co. v. O'Donnell, 58 Id. 27; Western Union Tel. Co. v. Hoffman, 80 Id. 420, 15 S. W. 1048); *Utah* (Hyde v. Union Pacific R. Co., 7 Utah, 356, 26 Pac. 979); *Virginia* (Norfolk, etc. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. 454; Norfolk, etc. R. Co. v. Ormsby, 27 Gratt. 455). See collection of the later cases in n. 86, § 73a, *ante*. After quoting at length the forcible presentation of the *rationale* of the rule in *Newman v. Pittsburg R. Co.*, *supra*;

§ 79. No imputed negligence, if child careful. — The so-called New York rule, wherever it is followed, is to be applied only to cases in which a child has itself failed to use that degree of care which would be required from an adult. If it has in fact been as free from negligence as an adult would be expected to be, no amount of negligence on the part of its parents or guardians can affect its right to recover, except, of course, as their acts, in breaking the sequence of events, might affect the same right in any other person. The whole theory of imputed negligence rests upon the assumption that the child has acted in a manner which would be negligent, if it had been of full age.¹¹⁸

§ 80. Imputed negligence; limitations of rule. — [*Omitted as now unnecessary*].

§ 81. Imputed negligence; parent must be acting as such. — Under the "New York rule," the negligence of a parent or guardian, when not acting in that capacity, is not chargeable to his child, even though it tends to expose the child to injury from other persons. Thus, if a gas company, being called upon to repair a leak, sends an agent, who carelessly strikes a light in a cellar full of gas, thus causing an explosion which injures a child, the

Mr. Beven, p. 171, says: "What- ever the ultimate course taken by the English courts, there can be no doubt this view has the merit both of common sense and humanity."

¹¹⁸In our first edition (1869), we said: "This limitation is not expressly sanctioned by the decisions, but is so obviously consistent with good sense, and with the facts upon which the decisions were based, that its propriety cannot be doubted. Thus, it would be impossible to say that a child, even though barely able to walk, may be run over with impunity, while on the sidewalk, conducting itself in the same manner as grown persons." This doctrine has now received the fullest judicial sanction (*Lynch v. Smith*, 104 Mass. 52; *McGarry v. Loomis*, 63 N. Y. 104; *Cummings v. Brooklyn R. Co.*, 104 Id. 669, 10 N. E. 855; *O'Brien v. McGlinchy*, 68 Me. 552). See *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 323; *McMahon v. New York*, 33 Id. 642; *South, etc. Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 So. 142; *Serano v. N. Y. Cent. & H. R. Ry. Co.*, 188 N. Y. 156, 80 N. E. 1025 (1907). See § 74, note 101a, *ante*.

fact that the leak was caused by the negligence of the child's father would be no excuse for the gas company.¹¹⁹ On the other hand, if gas should leak in a house to such an extent as to make it contributory negligence on the part of a father himself to remain in the house, his negligence in keeping his children in the house under such circumstances must be imputed to them.¹²⁰

§ 82. Imputed negligence; parent must be negligent in fact. — Furthermore, under the New York rule, it is to be observed that the guardian must have been guilty of *actual negligence* in the care of the child, in order to prejudice the child's right of action for negligence on the part of a stranger. The mere fact that a child is found in an exposed and dangerous position is not conclusive proof of negligence on the part of its guardian.¹²¹ If the guardian of the child has taken reasonable care of it, and, notwithstanding the use of such care, the child escapes into a dangerous place, there is no negligence on the part of the guardian to be imputed to the child.¹²²

¹¹⁹ *Lannen v. Albany Gas Co.*, 46 Barb. 264; *aff'd*, 44 N. Y. 459. To hold otherwise "would be 'visiting the sins of the fathers upon the children' to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law" (*Id.*). The text is quoted and approved in *Hennessey v. Brooklyn R. Co.*, 6 N. Y. App. Div. 206, 39 N. Y. Supp. 805.

¹²⁰ *Holly v. Boston Gas Co.*, 8 Gray, 132. The particular application of the principle in this case seems to us very questionable, inasmuch as the facts did not make it clearly necessary or wise for the plaintiff or her father to leave the house. Indeed, it might have been out of their power to do so.

¹²¹ *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Coghlan v. Third Ave.*

R. Co., 7 N. Y. App. Div. 124, 39 N. Y. Supp. 113. See notes to § 114, *post*.

¹²² *Mangam v. Brooklyn R. Co.*, *supra*. In that case, a child less than four years old was left alone in the room for a very few minutes the front door being locked; and he escaped through the window into the street, where he was almost immediately run over by a horse railroad car carelessly driven. Held, that he could recover against the railroad company if the jury should deem that sufficient care had been taken of him, and a non-suit was set aside. To similar effect, *Weil v. Dry Dock*, etc. *R. Co.*, 119 N. Y. 147, 23 N. E. 487. Permitting a child six years old to go out by himself in a quiet street (*Cosgrove v. Ogden*, 49 N. Y. 255), or permitting a child five years

§ 83. **Imputed negligence; age of child.** — Under the New York rule, great difficulty arises in defining the age at which a child becomes subject to the rule of imputed negligence, and still more in defining the age at which it will be deemed negligent on the part of its parents or guardians to suffer it to go abroad unattended or attended only by a very young person. On the one hand, it has been apparently held that a jury may find it to be culpable negligence on the part of parents to allow boys of ten years old to go out alone;¹²³ though not so as to boys of eleven years;¹²⁴ but in such cases, and even in the case of a child six years old, it has been held that it is not conclusive evidence of negligence on the part of the parent to show that the child was allowed upon the streets unattended.¹²⁵ Beyond these limits it is difficult to say what the rule is, or whether any will be enforced with such rigidity as to take the question away from the jury. We can only refer to the cases as reported.¹²⁶

§ 84. **Imputed negligence; lunatics, etc.** — All that is here said with regard to children is equally applicable to lunatics of any kind,¹²⁷ with this difference as to the obli-

old to remain alone in a room with an open door (Fallon v. Central Park, etc. R. Co., 64 N. Y. 13), is not conclusive of contributory negligence on the part of the parent. See § 73a, note 89, *ante*.

¹²³ See Karr v. Parks, 40 Cal. 188; Lovett v. Salem, etc. R. Co., 9 Allen, 557.

¹²⁴ McMahon v. New York, 33 N. Y. 642, 647. In that case, the defendant was repairing an old well in front of the plaintiff's house, and, in consequence of negligence in covering it, the plaintiff's son, a boy of eleven years old, fell into it and was killed. In an action by plaintiff, as administrator of his son, it was held that negligence of the parents of the child did not neces-

sarily form a defense to the action, and Wright, J., remarked: "The deceased was not an infant, incapable of taking proper care of himself in the street. * * * Had he survived the injury, and been without fault himself, he could have recovered, notwithstanding his father or mother were guilty of negligence; and so may his administrator, such injury causing his death."

¹²⁵ Oldfield v. Harlem R. Co., 14 N. Y. 310; *aff'g*, s. c., 3 E. D. Smith, 103.

¹²⁶ See notes to § 73a, *ante*.

¹²⁷ Willetts v. Buffalo, etc. R. Co., 14 Barb. 585; see Hartfield v. Roper, 21 Wend. 615, 619; Johnson v. St. Paul City Ry. Co., 67 Minn. 260, 69 N. W. 90, 36 L. R. A. 586 (1897).

gations of others towards them, that the sight of a child in peril ought to be sufficient to induce every mature person to take greater care than he otherwise would;¹²⁸ whereas a lunatic does not necessarily manifest his infirmity by his appearance, and one who is not aware of that fact is not to be blamed for dealing with him as a person of ordinary intellect.¹²⁹

§ 85. Acts in emergencies; plaintiff not prejudiced unless actually in fault.—The plaintiff's right to recover is not affected by his having contributed to his injury, unless he was in fault for so doing.¹³⁰ It is possible not only for the plaintiff to contribute to his own injury, but even to be himself its immediate cause, and yet to recover compensation therefor. The occurrences illustrating this principle may be classified under the heads treated in the three next succeeding sections; they are characterized by an existing emergency, caused by the negligence of the defendant. The rationale of the doctrine is that in such case the natural action of the plaintiff in his efforts to avoid or avert the danger thus threatened shall stand as a substitute for that ordinary

¹²⁸ *East Saginaw R. Co. v. Bohn*, 27 Mich. 503; *Pittsburgh, etc. R. Co. v. Caldwell*, 74 Pa. St. 421; *Brennan v. Fairhaven R. Co.*, 45 Conn. 284; *Walters v. Chicago, etc. R. Co.*, 41 Iowa, 71, 76. See this distinction commented upon by Redfield, J., in *Robinson v. Cone* (22 Vt. 213, 225). s. c., in full, *Thompson, Negl.* 1129.

¹²⁹ A lunatic was traveling on a railroad, in charge of his father, and the father left him in one car and took a seat in another. The lunatic not paying his fare after repeated requests, the conductor, in ignorance of his condition, put him off the train; he wandered about the track, and was run over by another train and killed. Held, that there was negligence on the part of the father, which was attributable in law to the conductor (Willetts v. Buffalo, etc. R. Co., 14 Barb. 585). Where a deaf-mute slave, who was walking on a railroad, with his back to an approaching train, was killed by the train, it not appearing that the engineer knew of the slave's infirmity, and it being shown that the usual warning was given by the steam whistle, it was held, that the railroad company was not liable (*Poole v. North Carolina R. Co.*, 8 Jones [N. C.] Law, 340).

¹³⁰ He must be shown to have neglected some duty (*Missouri Pac. Ry. Co. v. White*, 80 Tex. 202, 15 S. W. 808 (1895)).

care which the law generally requires, and that as the defendant has brought about the emergency, so too he should be held responsible for such injuries as the plaintiff may receive in consequence thereof.

§ 85a. Danger to life; where the life of the plaintiff or his bodily injury is threatened.—If one's safety has been endangered by the negligent act or omission of another, and in his efforts to avert the danger he acts imprudently and is injured he is not to be held guilty of contributory negligence, even if but for such action on his part he would not have been injured. Acts done or omitted by the plaintiff under the influence of terror caused by the negligence of the defendant seriously endangering his personal security, though resulting in injury which would not otherwise have occurred, are not imputed as contributory negligence. And the rule is sound and just which holds a party guilty of having caused another to be surrounded by such circumstances responsible for the result.¹³¹ In judging of the care exer-

¹³¹ *Gee v. Metropolitan Ry. Co.*, L. R. Q. B. 161, 174; *Whaley v. Laing*, 2 Hurlst. & N. 476. See this doctrine applied in *Baldwin v. Greenwoods, etc. Co.*, 40 Conn. 238; *Pittsburgh, etc. R. Co. v. Nelson*, 51 Ind. 150; *Hammond v. Mukwa*, 40 Wis. 35; *Schultz v. Chicago, etc. R. Co.*, 44 Wis. 638; *Walter v. Chicago, etc. R. Co.*, 39 Iowa, 33; *Wyandotte v. White*, 13 Kans. 191; *Baltimore v. Holmes*, 39 Md. 241; *Geiselman v. Scott*, 25 Ohio St. 86; *Gillespie v. Newburg*, 54 N. Y. 468; *Jennings v. Wayne*, 63 Me. 468. Acts in emergencies: when an emergency is brought about by the negligence of the defendant, threatening death or serious bodily harm to the plaintiff, the latter will not be chargeable with negligence or contributory negligence because in his effort to save himself he acts imprudently; but his injury, though had he acted differently or done nothing he would not have been injured, will be imputed to the defendant's negligence as its responsible cause (*South Chicago, etc. Ry. Co. v. Kinnare*, 216 Ill. 451, 75 N. E. 179 (1905); *Ellick v. Wilson*, 58 Neb. 584, 79 N. W. 152 (1899); *Remer v. Long*, 13 Kans. 191; *Island Ry. Co.*, 113 N. Y. Supp. 669, 21 N. E. 1116; see N. Y. Supp. 124 (1899); *Kreider v. Lancaster, etc. Turnpike Co.*, 162 Pa. St. 537, 29 Atl. 721 (1894); *Mitchel v. Charleston, etc. Power Co.*, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577 (1895); *Texas, etc. Ry. Co. v. Watkins*, 88 Tex. 20, 29 S. W. 232 (1895); *Chicago, etc. Ry. Co. v. O'Leary*, 126 Ill. App. 311 (1906); *Sherwood v. N. Y. Cent. & H. R. Ry. Co.*, 105

cised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and if the plaintiff is suddenly put in peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise.¹⁸²

N. Y. Supp. 547, 120 App. Div. 639 (1907); *Jennings v. Philadelphia, etc. Ry. Co.*, 29 App. D. C. 219 (1907); *North American, etc. House v. McElligott*, 227 Ill. 317, 81 N. E. 388 (1907); *Louisville, etc. N. Ry. Co. v. Molloy's Admr.*, 32 Ky. L. R. 745, 107 S. W. 217 (1908); *Duncan v. Houghton Co. St. Ry. Co.*, 150 Mich. 235, 113 N. W. 1126 (1907); *Lange v. Missouri Pac. Ry. Co.*, 208 Mo. 458, 106 S. W. 660 (1907); *Davis v. Chicago, etc. Ry. Co.*, 159 Fed. 10 (1907); *Hainlin v. Bridge*, 47 So. (Fla.) 825 (1908); *Paige v. Ill. Steel Co.*, 233 Ill. 313, 84 N. E. 239 (1908); *Leonard v. Joline*, 133 N. Y. Supp. 682, 61 Misc. Rep. (1908); *Pacetti v. Central of Ga. Ry. Co.*, 6 Ga. App. 97, 64 S. E. 302 (1908); *Woodson v. Prescott, etc. Ry. Co.*, 121 S. W. (Ark.) 273 (1909); *Wheeler v. Oregon R., etc. Co.*, 16 Idaho, 375, 102 Pac. 347 (1909); *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400 (1909). That plaintiff was engaged in an unlawful act does not necessarily deprive him of the benefit of the rule (*McLain v. Lewistown Interstate, etc. Co.*, 17 Idaho, 63, 101 Pac. 1015 (1909)). A violation of law contributing to the injury received would disentitle one to the benefit of the rule; but where such violation is merely a condition or an attendant circumstance it would not have that effect (*Moran v. Dickinson*, 204 Mass. 559, 90 N. E. 1150 (1900)). Applying the general doctrine to the case of a section hand working alongside the track, injured by a fireman jumping from the train in imminent danger of collision by the company's negligence, and falling on him, the Supreme Court of Texas, by Denman, J., said: "The true ground upon which the acts of a person so circumstanced are not imputed to him as contributory negligence, is that the negligent conduct of the wrongdoer has, for the time being, acquired such a controlling influence over such person that his acts are attributable thereto instead of his own volition. His acts, under the circumstances are in law regarded as would be the movements of an inanimate object set in motion by such negligence. If the fireman had also been injured in the collision with the plaintiff there could be no doubt that the defendant's negligence would have been the proximate cause, under the principles above stated, and such negligence stands in the same relation to the injuries inflicted upon plaintiff" (*Jackson v. Galveston, etc. Ry. Co.*, 90 Tex. 372, 38 S. W. 742 (1897)).

¹⁸² *Bucher v. N. Y. Central R. Co.*, 98 N. Y. 128; *Salter v. Utica, etc. R. Co.*, 88 Id. 42, 49; *Pennsylvania R. Co. v. Werner*, 89 Pa. St. 59 [plaintiff, in endeavoring to escape injury from a train, was struck by a locomotive going in the opposite direction]; *Mack v. St. Paul, etc. R. Co.*, 30 Minn. 493 [plaintiff, hear-

This is especially true, if his peril is caused by the defendant's fault.^{132a} If one is placed, by the negligence of

ing a cry of danger, ran in front of the locomotive and was injured]. The plaintiff knew of a defect in a sidewalk, but being frightened by the attempt of a strange man to seize her, ran along the sidewalk without thought of the defect, and was injured. Held, she was not prevented from recovering (*Barton v. Springfield*, 110 Mass. 131); and in a similar case (*Weare v. Fitchburg*, Id. 334), where the woman, alarmed by hearing that her children were in danger, ran to her home without thought of the sidewalk, a recovery was had. Mere mental abstraction will not excuse a failure to observe a defect of which the traveler has knowledge (*Gilman v. Deerfield*, 15 Gray, 577; *Kewanee v. Depew*, 80 Ill. 119. Compare *George v. Haverhill*, 110 Mass. 506; *Wheeler v. Westport*, 30 Wis. 392). Applies only where plaintiff's previous contributory negligence has not contributed to the dangerous situation (*Smith's Admr. v. Norfolk, etc. Ry. Co. (Va.)* 60 S. E. 56 (1908); *New York Tr. Co. v. O'Donnell*, 159 Fed. 659, 86 C. C. A. 527 (1908); *Chesapeake, etc. Ry. Co. v. Hall's Admr.*, 109 Va. 206, 63 S. E. 1007 (1909). If the plaintiff was guilty of unlawful conduct of which the defendant had a right to complain, either because it violated some duty the plaintiff owed defendant, or because it placed him within range of the dangerous instrumentality in a manner that could not have been anticipated, he is not entitled to the benefit of the rule exempting parties placed by the negligence of another in a dangerous position from the rule of ordinary care (*Johnson v. Rome Ry. Co.*, 4 Ga. App. 742, 62 S. E. 491 (1908). See § 85, note 28a, *ante*.

^{132a} One "who places another in peril cannot complain if he does not exercise the best judgment in extricating himself from such peril" (*Voak v. Northern Central R. Co.*, 75 N. Y. 320, 323; *Coulter v. American Exp. Co.*, 56 Id. 585; *Wheelock v. Boston, etc. R. Co.*, 105 Mass. 203; *Pennsylvania, etc. R. Co. v. Werner*, 89 Pa. St. 59; *Gibbons v. Wilkesbarre R. Co.*, 155 Id. 279, 26 Atl. 417; *Vallo v. U. S. Exp. Co.*, 147 Pa. St. 404, 23 Atl. 594 [trying to avoid missile]; *Blackwell v. Lynchburg, etc. R. Co.*, 111 N. C. 151, 16 S. E. 12 [plaintiff killed while seeking refuge from blast without notice]; *Richmond, etc. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86; *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808; *Chicago, etc. R. Co. v. Miller*, 46 Mich. 532, 9 N. W. 841; *Wesley Coal Co. v. Healer*, 84 Ill. 126; *Dunham Towing Co. v. Dandelin*, 143 Ill. 409, 32 N. E. 258; *Smith v. St. Paul, etc. R. Co.*, 30 Minn. 169; *Wilson v. Northern Pac. R. Co.*, 26 Id. 278; *Gumz v. Chicago, etc. R. Co.*, 52 Wis. 672; *Stackman v. Chicago, etc. R. Co.*, 80 Id. 433, 50 N. W. 404; *Lincoln Transit Co. v. Nichols*, 37 Neb. 332, 55 N. W. 872; *Silver Mining Co. v. McDonald*, 14 Colo. 191, 23 Pac. 346; *Karr v. Parks*, 40 Cal. 188; *Stephenson v. Southern Pac. R. Co.*, 102 Id. 143, 34 Pac. 618, 36 Id. 407; *Ladd v. Foster*, 31 Fed. 827; *Collins v. Davidson*, 19 Id. 83; *Stevenson v. Chicago, etc. R. Co.*, 18 Id. 493, 5 McCrary, 634. But compare *Muldowney v. Illinois, etc. R. Co.*, 36 Iowa, 462, and *Peck v. New*

another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance.¹³³ Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault.¹³⁴ The confusion of

Haven R. Co., 50 Conn., 379 [jumping from wagon, in fear of collision with train]). A plaintiff is not necessarily to be regarded as having contributed to his own injury by acting in a manner *prima facie* dangerous and imprudent, if there is evidence of acts or omissions of the defendant, by which he might have been put off his guard (Dublin, etc. R. Co. v. Slattery, L. R. 3 App. Cas. 1155. See Knapp v. Sioux City R. Co., 65 Iowa, 91, 21 N. W. 198). In Chicago, etc. R. Co. v. Parkinson (56 Kans. 652, 44 Pac. 615), a boy fifteen years old, when delivering railroad mail to the baggage master on a car, being rudely cursed by the baggage man, became confused, and stepped in front of an approaching engine on another track close by, and was injured. Held, proper to refuse to direct a verdict for defendant. Note 131, *ante*.

¹³³ Stokes v. Saltonstall, 13 Pet. 101; Eldridge v. Long Island R. Co., 1 Sandf. 89; Ingalls v. Bills, 9 Metc. 1; Frink v. Potter, 17 Ill. 406; Southwestern R. Co. v. Paulk, 24 Ga. 356; McKinney v. Neil, 1 McLean, 540; Pennsylvania Tel. Co. v. Varnau (Pa.), 15 Atl. 624; Gibbons v. Wilkesbarre, etc. R. Co., 155 Pa. St. 279, 26 Atl. 417. This principle applies to the case of plaintiffs who are injured by jumping from car, attempting to get off under such circumstances, although no harm hap-

pened to the car (Buel v. N. Y. Central R. Co., 31 N. Y. 314; Twomley v. Central Park, etc. R. Co., 69 Id. 158; Smith v. Wrightsville, etc. R. Co., 83 Ga. 671, 10 S. E. 361; Woolery v. Louisville, etc. R. Co., 107 Ind. 599, 8 N. E. 226; Peoria, etc. R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; South Covington, etc. R. Co. v. Ware, 84 Ky. 267, 1 S. W. 493; Kleiber v. People's R. Co., 107 Mo. 240, 17 S. W. 946; Spohn v. Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880 [train robbery]; St. Louis, etc. R. Co. v. Murray, 55 Ark. 248, 18 S. W. 50; s. p., Louisville, etc. R. Co. v. Shivell [Ky.], 18 S. W. 944. Compare Sears v. Dennis, 105 Mass. 310; Wilson v. Northern Pac. R. Co., 26 Minn. 278; Pittsburgh R. Co. v. Grier, 22 Pa. St. 54; Indianapolis, etc. R. Co. v. Stout, 53 Ind. 143; Jeffersonville, etc. R. Co. v. Swift, 26 Id. 459, 476). A passenger who leaps from a train while moving at a rate of speed which makes death or great bodily injury inevitable, is guilty of negligence to a degree of rashness; unless the circumstances are such as to induce in his mind the belief that to remain will result in greater bodily harm (Card v. Ellsworth, 65 Me. 547).

¹³⁴ McMillan Marble Co. v. Black, 89 Tenn. 118, 14 S. W. 479 [boy ran under falling rock]; Texas, etc. R. Co. v. Watkins, 7 Tex. Civ. App.

mind, caused by such negligence, is part of the injury inflicted by the negligent person; and he must bear its consequences. When the question is one of mere inconvenience, and not actual danger, some moderate risk may be taken, if there is not obvious danger.¹³⁵ But the plaintiff will be chargeable with contributory negligence, if he runs the risk of an obvious and serious danger, merely to avoid inconvenience.¹³⁶ No such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment.¹³⁷

§ 85b. Danger incurred to save the life of another. — Though the effort of one to save the life of another endangered by the negligence of the defendant is, inde-

1, 26 S. W. 760 [woman jumped in front of train]; Killien v. Hyde, 63 Fed. 172 [fireman of tug, in collision, jumped overboard]; Word v. District of Columbia, 24 App. D. C. 524 (1905); Atkins v. Lackawanna Trans. Co., 79 Ill. App. 19, aff'd, 182 Ill. 237, 54 N. E. 1004 (1899); Chicago, etc. Ry. Co. v. Corson, 101 Ill. App. 115, aff'd, 198 Ill. 98, 64 N. E. 739 (1902); Dummer v. Milwaukee Elec. Ry., etc. Co., 108 Wis. 589, 84 N. W. 853 (1901); Pennsylvania, etc. Ry. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700 (1896); Dolson v. Dunham, 96 Minn. 227, 104 N. W. 964 (1905); Gartland v. Zoological Soc., 135 App. Div. 163, 120 N. Y. Supp. 84; St. Louis, etc. Ry. Co. v. Stamps, 84 Ark. 241, 104 S. W. 1114 (1907).

¹³⁵ Gee v. Metropolitan R. Co., L. R. 8 Q. B. 161; Fordham v. Brighton, etc. R. Co., L. R. 4 C. P. 619; Clayards v. Dethick, 12 Q. B. 439; Wyatt v. Great Western R. Co., 6 Best & S. 709; Siner v. Great Western R. Co. L. R. 3 Exch. 150; Johnson v. West Chester, etc. R. Co., 70 Pa. St. 357.

¹³⁶ Solomon v. Manhattan R. Co., 103 N. Y. 437, 443, 9 N. E. 430; Adams v. Lancashire, etc. R. Co., L. R. 4 C. P. 739, a very doubtful case. To the same effect, Richardson v. Metropolitan R. Co., L. R. 3 C. P. 374, note; Lax v. Darlington, 5 Exch. Div. 28. See also Gavett v. Manchester, etc. R. Co., 16 Gray, 501; Damont v. New Orleans, etc. R. Co., 9 La. Ann. 441; Illinois Central v. Able, 59 Ill. 131; Jeffersonville, etc. R. Co. v. Hendricks, 26 Ind. 228; Gulf, etc. R. Co. v. La Gierse, 51 Tex. 189.

¹³⁷ An error of judgment in one suddenly placed in peril by his own fault does not relieve him from the consequences of the negligence which caused such position (Schneider v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752; Richfield v. Michigan Cent. R. Co., 110 Mich. 496, 68 N. W. 218; Baltzer v. Chicago, etc. R. Co., 83 Wis. 459, 53 N. W. 885; Shankenbery v. Metropolitan R. Co., 46 Fed. 177; Reary v. Louisville, etc. R. Co., 40 La. Ann. 32, 3 So. 390; Austin, etc. R. Co. v. Beatty, 73 Tex. 592, 11 S. W. 858. See a

pendently, such as would ordinarily be regarded as contributory negligence, it will not be so regarded in such case in law.¹³⁸ Hence, one who imperils his own life for the purpose of rescuing another in imminent danger, is not chargeable, as matter of law, with contributory negligence; and, if the life of the rescued person was endangered by the defendant's negligence, the rescuer may recover for the injuries which he suffered from the defendant in consequence of his intervention.¹³⁹ There

hard and doubtful case, *International, etc. R. Co. v. Hester*, 72 Tex. 40, 11 S. W. 1041.

¹³⁸ In the case of *San Antonio, etc. Ry. Co. v. Gray*, 95 Tex. 424, 67 S. W. 763 (1902), the plaintiff's child, two years old, was on the railway track, and the father was injured in the attempt to rescue the child. The plaintiff himself was on the track and looking back saw other children on the track. He ran back, shouting to them to get off, they did so. He then saw his own child enter on the track. There was evidence that the train was running at a speed of twenty-five miles an hour, within the corporate limits of a town limiting the speed of trains to ten miles, also that the child was seen and no effort made to stop the train. The Supreme Court of Texas said: "The fact that Gray was wrongfully on the track of the defendant at the time he discovered the peril of his child does not make him a trespasser in his subsequent efforts to rescue the child from danger. If he had been off the track he would have been authorized by law to go upon it in order to make the rescue, and, being upon the track, it was equally permissible for him to run along it as the best and quickest method by which to accomplish his purpose. One who endangers his

own life to save the life of another person is not chargeable with being a trespasser upon the railroad track, nor does his entrance on the track in the presence of danger for such purpose lay him liable to the charge of contributory negligence (*Eckert v. Railway*, 43 N. Y. 502; *Spooner v. Railway*, 115 N. Y. 22; *Becker v. Railway*, 61 S. W. Rep. 997, 1 *Shearm. & Redfield on Negl.*, (5th ed.), § 85").

¹³⁹ Where one threw himself in front of a train for the purpose of saving the life of a child, it was held that he was not necessarily negligent in so doing (*Eckert v. Long Island R. Co.*, 43 N. Y. 502). "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons" (per *Grover, J., Id.*). *s. p.*, *Spooner v. Delaware, etc. R. Co.*, 115 N. Y. 22, 21 N. E. 696 [children on track]; *Gibney v. State*, 137 N. Y. 1, 33 N. E. 142 [father trying to save his child from drowning]; *Condiff v. Kansas City, etc. R. Co.*, 45 *Kans.* 256, 25 *Pac.* 562; *Peyton v. Texas, etc. R. Co.*, 41 *La. Ann.* 861, 6 *So.* 690; *Pennsylvania Co. v. Langendorf*, 48 *Ohio St.* 316, 28 *N. E.* 172; *Clark v. Shoe, etc. Co.*, 16 *Mo. App.*

need be no fear that this principle will make any one liable for the cost of volunteered benevolence, without being himself in fault. No one is liable at all unless he is in fault. Thus a railroad company could not be made liable for injuries suffered by one who, with the most praiseworthy motives, rushed in front of a train to rescue another who was unlawfully on the track, and of whose presence the engineer in charge had no notice, actual or constructive, the train being prudently managed. In such a case neither party would be in fault, and, therefore, neither could recover damages.¹⁴⁰

§ 85c. Neither the discharge of a high moral duty nor the exercise of a legal right can be made the basis of contributory negligence. — So a railroad engineer who, at the time of threatened collision, remains at his post

463. In *Evansville, etc. R. Co. v. West Chicago St. Ry. v. Liderman*, 17 Ind. 102) and *Atlanta, etc. R. Co. v. Leach* (91 Ga. 419, 17 S. E. 619), no negligence was proved against the railroad company. *Dicta* on other points in these cases should be disregarded. The principle of the *Eckert* case has been approved, even in *Massachusetts (Linnehan v. Sampson, 126 Mass. 506)*. Danger incurred to save life (*Louisville, etc. Ry. Co. v. Orr, 121 Ala. 489, 26 So. 35 (1899); Chicago, etc. Ry. Co. v. Eganolf, 112 Ill. App. 323 (1904); Saylor v. Parsons, 122 Iowa, 679, 98 N. W. 500, 101 Am. St. Rep. 283, 64 L. R. A. 542 (1904); Texas, etc. Ry. Co. v. Scarborough (Tex. App.), 104 S. W. 408, judgment affirmed Sup. Ct., 108 S. W. 805 (1908)*). But if the person attempted to be rescued was placed in the position of danger through the fault of the person injured, the danger will not excuse the attempt to save him (*Atlanta, etc. Ry. Co. v. Leach, 91 Ga. 419, 17 S. E. 619 (1893)*);

¹⁴⁰ "It is only when a railroad company, by its own negligence, created the danger, or, through its negligence, is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person and recover for an injury he may sustain in that attempt. * * * The negligence of the company as to the person in danger is imputed to the company, with respect to him who attempts the rescue; and if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the

and faces a danger which he could personally escape, in the hope of saving others upon the train, is not chargeable with contributory negligence; for he is at least doing right, if not performing a positive duty, even though he runs into certain death.¹⁴¹ And upon this principle it is, that no proper use of his own land, though exposing him to greater risk from the negligence of others than would be the case if a different use were made of it, will deprive any one of a remedy for such negligence.¹⁴²

§ 85d. When property is imperiled by defendant's negligence. — The same rule is generally applied where property is seriously imperiled by the defendant's negligence, provided such conduct is not reckless. Under such circumstances even conduct on the part of the plaintiff, not reckless, that would ordinarily constitute negligence, when it is directed to the preservation of property from the effects of defendant's negligence, if adapted to that end and naturally so induced, is not considered contributory negligence.¹⁴³

rescuer, after his efforts to rescue the person in danger commenced" (Henry, J., in *Donahoe v. Wabash, etc. R. Co.*, 83 Mo. 560). This was the true ground for the decision in *Atlanta, etc. R. Co. v. Leach, supra*.

¹⁴¹ *Cotterill v. Chicago, etc. R. Co.*, 47 Wis. 634; *Pennsylvania Co. v. Roney*, 89 Ind. 453.

¹⁴² In *Kalbfleisch v. Long Island R. Co.* (102 N. Y. 520, 7 N. E. 557), it was held not to be negligence for the proprietor of a varnish factory, which was adjacent to a railway, to set some varnish out of doors in the process of manufacture, where it was set on fire by sparks from a passing locomotive, which had a defective spark arrester. The mere location and use of a railroad do not operate as a prohibition upon branches of industry which may be endangered

by its vicinity. To same effect, *Cook v. Champlain, etc. Co.*, 1 Den. 91; *Vaughan v. Taff Vale R. Co.*, 3 Hurlst. & N. 743; see *Fero v. Buffalo, etc. R. Co.*, 22 N. Y. 209.

¹⁴³ *Rexter v. Starin*, 73 N. Y. 601; *Wasmer v. Delaware, etc. R. Co.*, 80 Id. 212. In the first case, the plaintiff's boat was fastened to a pier, and he was on another boat adjoining, when he saw a barge approaching his boat, and, apprehending a collision, he ran on his own boat; the barge struck it, and a piece of timber torn off by the collision injured him. Held, that it was plaintiff's right and duty to look to the safety of his boat; and it was for the jury to say whether the act was reasonable under all the circumstances. To same effect, see *North Penn. R. Co. v. Kirk*, 90 Pa.

§ 86. Plaintiff not prejudiced by want of more than ordinary care.—The contributory negligence of the plaintiff, when relied upon to defeat his recovery, must consist of at least ordinary negligence, that is, want of ordinary care.¹⁴⁴ His failure to take unusual care is no

St. 15. The case of *Illinois Cent. Ry. Co. v. Siler*, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819 (1907); (with excellent monographic note) in a judicious review of the authorities admirably presents the weight of reason and authority in support of the text. The facts of the *Siler* case were substantially the same as alleged in the scandalous *Seale* case, which went off on demurrer. The court said: "The case of *Seale v. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602, has been cited by appellant and fully sustains its position. That case holds that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri Court of Appeals in *Logan v. Wabash Ry. Co.*, 96 Mo. App. 461, 70 S. W. 434. In the case of *Chattanooga Light etc. Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616, 60 L. R. A. 459, 97 Am. St. Rep. 844, the injury resulted from 'an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence.' The court, while reversing the judgment against the defendant, said: 'The rule has been extended so as to give the injured party redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances.' The

cases which we think sustain the position of the appellant we think are wrong in principle and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. (*Berg v. Great Northern Ry. Co.*, 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; *Liming v. Illinois Cent. R. Co.*, 81 Ia. 246, 47 N. W. 66; *Glanz v. Chicago, etc. Ry. Co.*, 119 Ia. 246, 93 N. W. 575; *Wasmer v. Delaware, Lackawanna & Western R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239").

¹⁴⁴ The words "ordinary care" are used in almost every case upon this subject, as, for example, in *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Garmon v. Bangor*, 38 Me. 443; *Owings v. Jones*, 9 Md. 108; *Davies v. Mann*, 10 Mees. & W. 546;

defence to the action.¹⁴⁵ Substantially the same standard of ordinary care is applied to the conduct of a woman as to that of a man in questions of contributory negligence.¹⁴⁶ No one can be required to make efforts beyond

Bridge v. Grand Junct. R. Co., 3 Id. 244; Butterfield v. Forrester, 11 East, 60, and innumerable later cases. See, among other cases, Priest v. Nichols, 116 Mass. 401; Peverly v. Boston, 136 Id. 366; Railroad Co. v. Jones, 95 U. S. 439. Compare, however, N. J. Express Co. v. Nichols, 33 N. J. Law, 434; Cronin v. Delavan, 50 Wis. 375; Philadelphia, etc. R. Co. v. Boyer, 97 Pa. St. 91. "The plaintiff, in order to show that he was in the exercise of due care, must prove that he acted as men of ordinary prudence exercising this faculty, and possessed of sufficient sense and capacity to act intelligently, would have acted under similar circumstances" (per Devens, J., Patrick v. Pote, 117 Mass. 297).

¹⁴⁶ So it has been repeatedly adjudged, in cases involving the risk of life and limb (Ernst v. Hudson River R. Co., 35 N. Y. 9, 26; Beisiegel v. N. Y. Central R. Co., 34 Id. 622, 628, 632; Fero v. Buffalo, etc. R. Co., 22 Id. 209; Beers v. Housatonic R. Co., 19 Conn. 566; Bloor v. Delafield, 69 Wisc. 273, 34 N. W. 115; Bequette v. People's Tr. Co., 2 Ore. 200), as well as in cases involving injury to property only (Newbold v. Mead, 57 Pa. St. 487; Bridge v. Grand Junc. R. Co., 3 Mees. & W. 244; Thorogood v. Bryan, 8 C. B. 115; Clayards v. Dethick, 12 Q. B. 439; Butterfield v. Forrester, 11 East, 60; Whirley v. Whiteman, 1 Head, 610). Therefore, a vessel at anchor, with the usual watch on deck, which suffered injury from another drifting against her, was held not to be in fault, although, if she had been bet-

ter lighted and watched, she probably could have lifted anchor in time to avoid injury (The Clarita, 23 Wall. 1). For other illustrations of this rule, see Lyons v. Erie R. Co., 57 N. Y. 489; Mark v. Hudson River Bridge Co., 103 Id. 28; Evans v. Utica, 69 Id. 166; Chicago, etc. R. Co. v. Donahue, 75 Ill. 106; Centralia v. Scott, 59 Id. 129; Elgin v. Renwick, 86 Id. 498; Luvenguth v. Bloomington, 71 Id. 238; Bills v. Ottumwa, 35 Ia. 107; Larrabee v. Sewall, 66 Me. 376; Barstow v. Berlin, 34 Wis. 357; Krueger v. Bronson, 45 Id. 198; Perkins v. Fond du Lac, 34 Id. 435. "Slight negligence is the want of extraordinary care and prudence, and the law does not require of a person injured by the carelessness of others, the exercise of that high degree of caution as a condition precedent to right to recover" (Cremer v. Portland, 36 Wis. 92). We have found but one case in which a contrary opinion was even intimated (Hurst v. Burnside, 12 Ore. 520), and this is a mere *obiter dictum*.

¹⁴⁶ Hassenyer v. Mich. Central R. Co., 48 Mich. 205; Yarnall v. St. Louis, etc. R. Co., 75 Mo. 575; Snow v. Provincetown, 120 Mass. 580; Fox v. Glastonbury, 29 Conn. 204. Permitting a woman to drive a horse upon a highway is not conclusive of the plaintiff's want of care (Cobb v. Standish, 14 Me. 198; Bigelow v. Rutland, 4 Cush. 247; Babson v. Rockport, 101 Mass. 93; Blood v. Tyngsborough, 103 Id. 509). A woman may be presumed to be somewhat lacking in knowledge, skill,

his powers,¹⁴⁷ nor such as must needs be futile.

§ 87. Ordinary care defined.— Ordinary care does not require one absolutely to refrain from exposing himself to peril.¹⁴⁸ But it implies the use of such watchfulness and precautions to avoid coming into danger,¹⁴⁹ and such effort to escape from¹⁵⁰ or mitigate it, when actually in danger, as a person of ordinary prudence would use for his own protection, under the same circumstances, in view of the danger to be avoided.¹⁵¹ If the danger is re-

dexterity, steadiness of nerve and coolness of judgment in driving, so that a person meeting her under circumstances threatening a collision should govern his conduct with some regard to her probable deficiencies (*Daniels v. Clegg*, 28 Mich. 33. Compare *Bloomington v. Perdue*, 99 Ill. 329). *Ashbury v. Charlotte*, etc. Co., 125 N. C. 568, 34 S. E. 654 (1899).

¹⁴⁷ *Tilley v. St. Louis, etc. R. Co.*, 49 Ark. 535, 6 S. W. 8.

¹⁴⁸ It is not necessarily negligence, as matter of law, for one to expose his person or property to peril (*Dublin, etc. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Jeffrey v. Keokuk*, etc. R. Co., 56 Ia. 546). If the danger is not so great or imminent, that a man of ordinary prudence would refuse to encounter it, incurring it is not contributory negligence (*Stoddard v. St. Louis, etc. R. Co.*, 65 Mo. 514; *Railroad Co. v. Ogden*, 3 Colo. 499). It is not negligence *per se* for one who knows that there is ice on the pavement to attempt to pass over it, even at night (*Evans v. Utica*, 69 N. Y. 166; s. p., *Dewire v. Bailey*, 131 Mass. 169; *Weston v. N. Y. Elevated R. Co.*, 73 N. Y. 595). "The fact that a person voluntarily takes some risk is not conclusive evidence, under all cir-

cumstances, that he is not using due care" (*Lawless v. Connecticut River R. Co.*, 136 Mass. 1; s. p., *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Mahoney v. Metropolitan R. Co.*, 104 Id. 73).

¹⁴⁹ One who unnecessarily exposes himself or property to a known danger, assumes all the risks reasonably to be apprehended from such a course of conduct (*Mehan v. Syracuse, etc. R. Co.*, 73 N. Y. 585; *Goldstein v. Chicago, etc. R. Co.*, 46 Wis. 404; *Simpson v. Keokuk*, 34 Ia. 568; *Baltimore, etc. R. Co. v. Depew*, 40 Ohio St. 121; *Corlett v. Leavenworth*, 27 Kans. 672; *Mansfield, etc. Coal Co. v. McEnery*, 91 Pa. St. 185; *Erie v. Magill*, 101 Id. 616; *Pittsburgh, etc. R. Co. v. Collins*, 87 Id. 405; *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81.

¹⁵⁰ *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539, 10 S. E. 233.

¹⁵¹ *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; *Toledo, etc. R. Co. v. Goddard*, 25 Ind. 185. This is sufficient (*Totten v. Phipps*, 52 N. Y. 354, 357; *Ganiard v. Rochester, etc. R. Co.*, 50 Hun, 22, 26; *Clements v. La. Electric Co.*, 44 La. Ann. 692, 11 So. 51). For instances of application of the rules as to ordinary care laid down in the text, see *Eppendorf v. Brooklyn R. Co.*, 69 N. Y. 195; *Dou-*

mote or slight, the care required to avoid it may be such as would, under other circumstances, be called slight. If the danger is near or extraordinary, the care and vigilance required to avoid it may be such as, under a slighter peril, might be deemed extraordinary. Care must be proportioned to the circumstances.¹⁵² In either case, the plaintiff is bound to take that degree of care which persons of ordinary ¹⁵³ care and prudence are generally accustomed to use under similar circumstances, but no more.¹⁵⁴ It is not enough that he should use "his

gan v. Champlain, etc. Co., 56 Id. 1; Macauley v. New York, 67 Id. 602; Maguire v. Middlesex R. Co., 115 Mass. 239; Elkins v. Boston, etc. R. Co., Id. 190; French v. Taunton Br. R. Co., 116 Id. 537; Barton v. Springfield, 110 Id. 131; Marble v. Ross, 124 Id. 44; Kennard v. Burton, 25 Me. 39; Noyes v. Shepherd, 30 Id. 173; Daley v. Norwich, etc. R. Co., 26 Conn. 591; Williams v. Clinton, 28 Id. 266; Fox v. Glastonbury, 29 Id. 204; Philadelphia, etc. R. Co. v. Long, 75 Pa. St. 257; Chicago, etc. R. Co. v. Ryan, 70 Ill. 211; Augusta, etc. R. Co. v. Renz, 55 Ga. 126; Central R., etc. Co. v. Perry, 58 Id. 461; Crommelin v. Cox, 30 Ala. 318; Gothard v. Alabama, etc. R. Co., 67 Id. 114; Richmond, etc. R. Co. v. Morris, 31 Gratt, 200; Indianapolis, etc. R. Co. v. Stout, 53 Ind. 143; Wyatt v. Citizens' R. Co., 55 Mo. 485; Norton v. Ittner, 56 Id. 351; Jeffrey v. Keokuk, etc. R. Co., 56 Ia. 546; Leavenworth, etc. R. Co. v. Rice, 10 Kans. 426; Strong v. Sacramento, etc. R. Co., 61 Cal. 326.

¹⁵² Cincinnati, etc. R. Co. v. Howard, 124 Ind. 280, 24 N. E. 892. Due care must be exercised in advance of the injury, not merely "at the time" (Peoria, etc. R. Co. v. Herman, 39 Ill. App. 287. See Palmer v. Dearing, 93 N. Y. 7).

¹⁵³ It will not do to substitute the words "average prudence," in a charge to a jury (Marsh v. Benton, 75 Ia. 469, 39 N. W. 713). But the words "ordinary prudence" (Chicago, etc. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 Id. 218), or "a reasonably prudent man" (Pennsylvania R. Co. v. McTighe, 46 Pa. St. 316; Hawley v. Chicago, etc. R. Co., 71 Ia. 717, 29 N. W. 787; Parvis v. Philadelphia, etc. R. Co., 8 Del. 436, 17 Atl. 702) are sufficient.

¹⁵⁴ Cleveland, etc. R. Co. v. Terry, 8 Ohio St. 570, 581. Thus, one who passes along an obstructed highway, "is bound to observe ordinary care," that is, such care as a reasonably prudent man, under the circumstances, would exercise to preserve himself from injury (Pennsylvania R. Co. v. McTighe, 46 Pa. St. 316; Farrer v. Greene, 32 Me. 574; Wheeler v. Westport, 30 Wis. 392). See § 375, *post*. No greater care is required (see § 519, *post*; Totten v. Phipps, 52 N. Y. 354; Myers v. Chicago, etc. Ry. Co., 103 Mo. App. 268, 77 S. W. 149 (1903); Hone v. Mammoth Min. Co., 27 Utah, 168, 75 Pac. 381 (1904); City of Spring Valley v. Gavin, 81 Ill. App. 456; *aff'd*, 182 Ill. 232, 54 N. E. 1035 (1899); Chicago, etc. Trac. Co. v. Chugren, 110 Ill. App. 545; *aff'd*,

own best judgment." That is not the proper test.¹⁵⁵ Nor, on the other hand, is it always necessary "to exercise the best judgment or to use the wisest precaution."¹⁵⁶ It is not enough that the plaintiff should act prudently, in view of the knowledge which he actually had.¹⁵⁷ He is responsible for his ignorance of that which he ought to have known.¹⁵⁸ Undoubtedly, these definitions are all vague and unsatisfactory.¹⁵⁹ It is not possible to frame a definition of "prudence" or "ordinary care," which will be perfectly clear and accurate. Prudent men often act imprudently; and their conduct then furnishes no standard.¹⁶⁰ In special cases, it may

- 209 Ill. 429, 70 N. E. 573 (1904); 426 (1911); Missouri, etc. Ry. Co. v. Bishop Co., 184 Mass. 413, 68 N. E. 837 (1903); Davis v. Concord, etc. Ry. Co., 68 N. H. 247, 44 Atl. 447 (1895); San Antonio, etc. Ry. Co. v. Lester, 84 S. W. (Tex. App.) 401; see 99 Tex. 214, 89 S. W. 752 (1905); Newport News, etc. Co. v. Bradford, 99 Va. 117, 37 S. E. 807 (1901); Normile v. Wheeling Trac. Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901 (1905); Washington Mills v. Cox, 157 Fed. 634 (1907); Morrison v. Lee, 113 N. W. (N. D.) 1025, 13 L. R. A. (N. S.) 650 (1907); Dickson v. Swift Co., 238 Ill. 62, 87 N. E. 59, aff'g 142 Ill. App. 655 (1908); Frost v. McCarthy, 200 Mass. 445, 86 N. E. 918 (1909); Ford v. Tremont Lbr. Co., 123 La. 742, 49 So. 492, 22 L. R. A. (N. S.) 917 (1909); Shamp v. Lambert, 121 S. W. (Mo. App.) 770 (1909); Laurie & Co. v. McCulloch, 90 N. E. (Ind.) 1014 (1910); Winters v. Baltimore, etc. Ry. Co., 177 Fed. 44, 100 C. C. A. 462 (1910); St. Louis, etc. Ry. Co. v. Carr, 126 S. W. (Ark.) 850 (1910); Hovden v. Seattle Elec. Co., 180 Fed. 487 (1910); Simmerman v. Hills Creek Coal Co., 54 So. (Ala.) 505 (1911); Clayton, 133 S. W. (Ark.) 1124 (1911); Payne v. Oakland Trac. Co., 113 Pac. (Cal. App.) 1074 (1910).¹⁵⁵ Berg v. Milwaukee, 83 Wis. 599, 53 N. W. 890; Liermann v. Chicago, etc. R. Co., 82 Wis. 286, 52 N. W. 91.¹⁵⁶ Lent v. N. Y. Central, etc. R. Co., 120 N. Y. 467, 24 N. E. 653. While it is true that "mere error of judgment is not negligence," the danger of charging this to a jury is well illustrated by comparing the opposite fates of two cases in which this was done: Hoyt v. N. Y., Lake Erie, etc. R. Co., 118 N. Y. 399, 23 N. E. 565, reversed; and McClain v. Brooklyn R. Co., 116 N. Y. 459, 22 N. E. 1062, affirmed.¹⁵⁷ Louisville, etc. R. Co. v. Hall, 91 Ala. 112, 8 So. 371.¹⁵⁸ Bradwell v. Pittsburgh, etc. R. Co., 153 Pa. St. 105, 25 Atl. 623.¹⁵⁹ See McGrath v. N. Y. Central R. Co., 59 N. Y. 468.¹⁶⁰ "Whether plaintiff was negligent depended upon the particular facts admitted or satisfactorily proved in the case. If the facts thus established constituted negligence, then whether they exhibited such conduct as an ordinarily prudent

be, in a large sense, prudent to take great personal risks, for the sake of a great good. A surgeon, called to attend a dangerous case, might wisely leap off a train in motion, rather than be carried by the station. One who knew that a mob was in waiting for him at the first station might "prudently" leap off before reaching it. But common carriers are not required to participate in such risks. The best test which can be given is the general example of men reputed to be prudent, when using such prudence as they have, with reference to the protection of themselves or others from the effects of the defendant's acts.

§ 88. Care required of infirm.—The plaintiff's own condition may be such as to seriously modify his duty with regard to self-preservation. If he is in the prime of life, active, alert, vigorous, far-sighted and clear-headed, he may, without imprudence, take what might theoretically be considered a certain amount of risk, since he would be almost absolutely certain to place himself in no actual danger thereby. On the other hand, if he is old or infirm, lame, sick or weak, or even if he has dim sight, or is for any reason apt to lose his presence of mind under the appearance or sight of danger, he would not be justified in taking a risk which would be nothing to a vigorous and far-sighted man.¹⁶¹ Thus it would often be gross negligence for a decrepit or lame person to cross a street railway within the same distance of an approaching car at which a person of ordinary health and strength

man might reasonably be expected to indulge in or not, it was none the less negligence. The most prudent men are not always exempt from carelessness; and, when actually negligent, the law attaches the same consequence to their negligent conduct as to similar conduct in others" (per Mitchell, J., *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874).

¹⁶¹ Deceased was killed in the forenoon of the day on a railway which ran through his farm. He was sixty years of age, decrepit, hard of hearing, and of defective sight, and was seen just before the accident walking at a moderate gait along the railroad and on the trestle, where he was killed by a coming train. Held that, under the facts and circumstances, he was guilty of such con-

would have a right to cross without hesitation. In other words, every person must use that degree of care which prudent persons of his class, taking all circumstances into account, including health, strength and habits of body and of mind, would use,¹⁶² when acting prudently. Negligence is not imputed to persons bereft of their senses, as the deaf or the blind, on account of their failure to use senses which they have not. But if such a person, knowing his incapacity, needlessly places himself in a position in which danger is probable, without means on his part to avert it, that is negligence.¹⁶³ The incapacity of such a person to use care in one direction imposes on him the duty of exercising, for his own protection, a degree of care in other directions that will, as far as possible, compensate for his impaired senses or other disability.¹⁶⁴

tributory negligence as to preclude a recovery (*Maloy v. Wabash, etc. R. Co.*, 84 Mo. 270).

¹⁶² So held, as to persons partially blind (*Peach v. Utica*, 10 Hun, 477; *compare Davenport v. Ruckman*, 37 N. Y. 568), or having poor and weak eyesight (*Winn v. Lowell*, 1 Allen, 177; see *Sleeper v. Sandown*, 52 N. H. 244), or extremely aged (*Centralia v. Krouse*, 64 Ill. 19). As to the care required of such persons when traveling on a highway, see § 375, *post*; or when crossing a railroad track, see § 481, *post*.

¹⁶³ Deafness does not furnish an excuse for the negligence of one who, when about to cross a track, saw smoke of locomotive, but without stopping to find out which way it was coming, drove on and was injured (*Purl v. St. Louis, etc. R. Co.*, 72 Mo. 168). *Compare Zimmerman v. Hannibal, etc. R. Co.*, 71 Id. 476. In crossing a railroad track, it is negligence for a deaf person not to keep a sharp lookout for approach-

ing trains (*Illinois Central R. Co. v. Buckner*, 28 Ill. 299; *Ormsbee v. Boston, etc. R. Co.*, 14 R. I. 102; *Birmingham, etc. R. Co. v. Bowers*, 110 Ala. 328, 20 So. 345; *Galveston, etc. R. Co. v. Ryon*, 80 Tex. 59, 15 S. W. 588). Deafness calls for increased vigilance with the eyes (*Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570; *International, etc. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223). To same effect, *Fenneman v. Holden*, 75 Md. 1, 22 Atl. 1049.

¹⁶⁴ *Hayes v. Michigan, etc. R. Co.*, 111 U. S. 228; *Central, etc. R. Co. v. Feller*, 84 Pa. St. 226; *Winn v. Lowell*, 1 Allen, 177; *Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570; *Chicago, etc. R. Co. v. Miller*, 46 Mich. 532; *Lake Shore, etc. R. Co. v. Miller*, 25 Id. 279; *Morris, etc. R. Co. v. Haslan*, 33 N. J. Law, 147; *New Jersey Trans. Co. v. West*, 32 Id. 91; *Chicago, etc. R. Co. v. Triplett*, 38 Ill. 482; *Terre Haute, etc. R. Co. v. Graham*, 46 Ind. 239; *Cogswell v. Oregon, etc. R. Co.*, 6 Ore. 417;

§ 88a. Traveler suffering from mental or physical infirmity. — While it is a correct legal proposition that one suffering from mental or physical infirmity is only required to use ordinary care to avoid accidents, yet, as seen in the preceding section, ordinary care in his case imposes upon him an increased amount of care, proportioned to his disability, to overcome the greater liability to accidents incurred on that account.¹⁶⁵ The

Laicher v. New Orleans, etc. R. Co., 28 La. Ann. 320; *Purl v. St. Louis, etc. R. Co.*, 72 Mo. 168; *Simms v. South Carolina R. Co.*, 26 S. C. 490, 3 S. E. 301; *Worthington v. Mencer*, 96 Ala. 310, 11 So. 72 [dull intellect]. It is gross negligence in a blind person to attempt to cross a network of railroad tracks unattended, when he knows that trains are passing to and fro (*Florida Central, etc. R. Co. v. Williams*, 37 Fla. 406, 20 So. 558).

¹⁶⁵ A finding of contributory negligence has been sustained, where the plaintiff was old, of defective sight and knew of the defective condition of the sidewalk (*Garbanati v. City of Durango*, 30 Cal. 358, 70 Pac. 686 (1902)). In such case contributory negligence is a question for the jury (*Yeager v. Incorporated Town of Spirit Lake*, 115 Ia. 593, 88 N. W. 1095 (1902)). Where the plaintiff was lame and old he should use more care than required of a normal person (*Smart v. Kansas City*, 91 Mo. App. 586 (1902)). A blind person has a right to assume that a sidewalk apparently safe is so in reality (*Carter v. Village of Nunda*, 66 N. Y. Supp. 1059, 55 App. Div. 501 (1900)). When a blind man fell into a ditch it was not error to refuse to instruct that it was negligence for him to use the street without an attendant unless he constantly felt the way with his

staff (*Foy v. City of Winston*, 126 N. C. 381, 35 S. W. 609 (1896)). In case of a blind person injured on the street, unattended, held, he was rightfully there and a charge on contributory negligence in terms of ordinary care, was correct, the court stating that the fact that he was blind was to be considered by the jury in determining what was ordinary care in his case; and the refusal of the court to charge that he should have "exercised a higher degree of care and caution than a person ordinarily would be expected or required to use had he full possession of his senses," sustained (*Hill v. City of Glenwood*, 124 Ia. 479, 100 N. W. 522 (1904)). To the same effect in case of one with a club foot climbing between cars blocking the street. (*Texas, etc. R. v. Bean*, 119 S. W. 328 (1909)). Greater care required of a deaf person approaching a railway crossing than of one in full possession of his senses (*Toledo, etc. Ry. v. Hammett*, 220 Ill. 9, 77 N. E. 72 (1906)). To hold one to a degree of care of persons partially deaf, at a railway crossing, it must appear that he was aware of his infirmity (*Baltimore, etc. Ry. Co. v. Van Horn*, 21 Ohio Cir. Ct. R. 337, 12 Ohio C. D. 106 (1898)). A deaf man at a railway crossing is only required to look to the extent necessary in the exercise of ordinary

proposition is most frequently illustrated in the case of such persons using the streets and sidewalks of a city as highways or in passing over public crossings. Generally, they have the same right to use such highways as others, but in doing so must exercise an increased degree of care, that is such care as persons of ordinary prudence, so afflicted, would use under like circumstances. Cities and towns are generally responsible for maintaining their streets and sidewalks in such reasonably safe condition that they may be used with reasonable safety by travelers exercising ordinary care. The proposition is the same as in any other case; if the act be so obviously negligent that reasonable minds cannot differ, negligence

care (*Osteen v. Southern Ry. Co.*, 76 S. C. 368, 57 S. E. 196 (1907). Instruction that a deaf person at a railway crossing must exercise great caution in the use of his remaining senses to avoid danger correctly stated the law (*Hummer's Ex. v. Louisville, etc. Ry. Co.*, 32 Ky. L. R. 1315, 108 S. W. 885 (1908). One partially deaf who failed to look for train at crossing when it might have been seen for half a mile, held guilty of contributory negligence as matter of law (*Williams v. Chicago, etc. Ry. Co.*, 117 N. W. (Ia.) 956 (1908). One old and deaf walking along the street parallel to a railway track turning to cross the track was struck and killed. He did not look towards the car though he could have seen it for a distance of 550 feet. Held, not to warrant a finding that decedent was free from contributory negligence (*Beem v. Tama, etc. Elec. Ry., etc. Co.*, 104 Ia. 563, 73 N. W. 1045 (1898). One old and very deaf walking along a street railway track, not looking for approaching cars, held, guilty of contributory negligence; his deafness made it incumbent upon him to be more alert in the use of his other senses (*Adams v. Boston, etc. Ry.*, 101 Mass. 486, 78 N. E. 117 (1906). To the same effect, *Lyons v. Bay City, etc. Ry. Co.*, 115 Mich. 114, 73 N. W. 139 (1897). A deaf person walking along a street railway track is guilty of negligence in not providing against injury by looking as often as may be necessary (*Aldrich v. St. Louis Trans. Co.*, 101 Mo. App. 77, 74 S. W. 386 (1903). To the same effect, *Shanks v. Springfield Traction Co.*, Id. See *International, etc. Ry. Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223 (1889); *Thompson v. Salt Lake, etc. Ry. Co.*, 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172 (1898); *Houston, etc. Ry. Co. v. O'Donnell*, 99 Tex. 636, 92 S. W. 409 (1906). "The standard of care of one suffering from disability is the same as in any other case, but he is required to put forth the greater effort to attain such standard" (*Keith v. Worcester, etc. Ry. Co.*, 82 N. E. (Mass.) 680; *Same v. Inhabitants of Millbury*, Id. (1907).

will be assumed by the court; as if one's infirmities are so great that his attempt, unassisted, to use such highways at all is obviously negligent.¹⁶⁶

“ If ” * * * one “ is so absolutely devoid of intelligence as to be unable to apprehend apparent danger, and to avoid exposure to it, he cannot be said to have been guilty of negligence because he was incapable of exercising care. When the mere negligence of another causes or contributes to the injury of a person who is mentally incompetent to such a degree, if the conduct of the injured person would have avoided his claim to relief, if he had been capable of exercising care in his own behalf, the person inflicting the injury is not to be held to a liability which would not have been incurred under the same circumstances in favor of a person of ordinary capacity, unless he had notice of the injured person's mental deficiency, and of his consequent helplessness and peril in the circumstances in which he was placed.¹⁶⁷ A learned writer on Negligence in commenting on this case says: “ The jury ought to be possessed of the real facts, including the age, condition, the knowledge, the experience and capacity of the person injured, and then ought to be allowed to say whether, under all the circumstances, he acted reasonably or unreasonably; and this in point of fact, is the theory upon which nearly all the cases are tried.”¹⁶⁸

§ 89. This section has been transferred and becomes a part of § 185.

§ 90. **Duty of looking and listening.** — One of the most familiar applications of the rule requiring ordinary care to avoid injury is the requirement that the plaintiff should have used watchfulness to discover the approach

¹⁶⁶ Florida Cent. Ry. v. Williams, also, Houston, etc. Ry. Co. v. Symptons, 37 Fla. 406, 20 So. 558 (1897). kins, 54 Tex. 615, 38 Am. Rep.

¹⁶⁷ Worthington v. Mencer, 96 Ala. 623.

310, 315, 316, 11 So. 72 (1893). See, ¹⁶⁸ Thompson on Negligence, § 338.

of dangers which might reasonably be apprehended, or, as it is usually expressed, that "he must look and listen." Innumerable illustrations of this rule will be found in railroad cases.¹⁶⁹ The mere existence of a railroad track is sufficient to put one on notice to protect himself from locomotives and trains liable to pass.¹⁷⁰

¹⁶⁹ §§ 472-478, *post*. Thus, no recovery can usually be had for injuries suffered by one who, without looking carefully both ways along the track of a railroad, walked or drove across or along it, and was run over by a train (*Schofield v. Chicago, etc. R. Co.*, 114 U. S. 615; *Railroad Co. v. Houston*, 95 Id. 697; *Allerton v. Boston & M. R. Co.*, 146 Mass. 241, 15 N. E. 621; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430; *Steves v. Oswego, etc. R. Co.*, 18 Id. 422; *Wendell v. N. Y. Central, etc. R. Co.*, 91 Id. 420; *Nash v. Same*, 125 Id. 715, 26 N. E. 266; *Ellis v. Lake Shore, etc. R. Co.*, 138 Pa. St. 506, 21 Atl. 140; *Penn. R. Co. v. Leary*, 56 N. J. Law, 705, 29 Atl. 678; *Hearne v. Southern Pac. R. Co.*, 50 Cal. 482; *Zeigler v. Railroad Co.*, 5 S. C. 221; *Metropolitan R. Co. v. Johnson*, 90 Ga. 500, 16 S. E. 49; *Chicago, etc. R. Co. v. Harwood*, 80 Ill. 88; *Lake Shore, etc. R. Co. v. Hart*, 87 Id. 529; *New Orleans, etc. R. Co. v. Mitchell*, 52 Miss. 808; *Grostick v. Detroit, etc. R. Co.*, 90 Mich. 594, 51 N. W. 667; *Louisville, etc. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *Lesan v. Main Central R. Co.*, 77 Me. 85; *Maryland Central R. Co. v. Neubeur*, 62 Md. 391; *Louisville, etc. R. Co. v. Crawford*, 89 Ala. 240, 8 So. 243; *Galveston, etc. R. Co. v. Brocken*, 59 Tex. 71; *Delaney v. Milwaukee, etc. R. Co.*, 33 Wis. 67; *Nixon v. Chicago, etc. R. Co.*, 84 Ia. 331, 51 N. W. 157; *Carney v. Chicago, etc. R. Co.*, 46 Minn. 220, 48 N. W. 912; *Union Pacific R. Co. v. Adams*, 33 Kans. 427; *Durbin v. Oregon R. Co.*, 17 Ore. 5, 17 Pac. 5. See §§ 472, 476, *post*. These are but examples, from hundreds of cases. More are given under chap. XXI. A large collection is given in *Patterson on R. R. Accident Law*, 168 and *Beach, Contr. Negl.* (2d ed.), § 181. Exceptions to the rule are stated in *Dolan v. Delaware Canal Co.*, 71 N. Y. 285; *McGovern v. N. Y. Central R. Co.*, 67 Id. 417; *Jewett v. Klein*, 27 N. J. Eq. 550; *Chicago, etc. R. Co. v. Lee*, 87 Ill. 454. See §§ 477, 478, *post*. And the rule does not apply with the same strictness to city street railroads, having no exclusive right of way (*Robbins v. Springfield R. Co.*, 165 Mass. 30, 42 N. E. 334; *Consol. Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. 1094). On the general duty to look and listen, see also *Gulf, etc. Ry. Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538 (1895); *Galveston, etc. Co. v. Ryon*, 80 Tex. 59, 15 S. W. 588 (1891); *Houston, etc. Ry. Co. v. Kauffman*, 46 Tex. App. 72 (1907); *International, etc. Ry. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106 (1906).

¹⁷⁰ *Glenn v. Norfolk, etc. Ry. Co.*, 128 N. C. 184, 38 S. E. 812 (1900); *Savage v. Southern Ry. Co.*, 103 Va. 422, 49 S. E. 484 (1904); *Brammer's Admr. v. Norfolk, etc. Ry. Co.*, 104 Va. 50, 51 S. E. 211 (1905); *Cleveland, etc. Ry. Co. v. Penketh*, 27 Ind. App. 210, 60 N. E. 1095

And to convict one wrongfully walking thereon of contributory negligence it is not necessary to show that locomotives and trains were liable to pass at any time; and the fact that the plaintiff did not know it is immaterial.¹⁷¹ But while it is generally true that it is one's duty, even when rightfully using a railway track or crossing, to look and listen, it has been held it is not negligence *per se* not to look or listen where one has reasonable cause to believe he is in no danger;¹⁷² but in the absence of such reasonable cause to believe there is no danger, it has been held negligence *per se* to fail to keep a lookout and to listen.¹⁷³ And in some jurisdictions, though the duty generally to look and listen is recognized, it is also generally held error to so instruct the jury because an invasion of the province of the jury in determining the question of contributory negligence, which must be determined with reference to the facts in the particular case.¹⁷⁴ One approaching a railway crossing at night cannot excuse his failure to exercise care for his own safety, as by looking when the headlight of the locomotive was in plain view, because the required signals were not given.¹⁷⁵ But the rule denying a right

(1901); *Hook v. Missouri Pac. Ry.* 205; *Kansas City, etc. R. Co. v. Co.*, 162 Mo. 569, 63 S. W. 360; *Cook*, 66 Fed. 115, 13 C. C. A. 364, (1901); *Louisville, etc. Ry. Co. v.* 28 L. R. A. 181.

Schmetzer, 94 Ky 424, 22 S. W. 603

(1893); *Chesapeake, etc. Ry. Co. v.*

Farrow, 106 Va. 137, 55 S. E. 569

(1907).

¹⁷¹ *Louisville, etc. Ry. Co. v. Mc-*

Clish, 115 Fed. 268, 53 C. C. A. 60

(1902).

¹⁷² *Bradford v. Boston, etc. Ry.*

Co., 160 Mass. 392, 35 N. E. 1131

(1894).

¹⁷³ *Jordan v. Chicago, etc. R. Co.*,

58 Minn. 8, 59 N. W. 633, 49 Am.

St. Rep. 486; *Heffinger v. Minne-*

apolis, etc. R. Co., 43 Minn. 503, 45

N. W. 1131; *Northern Pac. R. Co.*

v. Jones, 144 Fed. 47, 75 C. C. A.

¹⁷⁴ It is not negligence *per se* for one not aware of the approach of a train to attempt to cross the track without stopping, looking and listening (*Bryson v. Southern Ry.*, 3 Ga. App. 407, 59 S. E. 1124 (1908)). Failure to look and listen is not negligence *per se*; whether an ordinarily prudent person would have so failed under the circumstances of the particular case, is a question for the jury (*Missouri, etc. Ry. v. Wall*, 11 S. W. (Tex. App.) 453 (1908)).

¹⁷⁵ *International & G. N. Rwy. Co. v. Edwards*, 100 Tex. 22, 93 S. W. 106 (1906).

of action for negligence, in cases in which the plaintiff, by simply looking, would have avoided the injury, is one of wide application. Thus, one who, in consequence of not looking, steps over the edge of a sidewalk,¹⁷⁶ or a hoist-way,¹⁷⁷ or otherwise fails to use proper watchfulness,¹⁷⁸ cannot recover for such injuries. But contributory negligence is not imputable to any one for failing to look out for a danger which he has no reasonable cause to apprehend.¹⁷⁹

§ 91. Effect of defendant's advice or invitation.—

Where the relation between the parties is such that it is the duty of the defendant to care for the plaintiff's safety, and the situation is such that the plaintiff has a right to look to the defendant, his agents or servants, for direction, advice or instruction in a matter involving

¹⁷⁶ One who, while walking on a sidewalk, five feet wide, in the enjoyment of sufficient light and eyesight, stepped off into a ditch and was injured, cannot recover (*McLaury v. McGregor*, 54 Ia. 717; *s. p.*, *Hutton v. Windsor*, 34 Upp. Canada [Q. B.], 487; see *Zettler v. Atlanta*, 66 Ga. 195).

¹⁷⁷ *Brenstein v. Mattson*, 10 Daly, 336.

¹⁷⁸ Plaintiff, while riding in one buggy and looking and talking to persons in another, drove into a child's swing suspended between the sidewalk and the traveled part of the street. Held, contributory negligence (*Tuffree v. State Centre*, 57 Ia. 538). One who, without necessity, joins a crowd leaving a ferry-boat, which is so dense as to prevent his seeing where he treads, and whose foot is caught between the boat and the dock, is guilty of contributory negligence (*Dwyer v. N. Y., Lake Erie, etc. R. Co.*, 47 N. J. Law, 9; *s. c.* on second trial, 7 Atl.

417; *s. c.*, without opinion, 48 N. J. Law, 373); but not so if he was unexpectedly surrounded by the crowd (*Id.*). A boy was riding on the runners of a sleigh. He suddenly dropped from the sleigh without looking behind him, and a horse, which was following behind, struck him. Held, contributory negligence (*Messenger v. Dennie*, 137 Mass. 197). As to duty to look before and behind while driving, see § 654, *post*.

¹⁷⁹ *Langan v. St. Louis, etc. R. Co.*, 72 Mo. 392; *Moulton v. Aldrich*, 28 Kans. 300 [not bound to prepare for runaway horse]; plaintiff's failure to look for a defect due to defendant's negligence, and unsuspected by him, is not contributory negligence *per se*, but is for the jury (*Gillespie v. Newburgh*, 54 N. Y. 468). *s. p.*, *Bradford v. Boston & M. R.*, 160 Mass. 392, 35 N. E. 1131 [mailbags thrown from trains]; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285.

such safety, the plaintiff may often be deemed to have used ordinary care for his safety when acting under such direction, advice, instruction or invitation even though, but for that circumstance, his conduct would be deemed clear evidence of negligence.¹⁸⁰

¹⁸⁰ *Lewis v. Delaware, etc. Co.*, 145 N. Y. 508, 40 N. E. 248; *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; *McIntyre v. N. Y. Central R. Co.*, 37 Id. 287; *Foy v. London, Brighton, etc. R. Co.*, 18 C. B. (N. S.) 225; *Cincinnati, etc. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122 [following train conductor's directions as to alighting from train]; *Irish v. Northern Pac. R. Co.*, 4 Wash. St. 48, 29 Pac. 845. See, also, *Louisville, etc. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572. These cases limited in *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 9 N. E. 430. Passenger may rely on carrier's superior knowledge or judgment and that of his agents or servants, "provided she took no more risk in getting off the train than a prudent person would have taken under the circumstances" (*St. L., etc. Ry. Co. v. Baker*, 67 Ark. 941 (1900)). "The direction, invitation or assurance of safety given by servant of the company may so qualify the plaintiff's act as to relieve it of the quality of negligence which it would otherwise have * * *. One who obeys the instructions of another, upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action for injuries received in attempting to follow out the instructions" (*Chicago, etc. Ry. Co. v. Winters*, 175 Ill. 293, 51 S. E. 901 (1898)). See, also, *Pennsylvania, etc. Co. v. McCaffery*, 173 Ill. 169, 50 N. E. 713 (1898). "It is not negligence *per se*, or as matter of law, for a passenger to alight from a moving train on the invitation of carrier's agent, unless the circumstances are such as to make the danger of alighting obvious to a person of ordinary prudence and senses" (*Cooper v. Georgia, etc. Ry. Co.*, 56 S. C. 91, 34 S. E. 16 (1898)). But information given that the train is to be taken from the other side of the track does not amount to assurance that it is safe to cross over (*Roberts v. N. Y., etc. Ry. Co.*, 175 Mass. 296, 56 N. E. 559 (1900)). Standing on platform of a crowded street car with implied permission of conductor, after fare has been accepted, is not itself contributory negligence; it is a question for the jury (*Ginna v. Second Ave. Ry. Co.*, 67 N. Y. 596 (1876)). In case of one traveling with cattle and allowed to ride on the top of car when being switched to slaughter house, the defendant asked a charge on contributory negligence, which was thus modified by the court, "But if the jury find that the defendants by their conduct had held out their employees to plaintiff as authorized to consent to his being carried on the train with his cattle, and such employees consented, then there will be consent by the corporation." This charge sustained in opinion by *McCormick, Cir. J.*, *Pardee, Cir. J.*, dissenting (*New Orleans, etc. Ry. Co. v. Thomas*, 60 Fed. 379, 23 U. S. App. 37, 9 C. C. A. 29 (1894)). Where the plaintiff went on platform at invitation of conductor,

Thus, where the gates at a railroad crossing are, as a rule, closed when trains are near, the fact that they are open dispenses with the usual obligation to look and listen.¹⁸¹ Much more is this the case, where the man in charge signals the train to proceed.¹⁸² But, in order to justify the plaintiff's conduct under circumstances otherwise questionable, it must appear that the invitation or advice actually proceeded from the defendant or some agent for whose act he was, at least apparently, responsible;¹⁸³ and even then such advice will not be a sufficient excuse, if the defendant was clearly not as well aware of the actual danger as the plaintiff was, or if, the advice being given only by an agent of the defendant under a mere general or implied authority, the circumstances were such that the plaintiff could not reasonably

preparatory to getting off at station, where the train was running thirty-five miles an hour, and was thrown from same by sudden stopping of the car, contributory negligence held to be a question for the jury (*Baltimore, etc. Ry. Co. v. Meyers*, 62 Fed. 367, 18 U. S. App. 569, 10 C. C. A. 485 (1894)).

¹⁸¹ *Cleveland, etc. R. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Pennsylvania Co. v. Stegemier*, 118 Ind. 305, 20 N. E. 843; *Lindeman v. N. Y. Central, etc. R. Co.*, 42 Hun, 306; s. c., on appeal, after new trial, 11 N. Y. St. Rep. 837; *Callagan v. Delaware, etc. R. Co.*, 52 Hun, 276; 5 N. Y. Supp. 285; *Kane v. New Haven, etc. R. Co.*, 9 N. Y. Supp. 879, 56 Hun, 648, *mem.* See notes to § 473, *post*.

¹⁸² *Chicago, etc. R. Co. v. Prescott*, 59 Fed. 237, 8 C. C. A. 109; *Warren v. Fitchburg R. Co.*, 8 Allen, 227. Defendant's leading a horse over the track implies that it is safe (*Rembe v. N. Y., Ontario, etc. R. Co.*, 102 N. Y. 721; more fully, 7 N. E. 797).

¹⁸³ *Nashville, etc. R. Co. v. Mc-*

Daniel, 12 Lea, 386, where a bridge watchman was injured while working to clear a tunnel of fallen rock, under orders of a servant of the railroad company whose duty it was to look after killed stock. The plaintiff is not negligent in obeying the directions of one who is apparently (although not actually) authorized by a corporation defendant to give such directions (*Mowrey v. Central R. Co.*, 66 Barb. 43; *aff'd*, 51 N. Y. 666). Passenger must rely on what was said by the conductor and be justified by the circumstances in doing so (*Ebert v. Gulf, etc. Ry. Co.*, 49 S. W. (Tex. App.) 1105 (1899)). And it has been held that where a passenger is merely allowed by the conductor to ride in a more dangerous position than that provided for him, and is injured in consequence, he cannot recover (*Pennsylvania Ry. Co. v. Langdon*, 92 Pa. St. 21, 37 Am. Rep. 651 (1876)). Nor where one attempts, though by permission, to get on locomotive (*Files v. Boston, etc. Ry.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411 (1889)).

have believed that the defendant intended to authorize the agent's act.¹⁸⁴ Neither can the plaintiff excuse himself, on this ground, for taking an unmistakably improper risk.¹⁸⁵ The defendant's advice or direction is an excuse only when the plaintiff might honestly think the question of negligence doubtful.¹⁸⁶ If the defendant, by his own act, has thrown the plaintiff off his guard, and given him good reason to believe that vigilance was not needed, the lack of such vigilance on the part of the plaintiff is no bar to his claim,¹⁸⁷ especially if the defendant has done so by means of positive misrepresentations, upon which the plaintiff relied.¹⁸⁸ Promises or assurances, unfulfilled, have the same effect, although not in-

¹⁸⁴ An act outside of any implied authority of the agent is no excuse for the plaintiff; *e. g.*, where an invitation is given to ride on freight trains (*Files v. Boston, etc. R. Co.*, 149 Mass. 204, 21 N. E. 311; *Virginia, etc. R. Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299, 9 S. W. 905; *Keating v. Michigan Cent. R. Co.*, 97 Mich. 154, 56 N. W. 346 [directing child to jump on moving train]; *St. Louis, etc. R. Co. v. Rosenberry*, 45 Ark. 256 [getting off train moving 12 miles an hour]). In *Chicago, etc. R. Co. v. Sykes* (96 Ill. 162), plaintiff's intestate tried to pass under a freight train obstructing the sidewalk, at invitation of conductor, and was injured so that he died. Held, the question of negligence should have been left to the jury.

¹⁸⁵ *Cassidy v. Maine Central R. Co.*, 76 Me. 488.

¹⁸⁶ In *Dist. of Columbia v. McElligott* (117 U. S. 621), a laborer under a road supervisor, at work on a gravel bank, discovered the

bank to be in a dangerous condition, and reported the fact to the supervisor, who said he would have a man watch it. The laborer continued to work for half a day, when the bank fell and injured him. Held, reversing a judgment below for the laborer, that it was his duty, having knowledge of the dangerous condition of the bank, to exercise care in protecting himself from harm, and to disregard any assurances of his superior. *s. p.*, *Baker v. Western, etc. R. Co.*, 68 Ga. 699; *Hunter v. Cooperstown, etc. R. Co.*, 126 N. Y. 18, 26 N. E. 958. This limitation is recognized in other cases already cited.

¹⁸⁷ *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 28; *Pater-son v. Wallace*, 1 Macq. H. L. 748; see *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521. The text was cited and approved in *Totten v. Phipps*, 52 N. Y. 354.

¹⁸⁸ *Hutchinson v. Guion*, 5 C. B. N. S. 149.

tentionally false.¹⁸⁹ All these rules are especially applicable in favor of children.¹⁹⁰

§ 92. Plaintiff not bound to anticipate negligence. —

As there is a natural presumption that every one will act with due care,¹⁹¹ it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant,¹⁹² or of a stranger.¹⁹³

¹⁸⁹ *Hawley v. Northern Central R. Co.*, 82 N. Y. 370 [assurance of repairs]; *Bradley v. N. Y. Central R. Co.*, 62 N. Y. 99 [promise to warn of danger]. To similar effect: *Holmes v. Clarke*, 6 Hurlst. & N. 349; *Hough v. Texas, etc. R. Co.*, 100 U. S. 213; *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; *Ford v. Fitchburg R. Co.*, 110 Mass. 261; *Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389; *Belair v. Chicago, etc. R. Co.*, 43 Iowa, 663; *Le Clare v. St. Paul, etc. R. Co.*, 20 Minn. 9; *Conroy v. Iron Works*, 62 Mo. 247; *Kansas City, etc. R. Co. v. Flynn*, 78 Id. 195; *East Tenn., etc. R. Co. v. Duffield*, 12 Lea, 63. A traveler may rely on published regulations (*Parsons v. N. Y. Central R. Co.*, 113 N. Y. 355, 21 N. E. 145).

¹⁹⁰ *Rosenberg v. Durfee*, 87 Cal. 545, 26 Pac. 793.

¹⁹¹ *Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. 45; *The Mangerton*, 1 Swabey, 120; *Vennal v. Garner*, 1 Cr. & M. 21, and cases *infra*. Compare *Texas, etc. R. Co. v. Young*, 60 Tex. 201; *Ford v. Tremont*, 123 La. 742, 49 So. 492, 22 L. R. A. (N. S.) 917 (1909); *Shamp v. Lambert*, (Mo. App.) 121 S. W. 770 (1909).

¹⁹² *N. Y., Lake Erie, etc. R. Co. v. Atlantic Ref'g Co.*, 129 N. Y. 597, 29 N. E. 829; *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344 [highway]; *Pettengill v. Yonkers*, 116 N. Y. 558, 22 N. E. 1095 [same];

Boyce v. Manhattan R. Co., 118 N. Y. 314, 23 N. E. 304 [railroad platform]; *Shutt v. Cumberland Val. R. Co.*, 149 Pa. St. 266, 24 Atl. 305 [same]; *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150, 7 S. W. 106 [railroad crossing]; *Central R. & B. Co. v. Attaway*, 90 Ga. 656, 16 S. E. 956 [implements]; *Newson v. N. Y. Central R. Co.*, 29 N. Y. 383, 391; *Ernst v. Hudson River R. Co.*, 35 Id. 9, 35; *Carroll v. New Haven R. Co.*, 1 Duer, 571; *Fox v. Sackett*, 10 Allen, 535; *Reeves v. Delaware, etc. R. Co.*, 30 Pa. St. 454; *Stephens v. Martins (Pa.)*, 17 Atl. 242 [blast without notice]; *Bullock v. Wilmington, etc. R. Co.*, 105 N. C. 180, 10 S. E. 988. Evidence that the plaintiff requested the defendant to perform the act which caused the injury does not tend to prove contributory negligence, if the injury was not a natural result of such act carefully performed (*Fisk v. Wait*, 104 Mass. 71). To same effect, *Gee v. Metropolitan R. Co.*, L. R. 8 Q. B. 161, 171 [passenger may rely on car door being fastened]. See, also, *Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570; *Reeves v. Delaware, etc. R. Co.*, 30 Pa. St. 454; *Brown v. Lynn*, 31 Id. 510; *Kellogg v. Chicago, etc. R. Co.*, 26 Wis. 223; *Seward v. Milford*, 21 Id. 491; *Langan v. St. Louis, etc. R. Co.*, 72 Mo. 392; *Damour v. Lyons*, 44 Iowa, 276; *Moulton v. Aldrich*, 28 Kans. 306;

He has a right to assume that every one else will obey the law (including not only the common law, but also any statutes¹⁸⁴ or city ordinances¹⁸⁵), and to act upon that belief.¹⁸⁶ But if the plaintiff sees, or by ordinary care could see, that the defendant has in fact negligently exposed him to the risk or injury, or will probably do so, he can no longer rely upon this presumption, and must use all the additional precautions, on his own part, which a person of ordinary prudence would use, in view of the circumstances as they are, and not as they ought to be.¹⁸⁷ Nevertheless, even where the plaintiff sees that

Robinson v. Western Pac. R. Co., 48 Cal. 409; Shea v. Potrero, etc. R. Co., 44 Id. 414.

¹⁸³ Murphy v. N. Y. Central, etc. R. R. Co., 118 N. Y. 527, 23 N. E. 812 [fellow servants]; Franke v. St. Louis, 110 Mo. 516, 19 S. W. 938 [falling wall]. A brakeman tried to uncouple cars; finding them moving too fast, he signaled the engineer to slow up, and not waiting to see if his signal was obeyed, made a second attempt and was killed. Held, not contributory negligence, as he had a right to believe that his signal would be immediately obeyed (Beems v. Chicago, etc. R. Co., 58 Iowa, 150).

¹⁸⁴ Klanowski v. Grand Trunk R. Co., 57 Mich. 525, 24 N. W. 801.

¹⁸⁵ A traveler has a right to presume that a railway company will conform to a city ordinance, regulating the rate of speed of its trains within the city limits (Hart v. Devereux, 41 Ohio St. 565). Lulled into a sense of security by a knowledge of such an ordinance, and assuming that the company will comply with it, it is not negligence for him, in the absence of apparent danger, not to use the precaution in crossing the track which he otherwise should (Meek v. Pennsylvania

R. Co., 38 Ohio St. 632; see Baker v. Pendergast, 32 Id. 494; Correll v. Railroad Co., 38 Iowa, 120).

¹⁸⁶ Continental, etc. Co. v. Stead, 95 U. S. 161; Jetter v. Harlem R. Co., 2 Abb. Ct. App. 458; Filer v. N. Y. Central R. Co., 59 N. Y. 351; Weston v. N. Y. Elevated R. Co., 73 Id. 595; Illinois, etc. R. Co. v. Shultz, 64 Ill. 172; Steele v. Central R. Co., 43 Iowa, 109; Robinson v. Western Pacific R. Co., 48 Cal. 409; McWilliams v. Detroit, etc. Co., 31 Mich. 274; Snyder v. Pittsburgh, etc. R. Co., 11 W. Va. 14; Schultz v. Chicago, etc. R. Co., 44 Wis. 638; Minor v. Sharon, 112 Mass. 477; Philadelphia R. Co. v. Hagan, 47 Pa. St. 244.

¹⁸⁷ In Dudley v. Camden, etc. Ferry Co., 45 N. J. Law, 368, and Hoboken Land, etc. Co. v. Lally, 48 Id. 604 (Ct. of Errors), it was held that one who has charge of horses on a ferryboat cannot recover, if he omits to guard them, even if they are not properly guarded by the ferrymaster. Woodruff, J., in Grip-pen v. N. Y. Central R. Co. (40 N. Y. 34), said: "Each has a right, in governing his own conduct to assume that all others will perform their duties also, and act accordingly, unless and until he sees, or,

the defendant has been negligent, he is not bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would think it prudent to take under similar circumstances.¹⁹⁸

by the exercise of ordinary care, might see, that it is dangerous to do so. But it will not permit a party, in reliance on such an assumption, to neglect his own means of self-preservation." If the peril of doing a certain thing is known to plaintiff, and means are provided for its being done in safety, as where a city has provided suitable steps for pedestrians to reach a sidewalk, raised above the level of the roadway, it is negligence for the plaintiff not to use such means (*Vicksburg v. Hennessey*, 54 Miss. 391). One who was injured while driving over a railway crossing, will not be exonerated from the presumption of contributory negligence, because of failure to give the statutory signals, or because the train was run at a rate of speed forbidden, if it appears that by the exercise of proper diligence he might have avoided the injury (*Cincinnati, etc. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138). Especially, if he drove recklessly on the track, without looking or listening (*Weller v. Chicago, etc. R. Co.*, 120 Mo. 635, 23 S. W. 1061, 25 Id. 532).

¹⁹⁸ This section was quoted and followed by the court in *Johnson v. Belden*, 2 Lans. 433. See *Reeves v. Delaware, etc. R. Co.*, 30 Pa. St. 454. The defendant is not necessarily ex-

cused, merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger and the circumstances which led the plaintiff to incur it, are for the consideration of a jury (*Clayards v. Dethick*, 12 Q. B. 439). Therefore, where the plaintiff, in full view of obstructions left in the road, led his horse over them, and the horse fell and was killed, it was a question for the jury whether the plaintiff was negligent or not (*Id.*). Where a traveler crossed a bridge which he knew to be somewhat unsafe, but which the county officers had not closed nor warned people not to pass, it was held that he was not in fault (*Humphreys v. Armstrong Co.*, 56 Pa. St. 204). So in Pennsylvania a traveler, whose path is wrongfully impeded by a railroad train standing across it, may recover for injuries suffered in attempting to cross before the train (*Rauch v. Lloyd*, 31 Pa. St. 358). But the contrary was held in two very arbitrary and unjust cases (*Gahagan v. Boston, etc. R. Co.*, 1 Allen, 187; *Wyatt v. Great Western R. Co.*, 6 Best and S. 709). In *Dewire v. Bailey* (131 Mass. 169), the plaintiff entered defendant's public hall; on coming out, he slipped on an accumulation of snow

While plaintiff is not bound to anticipate that defendant will be negligent,¹⁹⁹ and his failure to do so cannot be attributed to him as contributory negligence, the rule has relation to normal conditions, that is to things as they ought to be, to situations where the plaintiff has neither knowledge nor notice of such facts as would cause a person of ordinary prudence to anticipate the particular negligence causing the injury. It has no reference to the case of one who either knew of such negligence by the defendant as would cause one reasonably to expect the continuance thereof as causing the injury, or knew of the danger and failed to take reasonable precautions against it,²⁰⁰ or where it was his duty to have known, or in the discharge of his duties as a man of ordinary prudence he would have known. In all such cases the existence of contributory negligence is a question of fact for the jury. Hence, there is no such absolute formula, applicable alike in all cases, as that one is under no duty to anticipate another's negligence.

One placing his property in a situation of known danger of accidental injury is not guilty of contributory negligence as to one who by the observance of ordinary

and ice in front of the door. He 27, 58 N. Y. Supp. 917 (1899); was held not precluded from re- Dohn v. Dawson, 90 Hun, 271, 35 covery by the fact that he noticed N. Y. Supp. 984.

the snow and ice in going in. A ²⁰⁰Breeze v. Powers, 80 Mich. 172, teacher was injured by stepping in 45 N. W. 130 (1890); Young v. a hole in the school-house floor, Waters Pierce Oil Co., 185 Mo. 634, which she had seen three weeks pre- 84 S. W. 929 (1904); Morrissey v. vious; part of time it had been Smith, 67 N. Y. App. Div. 189, 73 covered with paste-board. When N. Y. Supp. 673 (1902); Smith v. she fell she was looking at the pupils Dow, 43 Wash. 407, 86 Pac. 555 and their books. Held, not contribu- (1906); Smith v. Day, 100 Fed. 244, tory negligence (Bassett v. Fish, 75 40 C. C. A. 366, 49 L. R. A. 108 N. Y. 303).

¹⁹⁹Dixon v. Pluns, 98 Cal. 384, 33 Richter v. Harper, 95 Mich. 221, 54 Pac. 268, 35 Am. St. Rep. 180, 20 N. W. 768 (1893); Boyle v. Degnon L. R. A. 698 (1893); District of McLane Constr. Co., 47 N. Y. App. Columbia v. Bowling, 4 App. Cas. Div. 311, 61 N. Y. Supp. 1043; Brown (D. C.) 397; Mahan v. Everett, 50 v. Brooks, 85 Wis. 290, 55 N. W. La. Ann. 1162, 23 So. 883 (1898); 395, 21 L. R. A. 255 (1893).
Healy v. Ehret, 42 N. Y. App. Div.

care could have avoided its injury.²⁰¹ It has been held that mere temporary forgetfulness of known danger does not constitute contributory negligence as a matter of law;²⁰² nor the fact that one's attention has been suddenly distracted in another direction by a cause for which the defendant is not responsible.²⁰³ In short, the plaintiff must be at fault.

§ 93. Plaintiff's fault must contribute to injury.—

The plaintiff's negligence or other fault does not affect his right to recover for an injury caused by the defendant's negligence, if it did not in any degree *contribute* to bring upon him the injury of which he complains;²⁰⁴ and

²⁰¹ *Fero v. Buffalo, etc. Ry. Co.*, 22 N. Y. 209, 78 Am. Dec. 178. The doing or not doing of an act from which danger could not reasonably be anticipated, cannot constitute contributory negligence (*Chicago, Tel. Co. v. Com. Union Ass'n*, 131 Ill. App. 248 (1907)).

²⁰² *Bassett v. Fish*, 75 N. Y. 303; *Boyle v. Degnon McLane Const. Co.*, *supra*; *Knoxville v. Cox*, 103 Tenn. 368, 53 S. W. 734 (1899).

²⁰³ *Nebraska Tel. Co. v. Jones*, 60 Neb. 396, 83 N. W. 197 (1905); *McGovern v. Standard Oil Co.*, 11 N. Y. App. Div. 588, 42 N. Y. Supp. 595.

²⁰⁴ *Inland Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653; *Southern Bell Tel. Co. v. Watts*, 13 C. C. A. 579, 66 Fed. 460; *Webster v. Rome, etc. R. Co.*, 115 N. Y. 112, 21 N. E. 725, *aff'g* 40 Hun. 161; *Savage v. Corn Exchange Ins. Co.*, 36 N. Y. 655; *Haley v. Earle*, 30 N. Y. 208 [no helmsman]; *Morrison v. General Steam Nav. Co.*, 8 Exch. 733; *Baker v. Portland*, 58 Me. 199; *Norris v. Litchfield*, 35 N. H. 271; *Alger v. Lowell*, 3 Allen, 402; *Churchill v. Rosebeck*, 15 Conn. 359; *Cummings v. Nat. Furance Co.*, 60 Wis. 603; *Louisville, etc. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *Gadsden R. Co. v. Causler*, 97 Ala. 237, 12 So. 439; *Lake Shore, etc. R. Co. v. Parker*, 131 Ill. 557, 23 N. E. 237 [excessive speed]. The absence of signals required by law is immaterial, if the defendant saw the plaintiff's vessel without them (*Silliman v. Lewis*, 49 N. Y. 379). The plaintiff had been injured by noxious vapors created by the defendant. Held, the fact that the plaintiff himself created other bad odors upon his own land was immaterial (*Brown v. Illius*, 27 Conn. 84). If the traveler could not have seen or heard the train, had he tried to do so, it is not material that he did not look and listen (*Dyer v. Erie R. Co.*, 71 N. Y. 228; *Davis v. N. Y. Central R. Co.*, 47 Id. 400; *Connelly v. New York Central R. Co.*, 88 Id. 346; *Chicago, etc. R. Co. v. Lee*, 87 Ill. 454; *Laverenz v. Chicago, etc. R. Co.*, 56 Iowa, 689; *State v. Philadelphia, etc. R. Co.*, 47 Md. 76). To the same effect, *The Wanata*, 95 U. S. 600; *Blanchard v. New Jersey, etc. Co.*, 59 N. Y. 292; *Flatles v. Chicago, etc. R. Co.*, 35

some courts have held that it is of no importance unless it *substantially* or *essentially* contributed to the injury.²⁰⁵ But other courts, fearing that this would leave too much discretion to juries, hold that the plaintiff's want of ordinary care is a bar to the action if it contributed in any degree, however slight, to bring about the particular accident which caused the injury.²⁰⁶ The defendant is not excused from liability by any negligence of the plaintiff, not amounting to a want of ordinary care in avoiding the injurious consequences of the defendant's negli-

Iowa, 191; Louisville, etc. R. Co. v. Fox, 11 Bush, 495; Central R. Co. v. Van Horn, 38 N. J. Law, 133; Rome v. Dodd, 58 Ga. 238; Centerville v. Woods, 57 Ind. 192; Omaha R. Co. v. Doolittle, 7 Neb. 481; Gould v. McKenna, 86 Penn. St. 297; McAunich v. Mississippi, etc. R. Co., 20 Iowa, 338; Pringle v. Chicago, etc. R. Co., 64 Id. 613. Where a person gets on a moving train, his negligence in so doing does not contribute to his death, caused by his being pushed therefrom by an employee of the company (Sharrer v. Paxson, 171 Pa. St. 26, 33 Atl. 120).

²⁰⁵ "Substantially" (Daley v. Norwich, etc. R. Co., 26 Conn. 591; New Haven Steamboat, etc. Co. v. Vanderbilt, 16 Id. 420; West v. Martin, 31 Mo. 375). "Essentially" (Montgomery Gas Co. v. Montgomery R. Co., 86 Ala. 372, 5 So. 735). In Sullivan v. Louisville Bridge Co. (9 Bush, 81), it was said that to constitute a defense, plaintiff's negligence must have been an *efficient* cause of the injury. So also in Spofford v. Harlow, 3 Allen, 176; Bigelow v. Reed, 51 Me. 325. It has been held unjust to the plaintiff to charge that he cannot recover, if his negligence "contributed in any *appreci-*

able degree" (Erie Tel. Co. v. Grimes, 82 Tex. 89, 17 S. W. 831).

²⁰⁶ This was expressly held in Louisville, etc. R. Co. v. Shanks, 94 Ind. 598. It has been held that a court is bound upon request to charge the jury that the injury must be "*solely*" caused by the defendant's fault (Grippen v. N. Y. Central R. Co., 40 N. Y. 34; Bigelow v. Reed, 51 Me. 325). But this is obviously erroneous. See § 65, *ante*. It has been held not sufficient to charge that it must be *essentially* so caused (Grippen v. N. Y. Central R. Co., *supra*; Oil City Fuel Co. v. Boundy, 122 Pa. St. 449, 15 Atl. 865, and it has been held error to charge that it must *materially* contribute (Artz v. Chicago, etc. R. Co., 38 Iowa, 293; Mattimore v. Erie, 144 Pa. St. 14, 22 Atl. 817; Monongahela v. Fischer, 111 Pa. St. 9, 2 Atl. 87). The plaintiff's negligence, to constitute a bar to his action for injuries caused by the negligence of another, must be an efficient cause (Hone v. Mammoth Min. Co., 27 Utah, 168, 75 Pac. 381 (1904); Oates v. Metropolitan St. Ry. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447 (1902); Kansas City, etc. R. Co. v. Prunty, 133 Fed. 13, 66 C. C. A. 163 (1900)).

gence.²⁰⁷ His negligence must not only *concur* in the transaction, but must *co-operate*, either in causing the injury, or in exposing himself or his property to it.²⁰⁸ If the injury would have occurred, notwithstanding the exercise of all due care by the plaintiff, his omission to take such care is immaterial.²⁰⁹ Thus, the fact that the plaintiff was intoxicated at the time of the injury, while no excuse for his negligence,²¹⁰ and indeed competent and material evidence of contributory negligence,²¹¹ is not of itself sufficient to defeat his action,²¹² unless it is proved

²⁰⁷ *Brown v. N. Y. Central R. Co.*, 31 Barb. 385; *aff'd*, 32 N. Y. 597; *Davies v. Mann*, 10 Mees. & W. 546; *Bridge v. Grand Junc. R. Co.*, 3 Id. 244; *Doggett v. Richmond, etc. R. Co.*, 78 N. C. 305. See § 61, *ante*.

²⁰⁸ *Carroll v. New Haven, etc. R. Co.*, 1 Duer, 571; *Colegrove v. New Haven, etc. R. Co.*, 20 N. Y. 492.

²⁰⁹ *Carrico v. West Va., etc. R. Co.*, 39 W. Va. 86, 19 S. E. 571; *Smith v. Irwin*, 51 N. J. Law, 507, 18 Atl. 852; *Richmond, etc. R. Co. v. Howard*, 79 Ga. 44, 3 S. E. 426; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Thomas v. Kenyon*, 1 Daly. 132; *McDonald v. Montgomery R. Co.*, 110 Ala. 161, 20 So. 317; *Wright v. Illinois, etc. R. Co.*, 20 Ia. 195. See *Colegrove v. New Haven, etc. R. Co.*, 6 Duer, 382; *aff'd*, 20 N. Y. 492; *Tuff v. Warman*, 5 C. B. [N. S.] 573; *aff'g s. c.*, 2 Id. 740; *Northern Central R. Co. v. State*, 31 Md. 357; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288. The only case opposed is *Reeves v. Delaware, etc. R. Co.*, 30 Pa. St. 454, and that is a mere *dictum*. *Kuhn v. Delaware, etc. Ry. Co.*, 92 Hun, 74, 36 N. Y. Supp. 339, *aff'd*, 153 N. Y. 683, 48 N. E. 1105, (1897); *Atlanta, etc. Ry. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818 (1905).

²¹⁰ The plaintiff's intoxication at the

time of the injury will not relieve him from the legal consequences of his contributory negligence (*Kean Bridge v. Blatimore, etc. R. Co.*, 61 Md. 154; *Milliman v. N. Y. Central, etc. R. Co.*, 66 N. Y. 642; *Herring v. Wilmington, etc. R. Co.*, 10 Ired. Law, 402; *Jones v. North Carolina R. Co.*, 67 N. C. 125; *Toledo, etc. R. Co. v. Riley*, 47 Ill. 514; *Illinois, etc. R. Co. v. Cragin*, 71 Id. 177; *Yarnall v. St. Louis, etc. R. Co.*, 75 Mo. 575; *Houston, etc. R. Co. v. Symkins*, 54 Tex. 615; *Weeks v. New Orleans, etc. R. Co.*, 32 La. Ann. 615; *Fitzgerald v. Weston*, 52 Wis. 354).

²¹¹ *Strand v. Chicago, etc. R. Co.*, 67 Mich. 380, 34 N. W. 712; *Lynch v. New York*, 47 Hun, 524; *Brand v. Schenectady, etc. R. Co.*, 8 Barb. 368.

²¹² The mere fact of intoxication will not establish want of ordinary care. The jury must determine whether the intoxication contributed to the injury; and if it did not, it is of no importance (*Ditchett v. Spuyten, etc. R. Co.*, 5 Hun, 164; *aff'd*, 67 N. Y. 425 [injury by defects in road]; *Alger v. Lowell*, 3 Allen, 402; *Robinson v. Pioche*, 5 Cal. 461; *Aurora v. Hillman*, 90 Ill. 61; *Ward v. Chicago, etc. R. Co.*, 85 Wis. 601, 55 N. W. 771; *Central R. Co. v. Phinazee*, 93 Ga. 488, 21 S. E. 66).

or is reasonably to be inferred from the circumstances that it prevented him from taking ordinary care to avoid the injury.²¹³ So the fact that the plaintiff was acting in violation of a municipal ordinance, or even of a statute, is not material, if such violation did not contribute to the injury.²¹⁴

§ 94. Plaintiff's fault must proximately contribute to injury.—The plaintiff's fault does not affect his right of action, unless it *proximately* contributed to his injury.²¹⁵ It must be a proximate cause, in the same sense

Plaintiff while partially intoxicated was injured in consequence of defects in the sidewalk. Held, it was for the jury and not for the court to say whether the intoxication contributed in any way to the injury sustained. Because one is intoxicated, it cannot be presumed that he is negligent. "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it" (Healy v. New York, 3 Hun, 708, quoting from Robinson v. Pioche, 5 Cal. 461; Houston, etc. R. Co. v. Reason, 61 Tex. 613; Baltimore, etc. R. Co. v. Boteler, 38 Md. 568). To similar effect, American Waterworks Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051; Dickson v. Hollister, 123 Pa. St. 421, 16 Atl. 484. So as to any other form of debauchery (McVoy v. Knoxville, 85 Tenn. 19, 1 S. W. 498). Evidence that one killed at a railroad crossing was given to the habit of intoxication is not admissible on the issue of contributory negligence (Lane v. Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645). Under a statute in Georgia, one who, being voluntarily drunk, places himself on a railway track, is not entitled to recover, whether the defendant was negligent or not (Southwestern R. Co. v. Hankerson, 61 Ga. 114). See § 110, *post*.

²¹³ Illinois, etc. R. Co. v. Cragin, 71 Ill. 177; Cramer v. Burlington, 42 Ia. 315. And see Reget v. Bell, 77 Ill. 593; Johnson v. Louisville, etc. R. Co., 104 Ala. 241, 16 So. 75; Baltimore, etc. R. Co. v. State, 81 Md. 371, 32 Atl. 201; Bageard v. Cons. Trac. Co., 64 N. J. Law, 316, 45 Atl. 620, 81 Am. St. Rep. 498, 49 L. R. A. 421 (1900); Sylvester v. Town of Casey, 110 Ia. 256, 81 N. W. 455 (1900); Louisville, etc. Ry. Co. v. Cummin's Admr., 111 Ky. 333, 63 S. W. 594 (1901); Cogdell v. Wilmington, etc. Ry. Co., 130 N. C. 313, 41 S. E. 541; rev'd, 132 N. C. 852, 44 S. E. 618 (1903); Little Rock Ry., etc. Co. v. Billings, 173 Fed. 903, 98 C. C. A. 467 (1909); Bennett v. Seattle Elec. Co., 56 Wash. 407, 105 Pac. 825 (1909); Wilcke v. Henrotin, 146 Ill. App. 481; aff'd, 89 N. E. 329 (1909). Hughes v. Chicago, etc. Ry. Co., 129 N. W. (Ia.) 956 (1911), (intoxication is a circumstance to be considered on the issue of contributory negligence, but does not bar recovery unless plaintiff was wanting in ordinary care).

²¹⁴ See § 104, *post*.

²¹⁵ Radley v. Northwestern R. Co., L. R. 1 App. Cas. 754; Sheffer v. Railroad Co., 105 U. S. 249; Austin v. N. J. St. Co., 43 N. Y. 75, 82;

in which the defendant's negligence must have been a proximate cause in order to give any right of action.²¹⁶

Isbell v. New Haven, etc. R. Co., 27 Conn. 393; *Smithwick v. Hall, etc. Co.*, 59 Id. 261, 21 Atl. 924; *Cleveland, etc. R. Co. v. Elliott*, 4 Ohio St. 474; *Richmond v. Sacramento, etc. R. Co.*, 18 Cal. 351; *Flynn v. San Francisco, etc. R. Co.*, 40 Id. 14; *Fernandez v. Sacramento, etc. R. Co.*, 52 Id. 45; *Indianapolis v. Caldwell*, 9 Ind. 397; *Towler v. Baltimore, etc. R. Co.*, 18 W. Va. 579; *Tompkins v. Kanawha*, 21 Id. 224; *Baltimore, etc. R. Co. v. Reaney*, 42 Md. 117; *Kennedy v. Cecil Co.*, 69 Id. 65, 14 Atl. 524; *Gunter v. Wicker*, 85 N. C. 310; *Doggett v. Richmond, etc. R. Co.*, 78 Id. 305; *Thirteenth St. R. Co. v. Boudron*, 92 Pa. St. 475; *Drake v. Kiley*, 93 Id. 492; *Oil City Gas. Co. v. Robinson*, 99 Id. 1; *Dudley v. Camden, etc. Ferry Co.*, 45 N. J. Law, 368; *Louisville, etc. R. Co. v. Wolfe*, 80 Ky. 82; *Louisville Gas Co. v. Gutenkuntz*, 82 Id. 432; *Barbee v. Reese*, 60 Miss. 906; *St. Louis, etc. R. Co. v. Maddry*, 57 Ark. 306, 21 S. W. 472; *Meyer v. People's R. Co.*, 43 Mo. 523; *Dickson v. Omaha, etc. R. Co.*, 124 Mo. 140, 27 S. W. 476; *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534; *O'Connor v. North Truckee Co.*, 17 Nev. 245, 30 Pac. 882; *Ford v. Umatilla County*, 15 Ore. 313, 16 Pac. 33 [intoxication of plaintiff]; *Davis v. Oregon, etc. R. Co.*, 8 Ore. 172 [same]. See *Thompson, Negl.* 1151. The fact that plaintiff left his horse untied in the street will not defeat a recovery for defendant's negligence, if plaintiff's negligence was not in any proper sense the immediate or proximate cause of the accident (*Wasmer v. Delaware, etc. R. Co.*, 80 N. Y. 212; *Griggs v. Fleckenstein*, 14 Minn. 81). The failure of one about to cross a railroad track to stop, look and listen, is immaterial, if it was not the proximate cause of the injury, as where the casualty was wholly due to the defective condition of the crossing, for which the railway company was responsible (*Baugham v. Shenango, etc. R. Co.*, 92 Pa. St. 335). An instruction to the jury asked by a turnpike company, to the effect that even if it were negligent in repairing its road, yet if the plaintiff were driving a fractious horse, or was unable to control his horse because of a weakness of his arm, he was not entitled to recover, was properly refused (*Baltimore, etc. Turnp. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805). Plaintiff's intoxication is, therefore, no defense, if it only remotely contributed to his injury (*Davis v. Oregon, etc. R. Co.*, 8 Ore. 172). See § 93, *ante*. It has been held, however, error to charge that negligence remotely contributing to the injury is not material (*Atchison, etc. R. Co. v. Plunkitt*, 25 Kans. 188). Such phrases, however scientifically correct, are, when used to a jury, without explanation, often misleading.

²¹⁶ See definition, § 26, *ante*. A charge which implies that contributory negligence, to defeat recovery, must be the sole proximate cause of the injury, is erroneous (*Payne v. Chicago, etc. R. Co.*, 129 Mo. 405, 13 S. W. 885; *Northern Pac. Ry. Co. v. Jones*, 144 Fed. 47, 75 C. C. A. 205 (1906); *De Lon v. Kokomo City St. Ry. Co.*, 22 Ind. App. 377, 53 N. E. 847 (1899); *Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App.

It is, of course, not correct to say that negligence which does not occur at the time of the injury necessarily does not proximately contribute thereto.²¹⁷ Great difficulties arise in charging juries upon this point. No jury could ever understand what "proximate" means. In most reported case, it has been held permissible to say that the plaintiff's negligence is no defence, unless it directly contributes to the injury;²¹⁸ but such an instruction is not tolerated in New York,²¹⁹ and perhaps not in Georgia.²²⁰

§ 94a. Degree of contribution.—Plaintiff's negligence which contributes in any degree to cause the in-

202, 71 N. E. 663, 72 N. E. 478, is that which does not occur at the (1904); *Cosgrove v. Kennebeck, etc.* time of such injury." Held, error Co., 98 Me. 473, 57 Atl. 841 (1904); (Chicago, etc. R. Co. v. Goss, 17 Bowen v. Southern Ry. Co., 58 S. C. Wis. 441). See § 26, *ante*.

222, 36 S. E. 590 (1900); International, etc. Ry. Co. v. Anchonda, 33 Tex. App. 24, 75 S. W. 557 (1903); St. Louis, etc. Ry. Co. v. Parks, 40 Tex. App. 480, 90 S. W. 343 (1905); Chesapeake, etc. Ry. Co. v. Conley, 124 S. W. (Ky.) 861 (1910); Winters v. Baltimore, etc. Ry. Co., 177 Fed. 44, 100 C. C. A. 462 (1910); Alabama Steel, etc. Co. v. Tallant, 51 So. (Ala.) 835 (1910); Belle Alliance Co. v. Texas, etc. Ry. Co., 125 La. 777, 51 So. 846 (1910); Wight v. Michigan, etc. Ry. Co. 126 N. W. (Mich.) 414 (1910); Chicago, etc. Ry. Co. v. Bennett, 181 Fed. 799, 104 C. C. A. 309 (1910); McGahey v. Citizens' Ry. Co., 129 N. W. (Neb.) 293 (1911). See *Evansville, etc. Co. v. Spiegel*, 94 N. E. (Ind. App.) 718 (1911).

²¹⁷In an action for the negligent killing of animals, the court instructed the jury that "proximate negligence is negligence at the time of the happening of the injury complained of," that "remote negligence

²¹⁸*Norris v. Litchfield*, 35 N. H. 271; *Lehigh, etc. R. Co. v. Greiner*, 113 Pa. St. 600, 605; *Farmer v. McCraw*, 26 Ala. 189; *Cleveland, etc. R. Co. v. Terry*, 8 Ohio St. 570; *Orleans v. Perry*, 24 Neb. 831, 40 N. W. 417; *McNaughton v. Caledonian R. Co.*, 21 Dunlop, 160. See *Haley v. Chicago, etc. R. Co.*, 21 Ia. 16; *O'Keefe v. Chicago, etc. R. Co.*, 32 Id. 467; *Carlin v. Chicago, etc. R. Co.*, 37 Id. 316.

²¹⁹*Button v. Hudson River R. Co.*, 18 N. Y. 248. Nevertheless, where the only negligence with which the plaintiff is charged is such as operated *directly*, if at all, to produce the injury, a new trial will not be granted on account of the judge's charging the jury that they must find for the plaintiff upon this issue, unless his negligence operated directly to produce the injury (*Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Tuff v. Warman*, 5 C. B. [N. S.] 573, 2 Id. 740).

²²⁰*Prather v. Richmond, etc. R. Co.*,

jury will defeat his recovery.²²¹ It is not a correct legal proposition that it is necessary to defeat the plaintiff's recovery that his contributory negligence should have contributed substantially or essentially to the injury or have been the direct or immediate cause thereof. Nor that it will not have such effect if only slight. It is true that contributory negligence only exists where there is a want of ordinary care on the part of the plaintiff, but the law recognizes no such legal conception as the slight want of ordinary care, and the use of the term is to divert the true inquiry. There is no line of decisions in support of the propositions here denied.

§ 94b. Negligence by the plaintiff without which the injury would not have occurred. — Contributory negligence only exists where without the negligent act or omission of the plaintiff the injury would not have been inflicted.²²²

§ 95. Negligence increasing damages only, no bar. — By the "injury," contribution to which by the plaintiff's fault is said to be a bar to his action, must be understood the particular event which causes damage to the plaintiff, not the damage itself. If the plaintiff in no degree contributed by his want of ordinary care to expose himself to the act by which he was injured, it is no bar to his

80 Ga. 427, 9 S. E. 530; Montgomery v. East Tenn. Ry. Co., 94 Ga. 332, 21 S. E. 571.

²²¹ "This," said Paxson, J., in *Monongahela City v. Fisher*, 111 Pa. St. 9, "is a safe rule, easily understood, and cannot well be frittered away by the jury" (*Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631; *Sheffield v. Rochester, etc. R. Co.*, 21 Barb. 304; *Louisville, etc. R. Co. v. Shanks*, 94 Ind. 598; *Banning v. Chicago, etc. Ry. Co.*, 89 Ia. 74, 56 N. W. 227 (1893); *Wilds v.*

Hudson R. Ry. Co., 21 N. Y. 430; *Owen v. Hudson R. Ry. Co.*, 35 N. Y. 516; *Gonzales v. New York, etc. Ry. Co.*, 38 N. Y. 440, 98 Am. Dec. 440. ²²² *Atoka Coal, etc. Co. v. Miller*, 104 S. W. (Ind. Ter.) 555 (1907); *Ewing & Sons v. Callahan*, 32 Ky. Law R. 36, 537, 105 S. W. 387, 978 (1908); *Chesapeake, etc. Ry. v. Conley*, 124 S. W. (Ky.) 861 (1910); *Lehman v. Chicago, etc. Ry. Co.*, 140 Wis. 497, 122 N. W. 1059 (1909). See, also, *Thompson on Negligence*, § 221, note 22.

action that, by any fault of his own, he aggravated the consequences of that injury.²²³ That fact, if established, only goes to mitigate the damages recoverable by him.²²⁴ He cannot recover compensation for any damage which he might have avoided by the use of ordinary care and diligence, after becoming aware of the injury of which he complains;²²⁵ but he can recover for any other damage;²²⁶ and the utmost result of such negligence on his part would be to reduce his recovery to a nominal sum. Where the plaintiff has suffered two distinct injuries, with respect to only one of which he is chargeable with

²²³ *Bradford v. Downs*, 126 Pa. St. 622, 17 Atl. 884; *Gould v. McKenna*, 86 Pa. St. 297; *Matthews v. Warner*, 29 Gratt. 570; *Second v. St. Paul*, etc. R. Co., 5 McCrary, 515; *Smithwick v. Hall*, etc. Co., 59 Conn. 261, 21 Atl. 924; *Thomas v. Kenyon*, 1 Daly, 132; *DuBois v. Decker*, 52 Hun, 610, 4 N. Y. Supp. 768 [disobeying surgeon's directions]; *Standard Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. 128 [same], *Strudgeon v. Sand Beach*, 107 Mich. 496, 65 N. W. 616 [same]. *Village of Atkinson v. Fisher*, 4 Neb. 21, 93 N. W. 211 (1903); *Texas, etc. Ry. Co. v. McKensie*, 30 Tex. App. 293, 70 S. W. 237 (1902); *Elliott v. Kansas City*, 174 Mo. 554, 74 S. W. 617 (1903); *Indiana Union Trac. Co. v. Ohne*, 89 N. E. (Ind. App.) 507 (1909).

²²⁴ *Goshen v. England*, 119 Ind. 368, 21 N. E. 977. See § 741, *post*. *Louisville, etc. Ry. Co. v. Mason*, 72 S. W. (Ky.) 27 (1903); *Village of Atkinson v. Fisher*, *supra*; *Texas, etc. Ry. Co. v. McKensie*, *supra*.

²²⁵ *Hamilton v. McPherson*, 28 N. Y. 72; *Milton v. Hudson River Steamboat Co.*, 37 Id. 210; *Chase v. N. Y. Central R. Co.*, 24 Barb. 273; *Sherman v. Fall River Iron Co.*, 2 Allen, 524; *Hunt v. Lowell Gas Co.*,

1 Id. 343; *Wright v. Illinois, etc. R. Co.*, 20 Ia. 195; *Tift v. Jones*, 52 Ga. 538; *Georgia R. Co. v. Eskew*, 86 Id. 641, 12 S. E. 1061 [expelled passenger walking, when he could have ridden]; *Ohio, etc. R. Co. v. Burrow*, 32 Ill. App. 161 [same]; *Memphis, etc. R. Co. v. Hembree*, 84 Ala. 182, 4 So. 392 [value of dead animal deducted]; *Sandwich v. Dolan*, 34 Ill. App. 199 [not employing competent physician]. Whether the refusal of plaintiff to have a limb amputated, as advised by his physician, contributed to his death so as to bar a recovery is for the jury (*Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 20 N. E. 569).

²²⁶ Where the damage caused by the negligence of defendant was increased by the negligence of plaintiff, the latter can recover up to the time when his contributory negligence began to affect the result (*Stebbins v. Vermont Central R. Co.*, 54 Vt. 464; quoting § 32 of our earlier edition). See *Miller v. Mariner's Church*, 7 Me. 51; *State v. Powell*, 44 Mo. 436; *Douglass v. Stevens*, 18 Id. 362; *Illinois, etc. R. Co. v. Finnigan*, 21 Ill. 646; *Toledo, etc. R. Co. v. Parker*, 49 Id. 385; *Worth v. Edmonds*, 52 Barb. 40.

contributory fault, he can nevertheless recover for the other.²²⁷ One injured by the negligence of another is bound to use due reasonable or ordinary care to prevent the unnecessary aggravation of the injury and enhancement of the damages therefrom, and to that end to procure proper medical treatment when it appears to be necessary. One's instinct of self-preservation and the natural desire to mitigate his own pain and suffering may generally be relied on to prompt him to adopt such a course as seems best to secure these results. Courts are not, therefore, inclined to hold the plaintiff to any higher exercise of care than such as seemed to himself reasonable at the time; and, in the absence of bad faith, an attempt purposely, by neglect or otherwise, to aggravate his injury and increase the damage, the plaintiff will ordinarily be entitled to recover damages to the full extent of his injury without reference to whether he pursued the most judicious course or not. If his neglect was caused by his suffering he will not be held contributorily negligent.²²⁸ Plaintiff's subsequent neglect of course only affects the amount of the recovery.²²⁹

§ 96. Plaintiff's fault need not be cause of injury. — It is not essential to this defence that the plaintiff's fault

²²⁷ In *Northern Central R. Co. v. Shore, etc. R. Co. v. Parker*, 131 Ill. Price, 29 Md. 420, the decedent, while negligent, was run over by a train. The trainmen laid his apparently lifeless body in a warehouse at night. In the morning it was found that decedent had survived, and he afterwards died from loss of blood. The company was held liable, notwithstanding plaintiff contributed to causing the collision. Whether one injured by falling on ice, negligently allowed to accumulate on the sidewalk, was negligent in not discovering the ice is for the jury (*Thuringer v. N. Y. Central R. Co.*, 71 Hun, 526, 24 N. Y. Supp. 1087; *Lake*

Price, 29 Md. 420, the decedent, while negligent, was run over by a train. The trainmen laid his apparently lifeless body in a warehouse at night. In the morning it was found that decedent had survived, and he afterwards died from loss of blood. The company was held liable, notwithstanding plaintiff contributed to causing the collision. Whether one injured by falling on ice, negligently allowed to accumulate on the sidewalk, was negligent in not discovering the ice is for the jury (*Thuringer v. N. Y. Central R. Co.*, 71 Hun, 526, 24 N. Y. Supp. 1087; *Lake*

²²⁸ *Gulf, etc. Ry. Co. v. Mannewitz*, 70 Tex. 73, 8 S. W. 66 (1888).

²²⁹ *Texas, etc. Ry. Co. v. McKensie*, 30 Tex. App. 293, 70 S. W. 237 (1903).

should have been, in any degree, the cause of the event by which he was injured.²³⁰ It is enough to defeat him if the injury might have been avoided by his exercise of ordinary care.²³¹ The question to be determined in every case is, not whether the plaintiff's negligence *caused*, but whether it *contributed* to the injury of which he complains.²³² This it may do by exposing him to the risk of injury, quite as effectually as if he committed the very act which injured him.²³³

§ 97. Effect of technical trespass.—The mere fact that the plaintiff, when he suffered the injury, was technically trespassing on the defendant's premises, and would not have been injured if he had not so trespassed, is not conclusive evidence of contributory negligence.²³⁴

²³⁰ *Colegrove v. New Haven R. Co.*, 26 Conn. 591; *Birge v. Gardiner*, 19 20 N. Y. 492; *Memphis, etc. R. Co. v. Jobe*, 69 Miss. 452, 10 So. 672; *S. P., McKeller v. Monitor*, 78 Mich. 485, 44 N. W. 412. Much less that it should be the *sole* cause (*Central Pass. R. Co. v. Stevens*, [Ky.], 22 S. W. 312; *North Birmingham R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360).

²³¹ See § 87, *ante*.

²³² *Brand v. Schenectady, etc. R. Co.*, 8 Barb. 368.

²³³ *Ochsenbein v. Shapley*, 85 N. Y. 214. Where there are various steps in the happening of an accident, culminating in plaintiff's injury, his negligence contributing to the initiation of the events, will bar his recovery for injuries sustained by the last event, though, as to that, he was without fault (*Rhing v. Broadway, etc. R. Co.*, 53 Hun, 321, 6 N. Y. Supp. 641 [plaintiff trampled on by horses after collision with street car]).

²³⁴ *Lowe v. Salt Lake City*, 13 Utah, 91, 44 Pac. 1050 [approving our text]; *Daley v. Norwich, etc. R. Co.*,

26 Conn. 591; *Birge v. Gardiner*, 19 Id. 507; *Brown v. Lynn*, 31 Pa. St. 510; *Vicksburg, etc. R. Co. v. McGowan*, 62 Miss. 682. The keeper of ferocious dogs is liable to a technical trespasser who, without warning, approaches the premises and is attacked by them (*Loomis v. Terry*, 17 Wend. 496; *Marble v. Ross*, 124 Mass. 44; *Woolf v. Chalker*, 31 Conn. 121). To the same effect, *Sherfey v. Bartley*, 4 Sneed, 58; see § 639, *post*. In *Bird v. Holbrook*, 4 Bing. 628, the defendant had put spring guns in the ground, for the obvious purpose of injuring trespassers. Not having put up any notice of warning, he was held liable to a trespasser injured by one of these guns. Recovery allowed for trespassing colt, injured by vicious mule at large (*Hill v. Applegate*, 40 Kans. 31, 19 Pac. 315). Except in the case of dogs that have killed his sheep (*Rev. St. 1889, c. 54*), a man has no right to set baits of poisoned meat on his premises for dogs that may trespass there, and is liable to their owners for injuries to such dogs (*Gillum v.*

The decisions upon this point, even in the same court, are probably not reconcilable with each other; and they certainly cannot be reconciled by any mere quotations from their language. But a principle can be found which will reconcile all decisions which ought to stand, including nearly all reported, disregarding *dicta* and looking to the real points decided. This principle appears to us to be that, in order to defeat his recovery, the plaintiff's trespass must be culpable, from a common-sense point of view, and not in the technical sense which would include every neglect to comply with the letter of the law. Unless the plaintiff has done something which persons of ordinary prudence and moral sense would feel to be careless or morally wrong, involving a reasonable possibility of injury either to himself or to the person upon whose premises he is trespassing, he should not be debarred from his right of action for negligence; but the defendant should be left to recover such damages as he can for the trespass. Thus, an entry upon a vacant, unfenced lot is a trespass, just as truly as an entry into a house with closed doors; but the presumption as to negligence in one case is vastly different from that in the other. In one of those vehement opinions which make some of the Pennsylvania reports such entertaining reading, but such unsafe guides, it was asserted that an entry upon the

Sisson, 53 Mo. App. 516). In *Townsend v. Wathen*, 9 East, 277, the defendant set traps in his wood, baited with strong-scented meat. The wood being uninclosed, the plaintiff's dogs entered it, attracted by the meat, and were caught in the traps: held, plaintiff could recover, notwithstanding his dogs were trespassers. See *Wooton v. Dawkins*, 2 C. B. [N. S.] 412; *Jordan v. Crump*, 8 Mees. & W. 782; *Deane v. Clayton*, 7 Taunt. 489, in which plaintiff was not allowed to recover for dog killed by a spike, placed by defendant, *with notice*. Compare *Johnson v.*

Patterson, 14 Conn. 1; *Gray v. Coombs*, 7 J. J. Marsh. 478; *Hooker v. Miller*, 37 Ia. 613. A person may protect his house from burglary by setting a spring gun (*State v. Moore*, 31 Conn. 479). Stepping on a railroad track to rescue another from injury by an approaching train is not a trespass (*Spooner v. Delaware, etc. R. Co.*, 115 N. Y. 22, 21 N. E. 696), nor is going on another's premises where a fire is raging, endangering life and safety, for the honest purpose of saving life or property (*Henry v. Cleveland, etc. R. Co.*, 67 Fed. 426).

land of an unfenced railroad stood upon the same footing with an entry into a bedroom;²³⁵ but this doctrine confounds all moral and some legal distinctions. The comparison fails at every point. The injury which a stranger does to the railroad company by entering upon its way is infinitesimal; while the risk to himself is great. The injury which he does to his neighbor by secretly entering his bedroom is great; while the risk to himself, if undiscovered, is infinitesimal. In each case, it is true, the effect upon the trespasser's right to sue for damages may be the same; but this will be for very different reasons. If he walks along the track, he knowingly takes the risk of fatal injuries, and should not recover, for that reason. If he secretes himself in the bedroom he knowingly engages in a gross invasion of his neighbor's rights, and should not recover for that reason. Most of the reported cases which appear at first sight inconsistent with this proposition, and all of them which are not inconsistent with other and better-considered decisions, will prove, upon examination, to be cases which turned, not upon contributory negligence, but upon the question whether the defendant owed any duty to persons in the plaintiff's situation, which he had neglected to perform,²³⁶ which is an entirely different matter. Yet nothing is more common than to find the two questions confused with each other in judicial opinions. A large majority of the apparently adverse cases, moreover, are railroad cases, in which the trespasser knowingly exposed himself to injury. They have, therefore, no bearing upon the question of the effect of a mere technical trespass. We have been unable to find any case of a mere trespass in which any different rule is applied from that which is applied by the same courts to the case of

²³⁵ Phil., etc. R. Co. v. Hummell, 44 101 N. Y. 391; Nicholson v. Erie R. Pa. St. 375; see N. Y. & Erie R. Co. Co., 41 Id. 525; Severy v. Nickerson, v. Skinner, 19 Id. 301. 120 Mass. 306; Hounsell v. Smyth,

²³⁶ For examples of such cases, see 7 C. B. [N. S.] 731; Parker v. Port-Larmore v. Crown Point Iron Co., land Pub. Co., 69 Me. 173 [absence

one who enters by a bare license. In both, the real decision is that the defendant is not bound to anticipate the presence of a stranger, and therefore is not negligent in failing to protect him against injury.²³⁷

The doctrine of the preceding part of this section is amply supported by authority;²³⁸ the duty of the defendant owing to the plaintiff generally being rested securely on the broad maxim *sic utere tuo ut alienum non laedas*. It is of course quite possible by simply denying the duty

of a duty insisted on]; *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203.

²³⁷ *Philadelphia, etc. R. Co. v. Hummell*, 44 Pa. St. 375; *N. Y. & Erie R. Co. v. Skinner*, 19 Id. 301; *Matze v. N. Y. Central R. Co.*, 1 Hun, 417; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Robertson v. New York*, 7 Misc. 645, 28 N. Y. Supp. 13; *Ward v. Southern Pac. R. Co.*, 25 Ore. 433, 36 Pac. 166, and cases cited. See § 705, *post*. And it will be presumed that he was not aware of their presence (*Chenery v. Fitchburg R. Co.*, 160 Mass. 211, 35 N. E. 544; *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990; *Cablett v. St. Louis, etc. R. Co.*, 57 Ark. 461, 21 S. W. 1062). In all the following cases, usually cited as authorities for the proposition that a trespasser cannot recover because he is a trespasser, the courts really decided nothing more than is stated in the text. In all, travelers took shelter from storms, without invitation: *Lary v. Cleveland, etc. R. Co.*, 78 Ind. 323 [taking shelter in a ruined house]; *Converse v. Walker*, 30 Hun, 596 [shelter in hotel]; *Pittsburgh, etc. R. Co. v. Bingham*, 29 Ohio St. 364 [station house]; *Parker v. Portland Publishing Co.*, 69 Me. 173. Plaintiff, a boy, going through a lumber yard, was injured by the fall of lum-

ber fifty feet from the highway (*Vanderbeck v. Hendry*, 34 N. J. Law, 467). See, also, *Jeffersonville, etc. R. Co. v. Goldsmith*, 47 Ind. 43; *Morgan v. Pennsylvania R. Co.*, 7 Fed. 78. Compare *Graves v. Thomas*, 95 Ind. 361, as distinguished in *Evansville, etc. R. Co. v. Griffin*, 100 Id. 221; *Cahill v. Layton*, 57 Wis. 600; *Davis v. Chicago, etc. R. Co.*, 58 Id. 646; *Bransom v. Labrot*, 81 Ky. 638. No recovery was allowed in the following cases: *Hargreaves v. Deacon*, 25 Mich. 1 [child coming on defendant's premises, some distance from highway, fell into an uncovered cistern]; *McAlpine v. Powell*, 70 N. Y. 126 [child getting on fire-escape attached to house, fell through defective trap door]; *Roulston v. Clark*, 3 E. D. Smith, 366 [going through a building in progress of erection]; *Kohn v. Lovett*, 44 Ga. 251 [plaintiff, responding to a fire alarm, ran through defendant's store and fell down an opening]; *Zoebisch v. Tarbell*, 10 Allen, 385 [plaintiff going into a room of factory on the door of which "no admittance" was painted]; s. p., *Severy v. Nickerson*, 120 Mass. 306.

²³⁸ *Daley v. Norwich Ry.*, 26 Conn. 591; 68 Am. Dec. 413; *Bridge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546.

to defeat cases properly coming within the principle stated, and this has sometimes been done.²³⁹ The tendency to apply old and familiar formula to substantially new questions of duty created by new conditions is ever present. But upon reflection it must surely be seen that the principle of law which was intended to protect the owner of house or land from the claims for damages by trespassers has no natural or reasonable application to public service companies maintaining by license their dangerous instrumentalities at places where others are likely to be present. To identify such companies with the owner of the property for purpose of applying the ancient and undifferentiated rules of the common law with reference to trespassers is to ignore the most obvious conditions resulting from industrial development. In both the cases adverted to in the preceding note the court determined as matter of law that the actions were not maintainable. The question in both cases was in truth one of contributory negligence and should have been left to the jury. It is for the jury to say whether so ordinary and probable act as one going on top of an awning, with the implied assent of the owner, to raise an electric wire that impedes him in a lawful use of the street, or a policeman or fireman lawfully going on top

²³⁹ *Brush Elec. Light, etc. Co. v. Pitts* case a policeman under instructions of the mayor of the city had gone upon the awning of a building for the purpose of detecting parties engaged in gambling, and there came in contact with an un-insulated wire and was injured. The same court held that he was a trespasser and, therefore, without remedy. An unsuccessful attempt was made to explain these cases in *Burnett v. Ft. Worth Light, etc. Co.*, 102 Tex. 31, 112 S. W. 1040 (1908). These decisions are shocking to the moral sense. It is even intimated in the *Burnett* case that the fact that such wires were required by city ordi-

of an awning to stop gambling or to put out a fire is making such nonculpable uses of these places as could reasonably have been foreseen and guarded against by an electrical company when it strung its wires there.²⁴⁰ The learned author of *Watson on Damages for Personal Injuries* quotes with approval from *Hamilton v. Goding*²⁴¹ by the Supreme Court of Maine, as follows: "The question how far a person can defend an otherwise indefensible act by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result generally reached is that no man can set up a public or private wrong committed by another as an excuse for a wilful or unnecessary or even negligent injury to him or his property."

§ 98. Technical trespass no bar. — The overwhelming weight of authority, both in number of decisions and in soundness of reasoning, by which is established the right of little children to recover damages for injuries suffered

nance to be insulated would have made no difference in the decisions of the cases here criticised.

²⁴⁰ *Griffin v. United States Elec. Co.*, 164 Mass. 492, 32 L. R. A. 400; *Guinn v. Delaware, etc. Tel. Co.*, — N. J. —, 62 Atl. 412, 3 L. R. A. 988 (1902); *Lowe v. Salt Lake City*, 13 Utah, 91, 44 Pac. 1050, 57 Am. St. Rep. 708 (1896).

²⁴¹ 55 Me. 428. See also *Mahoney v. Cooke*, 26 Pa. St. 349; *Philadelphia, etc. Ry. Co. v. Philadelphia Tow Boat Co.*, 23 Howard, 247; *Sutton v. Wanwatosa*, 29 Wis. 27. "The duty of care, which the law imposes upon those who undertake to operate so dangerous a force as electricity, may, under some circumstances, be due to one who, technically, is a trespasser. In such a case as this one its special facts are for consideration, and

upon them, and not solely with reference to the ownership or occupancy of the *locus in quo*, the question of duty must be determined. 'It is true that, where no duty is owed no liability arises. But, as has often been said, duties arise out of circumstances. Hence, when the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary' (*Hydraulic Co. v. Orr*, 83 Pa. St. 322). It makes no difference where the circumstances give rise to duty, that the plaintiff was 'technically a trespasser' (*Schilling v. Abernethy*, 112 Pa. St. 437, 3 Atl. 793). The true question is, Was he 'a trespasser there in the sense that would excuse the defendant for the acts of negligence?'" (*Newark Elec. Light, etc.*

while trespassing, should alone be sufficient to settle this question.²⁴² Innocence and mistake are no excuse for a trespass;²⁴³ and therefore one committed by a child is just as truly a trespass as if committed by an adult. The owner of premises has precisely the same right to eject a child therefrom as he has to eject a full-grown man. He has the same right to recover nominal damages in each case. But when he is sued for damages caused by his negligence towards a trespasser, he finds that there is a wonderful difference between the probable result of the suit if the plaintiff is a child, and the probable result of a like suit by an adult. Is there any intelligible ground of distinction to account for this difference, except that the child is presumably not guilty of conscious negligence, while the man presumably is? When the man proves that he was ignorant of the fact that he was trespassing, or shows that his trespass was only technical, and such as he might reasonably suppose would not be objected to by the defendant, and did not in fact produce any appreciable injury or annoyance, his right to recover is just as good as that of an infant.²⁴⁴ All this is well settled. And what inference can possibly be drawn from such decisions, if not that the plaintiff's trespass is only a circumstance tending to prove contributory fault upon his part, and not in and of itself such fault or attended with the usual effects of such fault?

§ 99. Defendant's later negligence where the injury could have been avoided by the defendant notwithstanding plaintiff's prior negligence; rule in *Davies v. Mann*. — It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the

Co. v. Garden, 78 Fed. (C. C. A.) 74). See also 1 Thompson on Negligence, § 801. ²⁴² Per Andrews, J., Beck v. Carter, 68 N. Y. 283, 289.

²⁴³ See § 73, *ante*; Vicksburg v. McLain, 67 Miss. 4, 6 So. 774. ²⁴⁴ Loomis v. Terry, 17 Wend. 496, and other cases cited under last section. Text quoted and approved

defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after ²⁴⁵ becoming aware of the plaintiff's danger, ²⁴⁶ to use ordinary care ²⁴⁷ for the purpose of avoiding injury to him. ²⁴⁸ We know of no court of last resort

(*Lowe v. Salt Lake City*, 13 Utah, 91, 44 Pac. 1050).

²⁴⁵ Defendant's negligence must be subsequent to plaintiff's. Recovery cannot be had for the killing by a train of a trespasser, by reason of the fact that the train was not properly equipped with appliances for stopping it quickly (*Smith v. Norfolk, etc. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923; *Sullivan v. Missouri Pac. R. Co.*, 117 Mo. 214, 23 S. W. 149). "The obligation is mutual to use care to avoid the consequences of each other's negligence" (*Northern Central R. Co. v. Price*, 29 Md. 420, and see § 101, *post*).

²⁴⁶ In all the cases cited in note 248, *infra*, with two or three exceptions, the defendant was fully aware of the plaintiff's danger.

²⁴⁷ A charge that defendant is liable unless its servants did everything in their power to prevent the accident prescribes too stringent a rule (*Mobile, etc. R. Co. v. Watly*, 69 Miss. 145, 13 So. 825). To same effect, *Norfolk, etc. R. Co. v. Dunnaway*, 93 Va. 29, 24 S. E. 698.

²⁴⁸ This principle, first enunciated in *Davies v. Mann*, 10 Mees. & W. 546, in different language, has been accepted in this form by every court in England, including the House of Lords (*Radley v. Northwestern R. Co.*, L. R. 1 App. Cas. 754; *Scott v. Dublin, etc. R. Co.*, 11 Irish C. L. 337; *Dimes v. Petley*, 15 Q. B. 276, 283; *Tuff v. Warman*, 5 C. B. [N.S.] 573; *Witherley v. Regent's Canal*

Co., 12 Id. 2); by the U. S. Supreme Court (*Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 S. Ct. 679 [an instructive case]; *Inland, etc. Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653); and by every court in the Union, except possibly Pennsylvania. It is the law in *Alabama* (*Gothard v. Alabama, etc. R. Co.*, 67 Ala. 114; *Louisville & N. R. Co. v. Hurt*, 101 Id. 34, 13 So. 130); *California* (*Needham v. San Francisco, etc. R. Co.*, 37 Cal. 409); *Colorado* (*Kansas, etc. R. Co. v. Cramer*, 4 Colo. 524); *Connecticut* (*Isbell v. New Haven, etc. R. Co.*, 27 Conn. 393); *Delaware* (*Cummins v. Presley*, 4 Harr. 315); *Georgia* (*Macon, etc. R. Co. v. Davis*, 18 Ga. 679; *Georgia, etc. R. Co. v. Neely*, 56 Id. 540); *Illinois* (*Illinois, etc. R. Co. v. Hoffman*, 67 Ill. 287; *Chicago v. Donahue*, 75 Id. 106; *Ohio, etc. R. Co. v. Stratton*, 78 Id. 88; *Chicago, etc. R. Co. v. Ryan*, 131 Id. 474, 23 N. E. 385; *City R. Co. v. Jones*, 61 Ill. App. 183 [attention diverted by a runaway team]); *Indiana* (*Jeffersonville, etc. R. Co. v. Adams*, 43 Ind. 402; *Wright v. Brown*, 4 Id. 95); *Iowa* (*Balcom v. Dubuque, etc. R. Co.*, 21 Ia. 102; *Kuhn v. Chicago, etc. R. Co.*, 42 Id. 420; *Searles v. Milwaukee, etc. R. Co.*, 35 Id. 490; *Morris v. Chicago, etc. R. Co.*, 45 Id. 29; *Deeds v. Chicago, etc. R. Co.*, 69 Id. 164, 28 N. W. 488; *Connors v. Burlington, etc. R. Co.*, 87 Ia. 147, 53 N. W. 1092; *Haden v. Sioux City, etc. R. Co.*, 92

in which this rule is any longer disputed;²⁴⁰ although the

Iowa, 226, 60 N. W. 537); *Kansas* (*Hampshire* (Felch v. Concord R. R., 66 N. H. 318, 29 Atl. 557); *New York* (Silliman v. Lewis, 49 N. Y. 379; *Button v. Hudson River R. Co.*, 18 N. Y. 248, per Harris, J.; *Austin v. N. J. Steamboat Co.*, 43 Id. 75; *Green v. Erie R. Co.*, 11 Hun, 333; *Sweeney v. N. Y. Steam Co.*, 15 Daly, 312, 6 N. Y. Supp. 528; *Whittaker v. Delaware, etc. Canal Co.*, 49 Hun, 400); *North Carolina* (*Aycock v. Wilmington, etc. R. Co.*, 6 Jones, 231; *Gunter v. Wicker*, 85 N. C. 310; *Manly v. Wilmington, etc. R. Co.*, 74 Id. 655; *Doggett v. Richmond, etc. R. Co.*, 78 Id. 305; *Lay v. Richmond, etc. R. Co.*, 106 Id. 404, 11 S. E. 412; *Clark v. Wilmington, etc. R. Co.*, 109 N. C. 430, 14 S. E. 43); *Ohio* (Cleveland, etc. R. Co. v. Elliott, 28 Ohio St. 340; *Kerwhacker v. Cleveland, etc. R. Co.*, 3 Id. 172; *Cincinnati, etc. R. Co. v. Kassen*, 49 Id. 230, 31 N. E. 282); *Texas* (Gulf, etc. R. Co. v. Fox, 6 S. W. 560); *Vermont* (Ross v. Troy, etc. R. Co., 49 Vt. 364; *Trow v. Vermont, etc. R. Co.*, 24 Id. 487); *West Virginia* (Carrico v. West Virginia Cent., etc. R. Co., 35 W. Va. 389, 14 S. E. 12; *Wisconsin* (Woodward v. West Side R. Co., 71 Wis. 625, 38 N. W. 347; *Little v. Superior, etc. R. Co.*, 88 Wis. 402, 60 N. W. 705).²⁴⁹ *Duncan v. St. Louis, etc. Ry. Co.*, 44 So. (Ala.) 418, (1907); *Southern Ry. Co. v. Stewart*, 45 So. (Ala.) 51 (1907); *Texas & N. O. Ry. Co. v. Scarborough*, 104 S. W. (Tex. App.) 408 (1907); *Harris, etc. Ry. Co. v. Finn*, 107 S. W. (Tex. App.) 94; aff'd by Supreme Court, 101 Tex. 511, 109 S. W. 94 (1908); *San Antonio Trac. Co. v. Kelleher*, 48 Tex. App. 421, 107 S. W. 64 (1908); *Morgan v. Missouri, etc. Ry.*, 49 Tex. App. 212, 110 S. W.

Iowa, 226, 60 N. W. 537); *Kansas* (*Kansas Pac. R. Co. v. Whipple*, 39 Kans. 531, 18 Pac. 730); *Kentucky* (Louisville, etc. R. Co. v. Collins, 2 Duvall, 116); *Louisiana* (Johnson v. Canal, etc. R. Co., 37 La. Ann. 53); *Maryland* (Baltimore, etc. R. Co. v. Mulligan, 45 Md. 486; Baltimore, etc. R. Co. v. McDonnell, 43 Id. 534; *Consolidated Gas Co. v. Crocker*, 82 Id. 113, 33 Atl. 423 [entering with light a cellar filled with gas]); *Massachusetts* (Lane v. Atlantic Works, 107 Mass. 104; *Britton v. Cummington*, Id. 347; *Hibbard v. Thompson*, 109 Id. 288; *Steele v. Burkhardt*, 104 Id. 59; *Lovett v. Salem, etc. R. Co.*, 9 Allen, 557; *Spofford v. Harlow*, 3 Id. 176); *Michigan* (Underwood v. Waldron, 33 Mich. 232); *Minnesota* (Donaldson v. Milwaukee, etc. R. Co., 21 Minn. 293; *Ingalls v. Adams Ex. Co.*, 44 Id. 128, 46 N. W. 325; *Hepfel v. St. Paul, etc. R. Co.*, 49 Id. 263, 51 N. W. 1049; *Evarts v. St. Paul, etc. R. Co.*, 56 Minn. 141, 57 N. W. 459); *Mississippi* (Mississippi, etc. R. Co. v. Mason, 51 Miss. 234; *Christian v. Illinois Cent. R. Co.*, 71 Miss. 237, 12 So. 710); *Missouri* (Morrissey v. Wiggins Ferry Co., 43 Mo. 380; *Boland v. Missouri R. Co.*, 36 Id. 484; *Isabel v. Hannibal, etc. R. Co.*, 60 Id. 475; *Nelson v. Atlantic, etc. R. Co.*, 68 Id. 593; *Price v. St. Louis, etc. R. Co.*, 72 Id. 414; *Hanlan v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. 233; *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488; *Chamberlain v. Missouri Pac. R. Co.*, 132 Mo. 318, 33 S. W. 437); *Nabraska* (Burnet v. Burlington, etc. R. Co., 16 Neb. 332; *Sioux City, etc. R. Co. v. Smith*, 22 Id. 775, 36 N. W. 285; *Union Pacific R. Co. v. Mertes*, 39 Neb. 448, 58 N. W. 106); *New*

same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy.²⁵⁰ But, furthermore, in a number of jurisdictions it is held that the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, *after having such notice of the danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury.* It is not necessary that the defendant should actually *know* of the danger to which the plaintiff is exposed. It is enough if in discharge of a duty owing the defendant he could, by the exercise of ordinary care, have discovered it in time by the use of the agencies at hand to have avoided the injury.²⁵¹

978 (1908); St. Louis, etc. R. Co. 439; Creed v. Pa. Ry. Co., 86 Id. v. Drodgy, 114 S. W. (Tex. App.) 139; Railroad Co. v. Norton, 24 Id. 902 (1908); Anniston Elec., etc. Co. 465; Catawissa Ry. Co. v. Armstrong, 48 So. (Ala.) 798 (1909); Heil v. Glandings, 49 Id. 193; Stanford v. St. Louis, etc. Ry. Co., 42 Id. 493.

50 So. (Ala.) 110 (1909); Chesapeake & O. Ry. Co. v. Corbin's Admr., 110 Va. 700, 67 S. E. 179 (1910).

²⁵⁰ In Pennsylvania, Woodward, J., referring to Beers v. Housatonic R. Co., 19 Conn. 566, criticised the language there used, and added: "I prefer our own mode of holding the law; that if the injury result from the want of ordinary care of both parties, neither has remedy against the other; but if it be not in any degree ascribable to the negligence of one party — due regard being had to all the circumstances of his position — he may have redress from the other" (Reeves v. Delaware, etc. R. Co., 30 Pa. St. 454). But in that case, the decision was in favor of the plaintiff, and we think that the doctrine of the text is substantially accepted in Pennsylvania. Compare Philadelphia, etc. Ry. Co. v. Spearen, 47 Id. 300; Stiles v. Geesey, 71 Id. 546. The celebrated "donkey case." Davies negligently left his donkey on the highway, fettered, so that it could not escape. Mann, driving rapidly and carelessly, ran over the donkey. The report does not show whether Mann's driver was aware of the donkey's presence on the road or not. It was held that the plaintiff was entitled to recover, on the ground that "although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief." s. p., Wynn v. City, etc. R. Co., 91 Ga. 344, 17 S. E. 649 [young child trespassing on street car]; Schulz v. Chicago, etc. R. Co., 57 Minn. 271, 59 N. W. 192; Sullivan v. Missouri Pac. R. Co., 117 Mo. 214, 23 S. W. 149; Kelly v. Union R. Co., 95 Mo. 279, 8 S. W. 420; Scoville v. Hannibal,

The most reckless persistence on the part of one ex-

etc. R. Co., 80 Mo. 434; *Welsh v. Jackson*, Id. 466 [overruling earlier cases]; *Chicago, etc. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 Id. 522; *Chicago, etc. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120; *Omaha R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Bottoms v. Seaboard, etc. R. Co.*, 114 N. C. 699, 19 S. E. 730 [child on track]; *Lloyd v. Albe-marle, etc. R. Co.*, 118 N. C. 1011, 24 S. E. 805 [person lying helpless on track]; *East Tennessee, etc. R. Co. v. St. John*, 5 Sneed, 524 [boy sleeping on track]; *St. Louis, etc. R. Co. v. Crosnoe*, 72 Tex. 79, 10 S. W. 342; *Yoakum v. Mettasch* (Tex. Civ. App.), 26 S. W. 129 [person on track at private crossing]; *Mitchell v. Tacoma R. Co.* 9 Wash. St. 120, 37 Pac. 341 [child on track]; *Gunn v. Ohio River R. Co.*, 37 W. Va. 421, 16 S. E. 628 [same]; *Kruger v. Omaha, etc. St. Ry.*, 114 N. W. (Neb.) 571 (1908); *Pilmer v. Boise Trac. Co.*, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254; *King v. Wabash, etc. R. Co.*, 211 Mo. 1, 109 S. W. 671 (1908); *Atchison, etc. Ry. Co. v. Baker*, 95 Pac. (Ind. Terr.) 433 (1908); *McGee v. Wabash R. Co.*, 214 Mo. 530, 114 S. W. 33 (1908); *Trigg v. Water, etc. Tr. Co.*, 114 S. W. (Mo.) 972 (1908); *Cole v. Metropolitan St. Ry. Co.*, 133 Mo. App. 440, 113 S. W. 684 (1908); *Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 97 Pac. 944 (1908); *Potter v. St. Louis, etc. Ry. Co.*, 136 Mo. App. 125, 117 S. W. 593 (1909); *Wilkerson v. St. Louis, etc. Ry. Co.*, 124 S. W. (Mo. App.) 543 (1910). The basis of the humanitarian doctrine is the principle that no person has the right knowingly or negligently to injure another, when he knows, or should know if he is reasonably careful, that such other is in danger of injury at his hands and that he himself can avoid that danger (*Ross v. Metropolitan St. Ry.*, 132 Mo. App. 472, 112 S. W. 9 (1908)). The following distinction has been made: If both plaintiff and defendant are negligent no recovery can be had except upon the principle of discovered peril or the last chance doctrine; but if the injured party alone is negligent there can be no recovery except upon the humanitarian principle which rests on actual knowledge (*Matz v. Missouri Pac. Ry. Co.*, 217 Mo. 275, 117 S. W. 584 (1909); see also *Hall v. Missouri Pac. Ry. Co.*, 219 Mo. 553, 118 S. W. (1909)). Whether actual knowledge is essential to recovery, it is said, depends on the nature of the duty owed to plaintiff, and where he is merely a trespasser it is not; but where a duty is imposed to exercise reasonable care to ascertain the danger and the means are at hand for its performance, then reasonable means of knowledge is equivalent to actual knowledge (*Bourrett v. Chicago, etc. Ry. Co.*, 121 N. W. (Iowa) 380 (1909)). See this case for a full discussion of the different phases of the subject. When the law does not impose the duty of watchfulness it follows that the failure to watch is not an omission of duty intervening between the negligence of the plaintiff in exposing himself to the accident, unless he be actually seen in time to avert it (*Baker v. Wilmington, etc. Ry. Co.*, 118 N. C. 115, 24 S. E. 415 (1896)). "Contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of

posed to the danger will not justify another in con-

reasonable care and prudence, have avoided the consequences of the injured party's neglect" (Grand Trunk Ry. Co. v. Ives, 144 U. S. 408 (1891)). This is the doctrine of *Davies v. Mann*, and in identical or equivalent terms is repeated in a great number of cases, and, as in the original case there is no statement showing whether the driver really knew of the presence of the hobbled donkey, so, in these cases to which reference is made, the distinction between knowledge and notice was not material to their decision nor is attention directed to it in the decisions. The language used by Parke, B., in *Davies v. Mann*, is as follows: "Notwithstanding previous negligence of the plaintiff, if at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie." See also *Denver, etc. Ry. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582 (1902), where it is said: "Though its engineer did not see plaintiff upon the track in time to avert accident, still, if, in the circumstances of this case, he ought to have seen her, and through some fault or neglect of his own did not, the result is the same as if he had seen her and did not stop his train, if with safety to his passengers he could have done so after actually seeing her" (*Cincinnati, etc. Ry. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674 (1892); *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886 (1903)). In *Guenther v. St. Louis, etc. Ry. Co.*, 108 Mo. 18, 18 S. W. 846 (1891), the court approved an instruction using the term "might have been aware, by the exercise of ordinary care, of the peril of said deceased while on the track" (*Edge v. Atlantic, etc. Ry. Co.*, 69 S. E. (N. C.) 74 (1910)), (the doctrine of the last clear chance is applicable not only when the perilous position of the plaintiff is actually observed, but when it should, or might have been observed by the exercise of proper care; and it is here applied to the case of one injured on a railway track whose presence could have been seen by the operatives in the discharge of the duty in keeping a lookout along the track); *Bourrett v. Chicago, etc. Ry. Co.*, 121 N. W. (Ia.) 380 (1909), (if the defendant owes no duty to the plaintiff, as when he is a trespasser, he cannot be held liable under the last clear chance doctrine unless guilty of negligence after actual discovery of plaintiff's peril); *Gumm v. Kansas City, etc. Ry. Co.*, 125 S. W. (Mo. App.) 786 (1910), (the fact that one is approaching the track is not enough, unless there is something in his appearance or in the circumstances indicating that he probably will not or cannot get out of the way, and it must appear that defendant had reasonable opportunity to discover his peril and avoid his injury); *Dey v. United Ry. Co.*, 120 S. W. (Mo. App.) 134 (1910), (humanitarian doctrine in case of collision between street cars and vehicles means that if the motorman discovered or might have discovered the danger by ordinary care in time to avert the injury the company is liable). See note to *Bogan v. Ry. Co.*, 55 L. R. A. 418, where the subject of liability growing out of the duty to discover the plaintiff's peril is exhaustively dis-

sciously refraining from using care to avoid injury to him.²⁵² This qualification of the doctrine of contributory negligence, often called "the rule in *Davies v. Mann*," from the leading case on this subject, has been much criticised.²⁵³ But those criticisms turn mainly on the language used by Parke, B., in that case which is, perhaps, too broad and which has not been here adopted; although it has been literally repeated in the highest court of England as well as in that of the United States.²⁵⁴ It is possible, too, that the application of the

cussed and the cases collected, the annotator thus concluding the review: "There is a decided tendency on the part of the courts to apply the doctrine * * * to any omission of duty on the part of the defendant, whether before or after the discovery of the peril in which the plaintiff or deceased had placed himself or his property by his antecedent negligence, if that breach of duty intervened or continued after the negligence of the other party had ceased." See also note to *Teakle v. San Pedro, etc. Ry. Co.*, 32 Utah, 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486 (1907); *Shipley v. Metropolitan St. Ry. Co.*, 128 S. W. (Mo. App.) 768 (1910), (the humanitarian doctrine takes the imperiled person where it finds him, and makes one liable for injuring him where he saw or by ordinary care might have seen his peril in time by the use of the means at hand to avoid injuring him); *Laughlin v. St. Louis, etc. Ry. Co.*, 129 S. W. (Mo. App.) 1006 (1910); *Evansville, etc. Ry. Co. v. Spiegel*, 94 N. E. (Ind. App.) 716 (1911), (where plaintiff's peril was known or could have been known); *Smith v. Southern Pac. Ry. Co.*, 113 Pac. (Ore.) 41 (1911); *Stewart v. Portland Ry., etc. Co.*, 114 Pac. (Ore.) 936 (1911);

Gehring v. Galveston Elec. Co., 134 S. W. (Tex. App.) 288 (1911).

²⁵² The wisdom of this rule is strikingly illustrated in *Spooner v. Delaware, etc. Ry. Co.*, 115 N. Y. 22, 21 N. E. 606 (1889), where plaintiff's foot was caught and she could not escape.

²⁵³ *Beach on Contributory Negligence*, §§ 54-5-6. *Radley v. London & N. W. Ry. Co.*, L. R. 1 App. Cas. 754. In that case Lord Penzance said: "Though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

²⁵⁴ In *Inland, etc. Coasting Co. v. Tolson*, 139 U. S. 551, 558, the trial court charged that even if the plaintiff had been "guilty of contributory negligence * * * yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." Held, that

principle in *Davies v. Mann* was erroneous; but that does not affect the validity of the principle which lay at the foundation of that case. That principle is that the party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence and not that of the one first in fault is the sole proximate cause of the injury.²⁵⁵

this charge "contained nothing of which the defendant has a right to complain." In that case, however, defendant was fully aware of the facts. The same language was repeated in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 429. So also in other American cases (*Little Rock, etc. v. Dick*, 52 Ark. 402, 12 S. W. 785; *Nathan v. Charlotte St. R. Co.*, 118 N. C. 1066, 24 S. E. 511; *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288; *Hall v. Ogden R. Co.*, 13 Utah, 243, 44 Pac. 1046).

²⁵⁵ *Dowell v. Gen. Steam Nav. Co.*, 5 El. & Bl. 195, 206; *Bostwick v. Minneapolis, etc. R. Co.*, 2 N. Dak. 440, 51 N. W. 781; *Hays v. Gainesville R. Co.*, 70 Tex. 602, 8 S. W. 491; See *Richmond, etc. R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132; *Little Rock, etc. Ry. Co. v. Haynes*, 47 Ark. 497, 1 S. W. 774 (1886); *Higgins v. Wilmington City Ry. Co.*, 1 Marr. (Del.) 352, 41 Atl. 86 (1899); *Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478 (1904); *Washington Mfg. Co. v. Barnett*, 19 Ky. L. R. 958, 42 S. W. 1120 (1898); *Coombs v. Mason*, 97 Me. 278, 54 Atl. 728 (1906); *Baxter v. St. Louis Tr. Co.*, 103 Mo. App. 597, 78 S. W. 70 (1907); *Bostwick v. Minneapolis, etc. Ry. Co.*, 2 N. D. 440, 51 N. W. 781 (1892); *Cincinnati, etc. Ry. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674 (1892); *Farley v. Charleston Basket, etc. Co.*, 51 S. C. 222, 28 S. E. 193 (1898); *St. Louis, etc. Ry. Co. v. Jacobson*, 28 Tex. App. 150, 66 S. W. 1111 (1902); *Thompson v. Salt Lake Tr. Co.*, 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172 (1898); *Green v. Los Angeles Ter. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, rev'g 69 Pac. 694 (1903); *Denver, etc. Ry. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582 (1902); *Tully v. Philadelphia, etc. Ry. Co.*, 3 Pennw. 455, 50 Atl. 95 (1900); *Von Bock v. Missouri, etc. Ry. Co.*, 171 Mo. 338, 71 S. W. 358 (1903); *Dailey v. Burlington, etc. Ry. Co.*, 58 Neb. 396, 78 N. W. 722 (1899); *Thompson v. Salt Lake, etc. Co.*, 16 Utah, 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172 (1898); *Baltimore, etc. Ry. Co. v. Hellenthal*, 88 Fed. 116, 31 C. C. A. 414 (1898); *Mapes v. Union, etc. Ry. Co.*, 56 App. Div. 508, 67 N. Y. Supp. 358 (1900); *Memphis, etc. Ry. Co. v. Martin*, 131 Ala. 261, 30 So. 827 (1901); *Sauer v. Eagle, etc. Co.*, 3 Cal. App. 127, 84 Pac. 425 (1906) [actual knowledge]; *Pickett v. Wilmington, etc. Ry. Co.*, 117 N. C. 616, 23 S. E. 264, 53 Am. St. Rep. 611, 30 L. R. A. 257 (1899); *Shanks v. Springfield Trac. Co.*, 101 Mo. App. 702, 74 S. W. 386 (1903); *Southern Ry. Co. v. Stewart*, 45 So. (Ala.) 51 (1907) [contributory negligence after discovering the peril, to constitute a defence must be with a

§ 100. **Illustrations of rule.**—Thus, one who negligently leaves a domestic animal on a highway or railroad, may recover from one who, seeing it, or being in fault for not seeing it, does not use proper care to avoid running over it.²⁵⁶ So, if a vessel fails to exhibit proper lights and take the proper side of the channel, this is no defence in favor of one who, having warning, fails to use proper care to avoid doing an injury.²⁵⁷ So, if a locomotive engineer sees persons or property on the track, though unlawfully there, he must use ordinary care to

knowledge of such peril]; Louisville, (N. M.) 552 (1910); Acton v. etc. Ry. Co. v. Young, 45 So. (Ala.) 238 (1907); Matterson v. Southern Pac. Co., 92 Pac. (Cal. App.) 101 (1907); Kruger v. Omaha, etc. Ry. Co., 114 N. W. (Neb.) 571 (1908); Texas, etc. Ry. Co. v. Scarborough, 104 S. W. 408, aff'd, 108 S. W. 805 (1908); Houston, etc. Ry. Co. v. Finn, 107 S. W. 94, aff'd, 101 Tex. 511, 109 S. W. 918 (1908); San Antonio Trac. Co. v. Kelleher, 107 S. W. (Tex. App.) 64 (1908); An-niston Elec., etc. Co. v. Rosen, 48 So. (Ala.) 798 (1909); Anderson v. Great Northern Ry. Co., 15 Idaho, 513, 99 Pac. 91 (1908); Metz v. Missouri, etc. Ry. Co., 217 Mo. 275, 117 S. W. 553, 118 S. W. 56 (1909); Stand-ford v. St. Louis, etc. Ry. Co., 50 So. (Ala.) 110 (1909); Bourrett v. Chicago, etc. Ry. Co., 121 N. W. (Ia.) 380 (1909); Bruggeman v. Illi-nois, etc. Ry. Co., 123 N. W. (Ia.) 1007 (1909) [if both could have prevented the injury, the negligence is concurrent and there can be no recovery]; Chesapeake, etc. Ry. Co. v. Corbin's Admr., 110 Va. 700, 67 S. E. 179 (1910); Denver City Tram. Co. v. Wright, 47 Colo. 366, 107 Pac. 1074 (1910); Clark v. St. Louis, etc. Ry. Co., 24 Okla. 764, 108 Pac. 361 (1909); Thompson v. Albuquerque Tr. Co., 110 Pac. (N. M.) 552 (1910); Fargo, etc. Ry. Co., 129 N. W. (N. D.) 225 (1910); Capital Tr. Co. v. Crump, 35 App. D. C. 169 (1910).
²⁵⁶ Davies v. Mann, 10 Mees. & W. 546; Kerwhacker v. Cleveland, etc. R. Co., 3 Ohio St. 172; Leavenworth, etc. R. Co. v. Forbes, 37 Kans. 445, 15 Pac. 595; Card v. Harlem R. Co., 50 Barb. 39. The American cases, in which a contrary opinion is ex-pressed, will be found, upon analyz-ing them, to be cases in which the negligence of the defendant con-sisted merely in not foreseeing the negligence of the plaintiff; for which, as we have already shown, the defendant is not responsible. See § 92, *ante*.
²⁵⁷ Tuff v. Warman, 5 C. B. (N. S.) 573, 2 Id. 740; Greenland v. Chap-lin, 5 Exch. 243; Vennall v. Garner, 1 Cro. & Mees. 21; Inman v. Reck, L. R., 2 P. C. App. 25; Austin v. N. J. Steamboat Co., 43 N. Y. 75; see Foster v. Holly, 38 Ala. 76. Where oysters are negligently left in the channel of a navigable river, officers of a vessel, knowing them to be there, are not justified in running against and destroying them, there being room to pass without doing so (Colchester v. Brooke, 7 Q. B. 339, 377).

avoid a collision.²⁵⁸ Even if a trespasser obstinately remains upon the track, in spite of warnings, the train must be stopped if necessary to avoid injuring him.²⁵⁹ It has been held where common experience has shown that persons or cattle are constantly upon the track, a recovery may be had for injuries suffered by them through the neglect of the engineer to look out for them, even if he did not see them.²⁶⁰

§ 101. Plaintiff last in fault.—The foregoing rule obviously does not apply, where the plaintiff's contributory negligence is, in order of causation, either subsequent to²⁶¹ or concurrent with²⁶² that of the defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if an engineer, seeing him,

²⁵⁸ *Illinois Central R. Co. v. Mid-* escape (*Peirce v. Walters*, 164 Ill. dlesworth, 46 Ill. 494; *Kerwhacker* 560, 45 N. E. 1068). See §§ 428, v. *Cleveland, etc. R. Co.*, 3 Ohio St. 483, 484, *post*; also § 99, *ante*.
²⁵⁹ *Erickson v. St. Paul, etc. R. Co.*, 41 Minn. 500, 43 N. W. 332; *Drown v. Northern O. Tr. Co.*, 76 Ohio St. 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421 (1907); *Matterson v. Southern Pac. Co.*, 92 Pac. (Cal. App.) 101 (1907).
²⁶⁰ *Chicago, etc. R. Co. v. Cauffman*, 38 Ill. 424; *Chicago, etc. R. Co. v. Barrie*, 55 Id. 226; *Cincinnati, etc. R. Co. v. Smith*, 22 Ohio St. 227; see *Baltimore, etc. R. Co. v. State*, 33 Md. 542; *Chicago, etc. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120. Not so, where engineer has no reason to expect them (*Ill. Central R. Co. v. Noble*, 142 Ill. 578, 32 N. E. 684). But see § 280 and note, *post*.
²⁶¹ *Smith v. Norfolk, etc. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923.
²⁶² *Holmes v. South. Pac., etc. R. Co.*, 97 Cal. 161, 31 Pac. 834; *Welsh v. Tri-City Ry. Co.*, 126 N. W. (Ia.) 1118 (1910) [no liability where negligence is concurrent]; *Himmelwright v. Baker*, 82 Kans. 569, 109

Where a wagon stuck in the rails, it was held that the engineer had no right to assume that it would be taken off the track before he reached it, but was bound to stop the train (*Chicago, etc. R. Co. v. Hogarth*, 38 Ill. 370). And, generally, an engineer ought to slacken speed, on seeing a child on the track (see *Philadelphia, etc. R. Co. v. Spearen*, 47 Pa. St. 300). The engineer is not absolutely bound to stop, however, even if he sees a child upon the track; for if, in the exercise of a sound judgment and great care, he believes that the child can easily escape, and will do so, he need not slacken speed after giving the usual signals (*Id.*). To same effect, *Meyer v. Midland, etc. R. Co.*, 2 Neb. 320. Much more does this apply to a person of mature age, upon the track (*Terre Haute, etc. R. Co. v. Graham*, 46 Ind. 239; *Chicago, etc. R. Co. v. Bixby*, 84 Ill. 82). But not so, if he is so situated that he cannot easily

makes no effort to check the train, he cannot recover if, after becoming aware of his danger, he makes no proper effort to escape.²⁶³ So, one who, after notice that a boiler is to be tested in a reckless manner, persists in standing by until it explodes, cannot recover.²⁶⁴

§ 102. Comparative negligence.—In Illinois, the doctrine of “comparative negligence” was, until recently, firmly established. It is not easy to state this doctrine with accuracy; but in most of the decisions it was said that, where both parties had been guilty of negligence contributing to the injury, the plaintiff could nevertheless recover, if his negligence had been slight, compared with that of the defendant, which had been gross.²⁶⁵ Although similar expressions were at one time used by the courts in other States,²⁶⁶ this distinction was not finally accepted anywhere else in America, Great

Pac. 178 (1910) [there can be no recovery where the negligence of both parties has been concurrent].

²⁶³ *International, etc. R. Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223. Applied (two judges dissenting) to the case of an intoxicated man, *not* aware of his danger (*Smith v. Norfolk, etc. R. Co.*, *supra*; *Louisville, etc. R. Co. v. Webb*, 90 Ala. 185, 8 So. 518 [injury at railroad crossing]).

²⁶⁴ See *Ochsenbein v. Shapley*, 85 N. Y. 214.

²⁶⁵ An instruction “that if plaintiff was guilty of some negligence, but defendant of gross negligence, and plaintiff’s negligence was slight compared with the negligence of defendant, plaintiff might recover,” correctly states the former law of Illinois as to comparative negligence (*Chicago v. Stearns*, 105 Ill. 554; *s. p.*, *Chicago, etc. R. Co. v. Lee*, 60 Id. 501; *Chicago, etc. R. Co. v. Har-*

wood, 90 Id. 425). This rule was first formulated by Breese, J., in *Galena, etc. R. Co. v. Jacobs*, 20 Ill. 478; and was continually reaffirmed down to 1891 (*Indianapolis, etc. R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc. R. Co. v. Clark*, 70 Id. 276; *Kewanee v. Depew*, 80 Id. 119; *Hayward v. Merrill*, 94 Id. 349; *Wabash, etc. R. Co. v. Wallace*, 110 Id. 114; *Jefferson v. Chapman*, 127 Id. 438, 20 N. E. 33; and scores of other cases. The latest seems to be [1891] *Lake Shore, etc. R. Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510).

²⁶⁶ *Ohio* (*Kerwhacker v. Cleveland*, etc. R. Co., 3 Ohio St. 172); *Indiana* (*Evansville, etc. R. Co. v. Lowdermilk*, 15 Ind. 120; *Lafayette, etc. R. Co. v. Adams*, 26 Id. 76); *Wisconsin* (*Stucke v. Milwaukee, etc. R. Co.*, 9 Wis. 182); *New York* (*Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Button v. Hudson River R. Co.*, 18 Id. 248).

Britain or Ireland.²⁶⁷ It has now been abolished in Illinois; ²⁶⁸ and, therefore, we omit the discussion of the question, which was given at length in a former edition. But some such rule has been adopted by statute in South Carolina.²⁶⁹

§ 103. Rule in Georgia, Tennessee, Florida, Kansas and Wisconsin. — The common-law rule in Georgia has been said to be that although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent the action is maintainable.²⁷⁰ Again, it has been stated that

²⁶⁷ The doctrine of comparative negligence has been expressly rejected in *Alabama* (Memphis, etc. R. Co. v. Copeland, 61 Ala. 376); *Indiana* (Terre Haute, etc. R. Co. v. Graham, 95 Ind. 286); *Iowa* (Johnson v. Tillson, 36 Ia. 89; Artz v. Chicago, etc. R. Co., 44 Id. 284; O'Keefe v. Chicago, etc. R. Co., 32 Id. 467); *Kentucky* (Digby v. Kenton Works, 8 Bush, 166; Kentucky, etc. R. Co. v. Thomas, 79 Ky. 160; but see Kentucky, etc. R. Co. v. Smith, 93 Id. 449, 20 S. W. 392); *Massachusetts* (Marble v. Ross, 124 Mass. 44); *Missouri* (Hurst v. St. Louis, etc. R. Co., 94 Mo. 255, 7 S. W. 1); *New Jersey* (Pennsylvania R. Co. v. Righter, 42 N. J. Law, 180); *New York* (Wells v. N. Y. Central R. Co., 24 N. Y. 181; Wilds v. Hudson River R. Co., Id. 430); *Pennsylvania* (Potter v. Warner, 91 Pa. St. 362; Stiles v. Geesey, 71 Id. 439); *Tennessee* (East Tennessee, etc. R. Co. v. Aiken, 89 Tenn. 245, 14 S. W. 1082; East Tennessee, etc. R. Co. v. Hull, 88 Tenn. 33, 12 S. W. 419); *Texas* (Houston, etc. R. Co. v. Gorbett, 49 Tex. 573; Missouri, etc. R. Co. v. Rogers, 89 Tex. 675, 36 S. W. 243); *Wisconsin* (Potter v. Chicago, etc. R., 21 Wis. 377, 22 Id. 615; Cunningham v. Lyness, Id. 236). Some decisions in *Kansas*

(Union Pacific R. Co. v. Rollins, 5 Kans. 167; Sawyer v. Sauer, 10 Id. 466; Kansas Pac. R. Co. v. Pointer, 14 Id. 37; Wichita, etc. R. Co. v. Davis, 37 Id. 743, 16 Pac. 78) seemed to indicate that the rule of comparative negligence was adopted there. But it has finally been decided that it is not (Kansas, etc. R. Co. v. Peavey, 29 Kans. 170; Atchison, etc. R. Co. v. Morgan, 31 Id. 77; Atchison, etc. R. Co. v. Henry, 157 Kans. 154, 45 Pac. 576).

²⁶⁸ "The doctrine of comparative negligence has been abolished in Illinois" (Cicero, etc. R. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823; Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892).

²⁶⁹ In *South Carolina*, by Gen. St. S. C., § 1529, plaintiff cannot recover where the injury was caused by defendant's negligence, if the person injured was, at the time, guilty of gross or willful negligence, which contributed to the injury. See *Petrie v. Columbia*, etc. R. Co., 29 S. C. 303, 7 S. E. 515.

²⁷⁰ "A plaintiff may recover of a railroad company for an injury done to his person or property, although not without fault himself, provided the mischief was the result of gross negligence on the part of the com-

when both parties are at fault the plaintiff may nevertheless recover; the damages being diminished in proportion to the amount of his default.²⁷¹ The latter rule, however, seems to be dependent on statutory provisions regulating the operations of railroads.²⁷² But in no case can the plaintiff recover if by ordinary care he could have avoided the consequences of the defendant's negligence.²⁷³ This is also statutory, but is, of course, only a reaffirmation of the common-law rule.²⁷⁴

In Tennessee the common-law rule is said to be that although the plaintiff may contribute to his own negligence, yet if the defendant's negligence was the proximate cause he may recover, the negligence of the plaintiff being considered in mitigation of damages.²⁷⁵ It has also been held in that State that while it is error to charge merely that the plaintiff can recover if the defendant was guilty of the greater negligence, it is not

pany, and could not have been avoided by the exercise of ordinary care" (*The Augusta, etc. R. Co. v. McElmurry*, 24 Ga. 75 (1858)).

²⁷¹ "When both parties are at fault the plaintiff may nevertheless recover, and the damages shall in such cases be diminished by the jury in proportion to the amount of default attributable to him; but, if the plaintiff by ordinary care could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover at all" (*Southern Ry. Co. v. Watson*, 104 Ga. 243, 30 S. E. 818 (1898)).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ "In this State we hold that although the injured party may contribute to the injury by his own carelessness or wrongful conduct, yet if the act or negligence of the party inflicting the injury was the proximate cause of the injury, the latter

will be liable in damages, the negligence or wrongful conduct of the party injured being taken into consideration, by way of mitigation, in estimating the damages. In other words, if defendant was guilty of a wrong by which plaintiff is injured, and plaintiff was also in some degree negligent or contributed to the injury, it should go in mitigation of the damages, but cannot justify or excuse the wrong (*East Tennessee, Virginia & Ga. R. Co. v. Fain*, 12 Lea, 35). At the same time we hold that if a party by his own gross negligence bring an injury upon himself, or proximately contribute to such injury, he cannot recover; neither can he recover in cases of mutual negligence where both parties are equally blamable (*Id.*). The principal difference between our rule and the English rule, as modified by the more recent decisions, is in allowing the damages

error so to charge if accompanied with the qualification that the defendant's negligence must have been the prime, principal and proximate cause of the injury.²⁷⁶ In the case last cited the doctrine of comparative negligence, it is said, does not obtain in that jurisdiction.

After some intimations to the contrary it now seems settled that the doctrine of comparative negligence is not recognized either in South Carolina²⁷⁷ or Kansas.²⁷⁸

In Florida²⁷⁹ there is a statutory provision governing actions against railroad companies only, where both are at fault, permitting recovery, the same to be diminished by the jury in proportion to the amount of fault attributable to the plaintiff.

§ 104. Plaintiff's violation of statute. — If the plaintiff is acting in violation of a statute or ordinance at the time of the accident, and such violation proximately contributes to his injury, he is guilty of contributory fault, and is as much debarred from recovery as in other cases of contributory negligence.²⁸⁰ But if such violation did not so contribute to the injury it is no defence.²⁸¹ In

to be mitigated by the conduct of the injured party" (Railroad Company v. Fleming, 14 Lea, 135 (1885).

²⁷⁶ Railroad Co. v. Aiken, 89 Tenn. 245, 14 S. W. 1082 (1891).

²⁷⁷ McLean v. Atlantic Coast Line Railroad, 81 S. C. 100, 61 S. E. 900 (1908).

²⁷⁸ Missouri Pac. Ry. v. Walters, 96 Pac. (Kans.) 346 (1908).

²⁷⁹ The statute of 1887, ch. 3744, § 1, provides that no person shall recover damages from a railroad company for injury occurring by his own consent, or through his own negligence, but that, if he and the agents of the company both are at fault, he may recover damages, to be diminished by the jury in proportion to the amount of fault attributable to him. Held, that in giv-

ing the statute in a charge, the court should instruct that the jury should not take into consideration any negligence of either of the parties which did not proximately contribute

to the injury (Florida Cent. R. Co. v. Williams, 37 Fla. 406, 20 So. 558).

²⁸⁰ So held, as to city ordinances (Newcomb v. Boston Prot. Dep., 146 Mass. 596, 16 N. E. 555; followed, Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925).

To same effect, McGrath v. City, etc. R. Co., 93 Ga. 312, 20 S. E. 317; Central R. Co. v. Brunswick, etc. R. Co., 87 Ga. 386, 13 S. E. 520.

²⁸¹ So held, as to ordinances (Steele v. Burkhard, 104 Mass. 59; Hall v. Ripley, 119 Id. 135; Klipper v. Coffey, 44 Md. 117; Baker v. Portland, 58 Me. 199); and as to statutes

Massachusetts²⁸² and Maine,²⁸³ which were originally one State, and in Vermont,²⁸⁴ general travel on a highway on Sunday has always been prohibited; and it was, therefore, formerly held in those States that an ordinary Sunday traveler could not recover for injuries suffered from obstacles in the road²⁸⁵ or other negligence; though he

(*Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, 21 N. E. 101 [child on car platform]; *Seymour v. Citizens' R. Co.*, 114 Mo. 266, 21 S. W. 739 [same]; *Atlanta R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48 [violating rule of the road]; *Quinn v. O'Keefe*, 9 N. Y. App. Div. 68, 41 N. Y. Supp. 116 [same; proper side of road being obstructed]; *Damon v. Scituate*, 119 Mass. 66; *Counter v. Couch*, 8 Allen, 436; *Spofford v. Harlow*, 3 Id. 176; *Griggs v. Fleckenstein*, 14 Minn. 81; *Neanow v. Uttech*, 46 Wis. 581). In *Sutton v. Wauwatosa*, 29 Wis. 21, the subject was fully discussed by Dixon, C. J., who said: "To make good the defence [of illegality] it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident, of which he complains; and the relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another." Hence it was held that the fact that a traveler was violating the Sunday law had no natural or necessary tendency to cause the injury happening to him from a defect in the highway, and that he could recover for the injury. *s. p.*, *Baldwin v. Barney*, 12 R. I. 392; *Platz v. Cohoes*, 89 N. Y. 219.

²⁸² Mass. Pub. Stat., ch. 98, § 3.

²⁸³ Maine Rev. Stat., ch. 124, § 20.

Traveling on Sunday, after sunset, 114 N. Y. 104, 21 N. E. 101 [child on car platform]; *Seymour v. Citizens' R. Co.*, 114 Mo. 266, 21 S. W. 739 [same]; *Atlanta R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48 [violating rule of the road]; *Quinn v. O'Keefe*, 9 N. Y. App. Div. 68, 41 N. Y. Supp. 116 [same; proper side of road being obstructed]; *Damon v. Scituate*, 119 Mass. 66; *Counter v. Couch*, 8 Allen, 436; *Spofford v. Harlow*, 3 Id. 176; *Griggs v. Fleckenstein*, 14 Minn. 81; *Neanow v. Uttech*, 46 Wis. 581). In *Sutton v. Wauwatosa*, 29 Wis. 21, the subject was fully discussed by Dixon, C. J., who said: "To make good the defence [of illegality] it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident, of which he complains; and the relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another." Hence it was held that the fact that a traveler was violating the Sunday law had no natural or necessary tendency to cause the injury happening to him from a defect in the highway, and that he could recover for the injury. *s. p.*, *Baldwin v. Barney*, 12 R. I. 392; *Platz v. Cohoes*, 89 N. Y. 219.

²⁸⁴ Vt. Gen. Stat., ch. 93, § 3. "No one shall travel on the Sabbath or the first day of the week, except from necessity or charity" (Ib.). The *New Hampshire* statute declares that "no person shall do any work, business or labor of his secular calling to the disturbance of others, etc., on the first day, etc." (N. H. Gen. Stat., ch. 255, § 3). In that State, traveling on Sunday, in such a manner as not to disturb others, does not bar a recovery for an injury by a defect in the highway (*Dutton v. Weare*, 17 N. H. 34).

²⁸⁵ *Bosworth v. Swansey*, 10 Metc. 363; *Jones v. Andover*, 10 Allen, 18; *Hall v. Ripley*, 119 Mass. 135; *Lyons v. Desotelle*, 124 Id. 387; *Smith v. Boston, etc. R. Co.*, 120 Id. 490; *Hyde Park v. Gay*, 120 Id. 589; *Connolly v. Boston*, 117 Id. 64; *Tillock v. Webb*, 56 Me. 100; *Cratty v. Bangor*, 57 Id. 423. Unless the traveler makes it appear that he was upon an errand of charity or necessity, he cannot recover (*Feital v. Middlesex R. Co.*, 109 Mass. 398; *Bucher v. Fitchburg, etc. R. Co.*, 131 Id. 156; *Davis v. Somerville*, 128 Id. 594; *Doyle v. Lynn, etc. R. Co.*, 118 Id. 195; *Hall v. Corcoran*, 107 Id. 251; *O'Connell v. Lewiston*, 65 Me. 34; *Davidson v. Portland*, 69 Id. 116). Walking for exercise in the

could recover for wanton or willful injuries.²⁸⁶ It would seem to follow that any one who is actually engaged, during every moment of the time in which he suffers an injury by the negligence of another in some unlawful proceeding, could not recover for such injury in those States. The last of these statutes, that of Maine, was repealed in 1895. But this application of the Sunday law has been repudiated by all the other courts which

open air on Sunday is not a violation of the statute (*Hinckley v. Penobscot*, 42 Me. 89). In *Massachusetts* it has been said that the statute does not prohibit an act which, under the circumstances, is morally fit and proper to be done on the Sabbath (*Commonwealth v. Knox*, 6 Mass. 76; *Commonwealth v. Joselyn*, 97 Id. 411; *Commonwealth v. Sampson*, 97 Id. 407; *Flagg v. Millbury*, 4 Cush. 243). Hence, executing a will on Sunday is proper (*Bennett v. Brooks*, 9 Allen, 118). So is walking for the purpose of making a social call (*Barker v. Worcester*, 139 Mass. 74); but not so, as to riding (*Stanton v. Metropolitan R. Co.*, 14 Allen, 485). As matter of law, it is not always unnecessary to work on Sunday to prevent a great waste of sap, in making maple sugar (*Whitcomb v. Gilman*, 35 Vt. 297). It is not an honest belief that a necessity for traveling exists, but the actual existence of the necessity, which renders Sunday traveling lawful (*Johnson v. Irasburgh*, 47 Vt. 28; see, also, *Holcomb v. Danby*, 51 Id. 438; *McCleary v. Lowell*, 44 Me. 116, per Wheeler, J.). The federal courts will recognize as binding the decisions of a State court, as to non-recovery for injuries received while traveling on Sunday (*Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 S. Ct. 974).

²⁸⁶ In *Wallace v. Merrimac River*

Nav. Co., 134 Mass. 95, it was held that if the injury was wantonly or willfully inflicted, the fact that plaintiff was traveling on Sunday is no defence. See § 64, *ante*. The plaintiff, while unlawfully traveling on Sunday, was bitten by defendant's vicious dog. Held, that he could recover (*White v. Lang*, 128 Mass. 598). It is no defence to an action for a conversion of property that it was let to defendant on Sunday. Thus, one who hires a horse to drive three miles on Sunday, but goes six miles further, and by over-driving kills the horse, is liable for conversion (*Morton v. Gloster*, 46 Me. 520; *Woodman v. Hubbard*, 25 N. H. 67). Compare, to the contrary, *Gregg v. Wyman*, 4 Cush. 322; *Whelden v. Chappel*, 8 R. I. 230, 233. In *Myers v. Meinrath*, 101 Mass. 366, it was held that an action for the conversion of a chattel delivered on Sunday in exchange for another retained by the defendant notwithstanding the return of the other by plaintiff, would not lie. Compare *Tucker v. Mowrey*, 12 Mich. 378. Relief has been denied to one who on Sunday was aiding the owner to clear out his wheel pit, and while doing so was injured by the negligence of the owner (*McGrath v. Merwin*, 112 Mass. 467); and to one who was defrauded in a trade of horses on that day (*Robeson v. French*, 12 Metc. 24).

have passed upon it.²⁸⁷ The principle stated in the early Massachusetts decisions doubtless exempted towns from liability for defects in highways, causing injuries to persons unlawfully traveling on Sunday, because the town officers were not bound to anticipate such traveling; but it is an unjustifiable extension of the rule to hold that a railroad company, for example, is exempt from all liability for its negligent management of trains, in which it carries passengers on Sunday. Such decisions are plainly subversive of the rule in *Davies v. Mann*. Nevertheless, such is the common law of Massachusetts.²⁸⁸ It

²⁸⁷ *New Hampshire* (Dutton v. Milwaukee R. Co., 59 Id. 278; McWeare, 17 N. H. 34; Norris v. Litchfield, 35 Id. 271; Sewell v. Webster, 59 Id. 596; Wentworth v. Jefferson, 60 Id. 158; Allen v. Deming, 14 Id. 133; Woodman v. Hubbard, 25 Id. 67); *Rhode Island* (Baldwin v. Barney, 12 R. I. 392; Whelden v. Chappel, 8 Id. 230); *Connecticut* (see Horton v. Norwalk, etc. R. Co., 66 Conn. 272, 33 Atl. 914); *New York* (Carroll v. Staten Island R. Co., 58 N. Y. 126; Platz v. Cohoes, 89 Id. 219; Merritt v. Earl, 29 Id. 115); *New Jersey* (Smith v. N. Y., Susquehanna, etc. R. Co., 46 N. J. Law, 7; Delaware, etc. R. Co. v. Trautwein, 52 Id. 169, 19 Atl. 178); *Pennsylvania* (Mohney v. Cook, 26 Pa. St. 342; Piollet v. Simmers, 106 Id. 95); *Maryland* (Philadelphia, etc. R. Co. v. Lehman, 56 Md. 209); *Kentucky* (Commonwealth v. Louisville, etc. R. Co., 80 Ky. 291; Illinois Central R. Co. v. Dick, 91 Id. 434, 15 S. W. 665); *Indiana* (Yonowski v. State, 79 Ind. 393; Loeb v. Attica, 82 Id. 175; Wilkinson v. State, 59 Id. 416 Louisville, etc. R. Co. v. Frawley, 110 Id. 18, 9 N. E. 594; compare Western Union Tel. Co. v. Yopst, 118 Ind. 248, 20 N. E. 222); *Wisconsin* (Sutton v. Wauwatosha, 29 Wis. 21; Knowlton v.

Milwaukee R. Co., 59 Id. 278; McArthur v. Green Bay, etc. R. Co., 34 Id. 139); *Minnesota* (Opsahl v. Judd, 30 Minn. 126); *Iowa* (Schmid v. Humphrey, 48 Ia. 652); *Arkansas* (Stewart v. Davis, 31 Ark. 518; Tucker v. West, 29 Id. 386; State v. Goff, 20 Id. 289); *Federal Courts* (Philadelphia, etc. R. Co. v. Phila., etc. Towboat Co., 23 How. U. S. 209; Armstrong v. Toler, 11 Wheat. 258; Sawyer v. Oakman, 7 Blatchf. 290). As to *West Virginia*, see State v. Railroad Co., 24 West Va. 783; *Ohio*, see McGatrick v. Wason, 4 Ohio St. 566. See § 92, *ante*, and § 381, *post*.

²⁸⁸ Thus it has been held that a street car driver or conductor cannot recover for injuries sustained by a collision with the car of another company while performing his ordinary duties on Sunday (*Day v. Highland St. R. Co.*, 135 Mass. 113); nor can a passenger on a street car, riding on Sunday, for the purpose of making a social call, recover of the car company for injuries (*Stanton v. Metropolitan R. Co.*, 14 Allen, 485). A locomotive engineer, performing the ordinary duties of his employment on Sunday, violates the statute, unless the running of the train is a work of necessity or

seems desirable to retain this account of the old Massachusetts law, since the discussion elsewhere could not be understood without reference to it. But the whole of this judicial construction of the Sunday law was abrogated by statute in 1884;²⁸⁰ and that law affords no longer any defence to an action for personal injury in Massachusetts.

§ 105. Plaintiff's fault in representative capacity.—

Although the point is not made entirely clear by reported cases, we think that any act of the plaintiff which contributes to his injury, although done by him purely in some representative capacity as agent, executor or public officer, is a defence to his action, as much as if it had been done in his individual capacity. Thus, where an executive officer had, by his own fault in his official capacity, failed to provide for the proper repair of a highway, it was held that he could not recover for injuries suffered by him through defect of such highway.²⁹⁰ But of course the plaintiff must be *in fault*, in a legal sense; and if he has made an error which contributes to his injury, but for which he is not legally in fault, this is no defence to the action. Thus, a public officer, deciding in a semi-judicial capacity in favor of a plan for certain public work, is not deemed guilty of contributory negligence, in his action for damages suffered by him through

charity; and if it is not, and while so laboring, he is injured by a defect in the railroad track, his illegal act necessarily contributes to cause his injury (*Read v. Boston, etc. R. Co.*, 140 Mass. 199).

²⁸⁹ Stat. 1884, ch. 37. That the accident occurred on Sunday is therefore, now, no defense to a personal injury action (*Jordan v. New Haven R. Co.*, 165 Mass. 346, 43 N. E. 111; *Barker v. Worcester*, 139 Mass. 74).

²⁹⁰ *Todd v. Rowley*, 8 Allen, 51; *Wood v. Waterville*, 4 Mass. 422, 5

Id. 294; see *Loker v. Brookline*, 13 Pick. 343. See a very peculiar case, in which the plaintiff, being an officer of the defendant corporation, had offered to do certain work necessary to avoid injury to his property by the defendant's ditch, and had been prevented from doing so by other officers of the corporation. Injuries resulted to him; the corporation set up a defence of contributory negligence in his action, apparently on the mere ground that, being a corporator and officer, he must be equally in fault with all the officers,

defects in such work, although such defects were the result of the adoption of that plan; since he could not be, in a legal sense, *in fault*, in his decision.²⁹¹

§ 106. Burden of proof; conflict of decisions. — The question as to which party bears the burden of proof on the issue of contributory negligence has been the subject of many conflicting decisions; and the courts are still divided upon it. Practically all the courts agree that the fact of contributory negligence is to be taken into account, no matter how it appears, whether by affirmative evidence on the part of the defendant, or by inference from the evidence on the part of the plaintiff. It is quite immaterial who proves the fact so long as it is proved.²⁹² This is a just rule, and may be considered universally settled. And on the other hand, it is agreed that the plaintiff need not produce direct evidence of his having used due care, if the fact sufficiently appears upon the whole case.²⁹³ As to whether the plaintiff is bound to prove, as part of his case, his freedom from contributory negligence, three different rules have been proposed: (1) That plaintiff's care *is* presumed, and if plaintiff can prove his case without showing contributory negligence, the burden is on the defendant. (2) That plaintiff's care is *not* presumed, and the burden is on him to prove affirmatively the exercise of due care. (3) That, in the absence of evidence, there is no presumption either

but this was of course overruled of this case go beyond the text, but (Burbank v. West-Walker Ditch Co., 13 Nev. 431). cannot, as we think, be sustained.

²⁹¹ The plaintiff, while a member of a city council, concurred with it in adopting a plan for a bridge. The bridge was built, and the abutments placed so that they obstructed the flow of the water more than was necessary, in consequence of which plaintiff's mill was stopped. Held, that plaintiff could recover (Perry v. Worcester, 6 Gray, 544). The *dicta* mon, 147 U. S. 571, 13 S. Ct. 557; State v. Baltimore, etc. R. Co., 69 Md. 339, 14 Atl. 685; Gerity v. Haley, 29 W. Va. 98, 11 S. E. 901; Overby v. Chesapeake, etc. R. Co., 37 W. Va. 524, 16 S. E. 813; Chicago, etc. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 Id. 218.

²⁹² See § 111, *post*.

way, *i. e.*, that neither care nor want of it is presumable, and that, if the facts show a duty of care, the plaintiff must give some evidence from which the jury may infer that he exercised it; otherwise he need not.

§ 107. Burden of proof on plaintiff.—In Maine, Massachusetts, Connecticut, New York, Indiana (except in personal injury cases, see note 334, *post*), Michigan, Illinois and Iowa the burden rests upon the plaintiff of proving either that he was free from contributory negligence or that the injury is in no degree attributable to any want of ordinary care on his part.²⁹⁴

²⁹⁴ So held in *Maine* (Chase v. 139 Mass. 542, 2 N. E. 97; Common-Maine Central R. Co., 77 Me. 62; wealth v. Boston, etc. R. Co., 134 Gleason v. Bremen, 50 Id. 222; Mass. 211). So in *Connecticut* Buzzell v. Laconia Mfg. Co., 48 Id. (Ryan v. Bristol, 63 Conn. 26, 27 113; Perkins v. Eastern, etc. R. Co., Atl. 309; Button v. Frink, 51 Conn. 29 Id. 307; Kennard v. Burton, 25 342; Fox v. Glastonbury, 29 Id. 204; Id. 39; French v. Brunswick, 21 Id. Beers v. Housatonic R. Co., 19 Id. 29; Mosher v. Smithfield, 84 Id. 334, 566; Park v. O'Brien, 23 Id. 339). 24 Atl. 876). So in *Massachusetts* (Planz v. Boston, etc. R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835; Stock v. Wood, 136 Mass. 353; Hinckley v. Cape Cod R. Co., 120 Id. 257; Prentiss v. Boston, 112 Id. 43; Lane v. Atlantic Works, 107 Id. 104; Gaynor v. Old Colony R. Co., 100 Id. 208; Robinson v. Fitchburg R. Co., 7 Gray, 92; Parker v. Adams, 12 Metc. 415; Bigelow v. Rutland, 4 Cush. 247; Adams v. Carlisle, 21 Pick. 146; Lane v. Crombie, 12 Id. 177). The burden, however, is upon the defendant to show plaintiff's gross or willful negligence (Copley v. New Haven, etc. R. Co., 136 Mass. 6). In an action under the Massachusetts statute making common carriers liable for the death of a passenger, caused by their negligence, it is not necessary for the plaintiff to prove that the deceased, if a passenger, was not negligent (McKimble v. Boston, etc. R. Co., 139 Mass. 542, 2 N. E. 97; Common-Maine Central R. Co., 77 Me. 62; wealth v. Boston, etc. R. Co., 134 Mass. 211). So in *Connecticut* Buzzell v. Laconia Mfg. Co., 48 Id. (Ryan v. Bristol, 63 Conn. 26, 27 113; Perkins v. Eastern, etc. R. Co., Atl. 309; Button v. Frink, 51 Conn. 29 Id. 307; Kennard v. Burton, 25 342; Fox v. Glastonbury, 29 Id. 204; Id. 39; French v. Brunswick, 21 Id. Beers v. Housatonic R. Co., 19 Id. 29; Mosher v. Smithfield, 84 Id. 334, 566; Park v. O'Brien, 23 Id. 339). So in *New York* (Hart v. Hudson River Bridge Co., 84 Id. 56; Hale v. Smith, 78 Id. 480; Holbrook v. Utica, etc. R. Co., 12 Id. 236; Tolman v. Syracuse, etc. R. Co., 98 N. Y. 198; Bond v. Smith, 113 N. Y. 378, 21 N. E. 128; Stone v. Dry Dock, etc. R. Co., 115 N. Y. 104, 21 N. E. 712). In *Gleeson v. Brummer* (87 Hun, 465, 34 N. Y. Supp. 375), Van Brunt, P. J., dissenting, held that the rule was seriously modified by *Galvin v. New York*, 112 Id. 223, 19 N. E. 675. In *Johnson v. Hudson River R. Co.*, 20 N. Y. 64, aff'g 6 Duer, 633, Denio, J., said: "I am of opinion that it is not a rule of law, of universal application, that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair, as it stands upon the undisputed facts."

§ 108. Burden of proof on defendant.—In the

The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration. Nor is it correct to say, as a general rule, that the defendant must himself prove, in order to establish his defence, that the plaintiff was guilty of negligence. That, as well as the absence of fault, may be inferred from the circumstances; and the negligent act of the defendant may be of such a mitigated character, that a party complaining of an injury from it ought to show that it occurred without fault on his own part. * * * The true rule, in my opinion, is this: The jury must eventually be satisfied that the plaintiff did not, by any negligence of his own, contribute to the injury. The evidence to establish this may consist in that offered to show the nature or cause of the accident, or in any other competent proof. To carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. It is not absolutely essential that the plaintiff should give any affirmative proof touching his own conduct on the occasion of the accident. The character of the defendant's delinquency may be such as to prove *prima facie* the whole issue; or the case may be such as to make it necessary for the plaintiff to show, by independent evidence, that he did not bring the misfortune upon himself. No more certain rule can be

laid down.' We quote this opinion thus at length, because it is the best statement of the rule anywhere made, and it was followed in *Galvin v. New York*, 112 N. Y. 223. The most stringent rule is maintained in *Indiana* (*Louisville, etc. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *Richmond Gas Co. v. Baker*, 146 Ind. 600, 39 N. E. 552; *Cincinnati, etc. R. Co. v. Butler*, 103 Ind. 31; *Louisville, etc. R. Co. v. Lockridge*, 93 Id. 191; *Rushville v. Poe*, 85 Id. 83; *Riest v. Goshen*, 42 Id. 339; *Ream v. Pittsburgh, etc. R. Co.*, 49 Id. 93; *Gramm v. Boener*, 56 Id. 497; *Indianapolis, etc. R. Co. v. Caudle*, 60 Id. 112. See note 334, *post*.

So also in *Illinois* (*Chicago, etc. R. Co. v. Levy*, 160 Ill. 385, 43 N. E. 357; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Kipperley v. Ramsden*, 83 Id. 354; *Dyer v. Talcott*, 16 Id. 300; *Aurora R. Co. v. Grimes*, 13 Id. 585). The cases are fully cited, and the rule affirmed, in *Calumet Iron Co. v. Martin*, 115 Ill. 358, 3 N. E. 456. But where circumstances in evidence show no fault by the plaintiff, he has sufficiently discharged himself of the burden (*Swift v. O'Brien*, 127 Ill. App. 26 (1906)). So also in *Iowa* (*Gregory v. Woodworth*, 98 Iowa, 246, 61 N. W. 962; *Slosson v. Burlington, etc. R. Co.*, 51 Iowa, 294; *Bonce v. Dubuque, etc. R. Co.*, 53 Id. 278; *Murphy v. Chicago, etc. R. Co.*, 45 Id. 661; *Way v. Illinois, etc. R. Co.*, 40 Id. 341; *Carlin v. Chicago, etc. R. Co.*, 37 Id. 316; *Benton v. Central R. Co.*, 42 Id. 192). See the very reverse held by the same court, apparently unaware of its own decisions (*Willis v. Perry*, 92 Iowa, 297, 60 N. W. 727). So in *Michigan* (*Mitchell v. Chicago, etc. R. Co.*, 51 Mich. 236;

Supreme Court of the United States,²⁹⁵ and in Alabama,²⁹⁶ Arizona,²⁹⁷ Arkansas,²⁹⁸ California,²⁹⁹ Colorado,³⁰⁰ Delaware,³⁰¹ Florida,³⁰² Georgia,³⁰³ Ida-

Teipel v. Hilsendegen, 44 Id. 461; Co., 95 Ala. 397, 11 So. 341; Le Baron v. Joslin, 41 Id. 313; Georgia, etc. R. Co. v. Davis, 92 Michigan, etc. R. Co. v. Coleman, Ala. 300, 9 So. 252; Montgomery 28 Id. 440; Lake Shore, etc. R. Co. Gas Co. v. Montgomery, etc. R. Co., v. Miller, 25 Id. 274; Detroit v. 86 Ala. 372, 5 So. 735; O'Brien v. Van Steinburg, 17 Id. 99; see Tatum, 84 Ala. 186, 4 So. 158; Mynning v. Detroit, etc. R. Co., 67 Mobile, etc. R. Co. v. Crenshaw, 65 Mich. 677, 35 N. W. 811). *Maine* Ala. 566; Holt v. Whatley, 51 Id. (Ward v. Maine Central Ry. Co., 569; Smoot v. Wetumpka, 24 Id. 96 Me. 136, 51 Atl. 947 (1902); 112; Alabama, etc. Ry. Co. v. Wil- *Massachusetts* (Dacey v. New York, liamson, 114 Ala. 131, 21 So. 827 etc. Ry. Co., 168 Mass. 479, 47 N. E. (1897); McDonald v. Montgomery 418 (1897); *New York* (Whalen v. St. Ry. Co., 110 Ala. 161, 20 So. 317 Citizens Gas, etc. Co., 151 N. Y. 70, (1897).

45 N. E. 363 (1897); Baxter v. ²⁹⁷ Lopez v. Central, etc. Mining Auburn, etc. Elec. Co., 190 N. Y. Co., 1 Ariz. 464, 2 Pac. 748; South- 439, 83 N. E. 469 (1908); Morris v. ern Pac. Co. v. Tomlinson, 4 Ariz. Lake Shore, etc. Ry. Co., 148 N. Y. 126, 33 Pac. 710 (1889); Heckle v. 182, 42 N. E. 579 (1896); *Illinois* So. Pac. Co., 123 Cal. 441, 56 Pac. (West Chicago, etc. St. Ry. v. Lider- 56 (1897). man, 187 Ill. 463, 58 N. E. 367, 79 ²⁹⁸ Little Rock, etc. R. Co. v. Am. St. Rep. 226, 52 L. R. A. 665 Eubanks, 48 Ark. 460, 3 S. W. 808. (1900); *Iowa* (Buchholtz v. Rad- ²⁹⁹ McDougall v. Central, etc. R. cliffe, 129 Ia. 27, 105 N. W. 336 Co., 63 Cal. 431; Nehrbas v. Central, (1906); Calloway v. Agar Pckg. etc. R. Co., 62 Id. 320; McQuilken Co., Id. 1, 104 N. W. 721 (1906); v. Central, etc. R. Co., 50 Id. 7; Cahill v. Illinois, etc. Ry. Co., 111 Robinson v. Western, etc. R. Co., 48 N. W. (Ia.) 216 (1908). Id. 409; Gay v. Winter, 34 Id. 153;

²⁹⁵ Washington, etc. R. Co. v. Har- App. 417, 99 Pac. 400 (1909).

Inland, etc. Coasting Co. v. Tolson, ³⁰⁰ Platte, etc. Milling Co. v. 139 U. S. 551, 11 S. Ct. 653; Dowell, 17 Colo. 376, 30 Pac. 68; Northern Pacific R. Co. v. Mares, Denver, etc. R. Co. v. Ryan, 17 Colo. 123 U. S. 710, 8 S. Ct. 321; see 98, 28 Pac. 79; Sanderson v. Frazier, Union Pacific R. Co. v. O'Brien, 161 8 Colo. 79, 5 Pac. 632.

U. S. 451, 16 S. Ct. 618; Hough v. ³⁰¹ Jefferson v. Brady, 4 Houst. Railroad Co., 100 U. S. 213; Indian- 626; Boyd v. Blumenthal, 3 Pennw. apolis, etc. R. Co. v. Holst, 93 Id. (Del.) 564, 52 Atl. 330 (1902); 291; Railroad Co. v. Gladmon, 15 Anderson v. City of Wilmington, 70 Wall. 401; Armour v. Carlas, 142 Atl. 204 (1907).

Fed. 721, 74 C. C. A. 53 (1906); ³⁰² Louisville, etc. R. Co. v. Ward v. Dampskibsselskabet Kjoeben- Yniestra, 21 Fla. 700; Orlando v. haven, 136 Fed. 502 (1905); Wes- Heard, 29 Fla. 581, 11 So. 182 tern Real Est. Trustees v. Hughes, (1893); Hainlin v. Budge, 56 Fla. 172 Fed. 206, 96 C. C. A. 658 (1909). 342, 47 So. 825 (1908).

²⁹⁶ Bromley v. Birmingham, etc. R. ³⁰³ Augusta v. Hudson, 88 Ga. 599,

ho,³⁰⁴ Kansas,³⁰⁵ Kentucky,³⁰⁶ Maryland,³⁰⁷ Minnesota,³⁰⁸ Missouri,³⁰⁹ Montana,³¹⁰ Nebraska,³¹¹ New Hampshire,³¹² New Jersey,³¹³ North Dakota,³¹⁴ Ohio,³¹⁵ Oregon,³¹⁶ Penn-

15 S. E. 678; *Prather v. Richmond, Light Co.*, 73 Id. 219; *Thompson v. etc. R. Co.*, 80 Ga. 427, 9 S. E. 530; *North Missouri R. Co.*, 51 Id. 190; *Seats v. Georgia, etc. R. Co.*, 86 Ga. 811, 13 S. E. 88 [statutory action for death]; *Chattanooga, etc. Ry. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853 (1892).

³⁰⁴ *Hopkins v. Utah N. R. Co.*, 2 Idaho, 277, 13 Pac. 343.

³⁰⁵ *St. Louis, etc. R. Co. v. Weaver*, 35 Kans. 412, 11 Pac. 408; *Kansas, etc. R. Co. v. Phillibert*, 25 Kans. 583; *Kansas, etc. R. Co. v. Pointer*, 9 Id. 620, 14 Id. 38; *Burns v. Metropolitan St. Ry. Co.*, 66 Kans. 188, 71 Pac. 244 (1903).

³⁰⁶ *Louisville, etc. R. Co. v. Goetz*, 79 Ky. 442; *Kentucky, etc. R. Co. v. Thomas*, Id. 160; *Louisville Canal Co. v. Murphy*, 9 Bush, 522; *Paducah, etc. R. Co. v. Hoehl*, 22 Id. 43; *Bevis v. Vanceburg Tel. Co.*, 121 Ky. 177, 89 S. W. 126 (1905).

³⁰⁷ *Prince George County v. Burgess*, 61 Md. 29; *State v. Baltimore, etc. R. Co.*, 58 Id. 482; *Frech v. Philadelphia, etc. R. Co.*, 39 Id. 574; *McMahon v. Northern Central R. Co.*, Id. 438; *Northern Central R. Co. v. State*, 31 Id. 357. So far as *Baltimore v. Marriott* (9 Id. 160), *Irwin v. Sprigg* (6 Gill, 209), and *Owings v. Jones* (9 Md. 102) hold the contrary, they are overruled.

³⁰⁸ *Engel v. Breikreitz*, 39 Minn. 423, 40 N. W. 519; *Hocum v. Weitherick*, 22 Minn. 152; *Lammers v. Great Northern Ry. Co.*, 82 Minn. 120, 84 N. W. 723 (1901).

³⁰⁹ *Crumpley v. Hannibal, etc. R. Co.*, 111 Mo. 152, 19 S. W. 820; *Mitchell v. Clinton*, 99 Mo. 153, 12 S. W. 793; *Stephens v. Macon*, 83 Mo. 345; *Buesching v. St. Louis Gas*

Light Co., 73 Id. 219; *Thompson v. North Missouri R. Co.*, 51 Id. 190; *Von Trebra v. Laclede Gaslight Co.*, 209 Mo. 648, 108 S. W. 559 (1908).

³¹⁰ *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372, 43 Pac. 81; *Nelson v. Helena*, 16 Mont. 21, 39 Pac. 905; *Mulville v. Pac. Mut. Life Ins. Co.*, 19 Mont. 95, 47 Pac. 650 (1897); *Harrington v. Butte, etc. Ry. Co.*, 95 Pac. (Mont.) 8 (1908).

³¹¹ *Anderson v. Chicago, etc. R. Co.*, 35 Neb. 95, 52 N. W. 840; *Omaha v. Ayer*, 32 Neb. 375, 49 N. W. 445; *Durrell v. Johnson*, 31 Neb. 796, 48 N. W. 890; *Lincoln v. Walker*, 18 Neb. 244, 20 N. W. 113; *Ventrees v. Gage County*, 115 N. W. (Neb.) 863 (1908).

³¹² *Smith v. Eastern, etc. R. Co.*, 35 N. H. 366; *White v. Concord, etc. R. Co.*, 30 Id. 207.

³¹³ *Delaware, etc. R. Co. v. Toffey*, 38 N. J. Law, 525; *N. J. Express Co. v. Nichols*, 32 Id. 166, 33 Id. 434; *Durant v. Palmer*, 29 Id. 544; *Moore v. Central R. Co.*, 24 Id. 268; *Consol. Tr. Co. v. Behr*, 59 N. J. L. 477, 37 Atl. 142 (1897).

³¹⁴ *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252, 46 N. W. 972; *Sanders v. Reister*, 1 Dak. 151; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321 [a Dakota case].

³¹⁵ *Baltimore, etc. R. Co. v. Whitacre*, 35 Ohio St. 627; *Cleveland, etc. R. Co. v. Crawford*, 24 Id. 636; *Schweinfurth v. Cleveland, etc. Ry. Co.*, 60 Ohio St. 215, 54 N. E. 89 (1899).

³¹⁶ *Ford v. Umatilla Co.*, 15 Oreg. 313, 16 Pac. 33; *Grant v. Baker*, 12 Oreg. 329, 7 Pac. 318; *distinguishing Walsh v. Oregon, etc. R. Co.*, 10

sylvania,³¹⁷ Rhode Island,³¹⁸ South Carolina,³¹⁹ South Dakota,³²⁰ Texas,³²¹ Vermont,³²² Virginia,³²³ Washington,³²⁴ West Virginia,³²⁵ Wisconsin,³²⁶ District of Columbia,³²⁷ In-

Oreg. 250; *Dubiver v. City, etc. Ry. Co.*, 44 Ore. 227, 74 Pac. 915 (1904); 75 Pac. 693 (1904); *Pereira v. Star Sand Co.*, 94 Pac. (Ore.) 835 (1908).

³¹⁷ *Baker v. Westmoreland, etc. Gas Co.*, 157 Pa. St. 593, 27 Atl. 789; *Bradwell v. Pittsburgh, etc. R. Co.*, 139 Pa. St. 404, 20 Atl. 1046; *Pennsylvania R. Co. v. Weber*, 76 Pa. St. 157; *Longenecker v. Pennsylvania R. Co.*, 105 Id. 328; *Reading, etc. R. Co. v. Ritchie*, 102 Id. 425; *Mallory v. Griffey*, 85 Id. 275; *Weiss v. Pennsylvania R. Co.*, 79 Id. 387; 87 Id. 447; *Penn. Canal Co. v. Bentley*, 66 Id. 30; *Erie v. Schwingle*, 22 Id. 384; *Beatty v. Gilmore*, 16 Id. 463; *Heiss v. Lancaster*, 203 Pa. St. 260, 52 Atl. 201 (1902); *Swanwick v. City Monongahela*, 36 Pa. Sup. Ct. 628 (1908).

³¹⁸ *Cassidy v. Angell*, 12 R. I. 447.

³¹⁹ *Crouch v. Charleston, etc. R. Co.*, 21 S. C. 495; *Carter v. Columbia, etc. R. Co.*, 19 Id. 20; *Roof v. Railroad Co.*, 4 Id. 61; *Danner v. South Carolina R. Co.*, 4 Rich. Law, 329; *Oliver v. Columbia, etc. Ry. Co.*, 65 S. C. 1, 43 S. E. 307 (1903).

³²⁰ *Smith v. Chicago, etc. R. Co.*, 4 S. Dak. 71, 55 N. W. 717.

³²¹ *San Antonio, etc. R. Co. v. Bennett*, 76 Tex. 151, 13 S. W. 319; *Dallas, etc. R. Co. v. Spicker*, 61 Tex. 427; *Houston, etc. R. Co. v. Cowser*, 57 Id. 293; *Texas, etc. R. Co. v. Murphy*, 46 Id. 356; *Murray v. Gulf, etc. R. Co.*, 73 Tex. 2, 11 S. W. 125; *Houston, etc. Ry. Co. v. Anglin*, 99 Tex. 350, 89 S. W. 966 (1906); *Gulf, etc. Ry. v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538 (1895).

³²² *Walker v. Westfield*, 39 Vt. 246; *Hill v. New Haven*, 37 Id. 501; *Barber v. Essex*, 27 Id. 62; *Hyde v. Jamaica*, 27 Id. 443; *Lester v. Pittsford*, 7 Id. 158.

³²³ *Gordon v. Richmond*, 83 Va. 436, 2 S. E. 727; *Winchester v. Carroll*, 99 Va. 727, 40 S. E. 37 (1902).

³²⁴ *Spurrier v. Front St. R. Co.*, 3 Wash. St. 659, 29 Pac. 346; *North-ern Pacific R. Co. v. O'Brien*, 1 Wash. St. 599, 21 Pac. 32; *Currans v. Seattle, etc. Ry. Co.*, 34 Wash. 512, 76 Pac. 87 (1904).

³²⁵ *Overby v. Chesapeake, etc. R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Johnson v. Chesapeake, etc. R. Co.*, 36 W. Va. 73, 14 S. E. 432; *Fowler v. Baltimore, etc. R. Co.*, 18 W. Va. 579; *Sheff v. Huntington*, 16 Id. 317; *Snyder v. Pittsburgh, etc. R. Co.*, 11 Id. 14.

³²⁶ *Hoth v. Peters*, 55 Wis. 405; *Randall v. Northwestern T. Co.*, 54 Id. 147; *Prideaux v. Mineral Point*, 43 Id. 513; *Bessex v. Chicago, etc. R. Co.*, 45 Id. 477; *Hoyt v. Hudson*, 41 Id. 105; overruling some earlier cases. The rule is not changed by the statute making railroad companies liable for injuries to employees "without contributory negligence on his part" (*Dugan v. Chicago, etc. R. Co.*, 85 Wis. 609, 55 N. W. 894); *Waterman v. Chicago, etc. Ry. Co.*, 82 Wis. 613, 52 N. W. 247, 1136 (1892).

³²⁷ *District Columbia* (*Harmon v. Washington, etc. Ry. Co.*, 7 Mackay, 255).

dian Territory,³²⁸ Louisiana,³²⁹ Mississippi,³³⁰ North Carolina,³³¹ Tennessee,³³² Utah,³³³ and in Indiana, in personal injury and death cases,³³⁴ the burden of proof as to contributory negligence rests upon the defendant, and it must therefore be established by a clear preponderance of proof.³³⁵ Whatever doubt there may have been as to the rule adopted in North Carolina³³⁶ was set at rest by statute, in 1887, casting the burden of proving contributory negligence upon the defendant.³³⁷

§ 109. Burden ought to be on defendant. — The weight of authority in support of the rule that the burden of proof of contributory negligence is upon the defendant is now so completely overwhelming that we omit most of our own argument in its favor, contained in earlier editions, when a majority of decisions were the other way. We then stated that our own view of the question agreed entirely with that expressed by the late Judge Duer.³³⁸ That able judge held negligence on the part of the plaintiff to be a mere matter of defence to be proved affirm-

³²⁸ *Indian Territory* (Chicago, etc. Ry. Co. v. Pounds, 1 Ind. Ter. 51, 35 S. W. 249 (1895)).

³²⁹ *Louisiana* (Buechner v. New Orleans, 112 La. 599, 36 So. 603, 104 Am. St. 455, 66 L. R. A. 334 (1904). The rule was formerly otherwise.

³³⁰ *Mississippi* (Miss. Cent. Ry. Co. v. Hardy, 88 Miss. 732, 41 So. 505 (1906)).

³³¹ *North Carolina* (Haltom v. Southern Ry. Co., 127 N. C. 255, 37 S. E. 262 (1901); Farris v. Southern Ry. Co., 151 N. C. 483, 66 S. E. 457 (1909)).

³³² *Tennessee* (Burke v. Citizens St. Ry. Co., 102 Tenn. 409, 52 S. W. 170 (1899)).

³³³ *Utah* (Hickey v. Rio Grande, etc. Ry. Co., 29 Utah, 392, 82 Pac. 29 (1906)).

³³⁴ *Indiana* by statute, see Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060 (1905); Stephens v. Am. Car, etc. Co., 38 Ind. 414, 78 N. E. 335 (1906); Evansville, etc. Ry. Co. v. Berndt, 172 Ind. 697, 88 N. E. 612 (1909), see act February, 1890, p. 58, c. 41.

³³⁵ Northern Pac. R. Co. v. Mares, 123 U. S. 710, 8 S. Ct. 321.

³³⁶ See Owens v. Richmond, etc. R. Co., 88 N. C. 502; as interpreted in Aycock v. Raleigh, etc. R. Co., 89 N. C. 321; Cornwall v. Charlotte, etc. R. Co., 97 Id. 11, 2 S. E. 659; Smith v. Richmond, etc. R. Co., 99 N. C. 241, 5 S. E. 896.

³³⁷ Statutes, 1887, ch. 33; Jordan v. Asheville, 112 N. C. 743, 16 S. E. 760.

³³⁸ Johnson v. Hudson River R. Co., 5 Duer, 21.

atively by the defendant, although it might, of course, be inferred from the circumstances proved by the plaintiff. He pointed out that parties were never required to prove negative matters of this kind, and also that it had never been held necessary, in a complaint upon negligence, to aver that the plaintiff had taken due care.³³⁹ When only ten States out of forty-five adhere to a rule condemned by the Supreme Court of the United States, it would be a waste of time to discuss the question further. It was said by a distinguished jurist, "I am of the opinion that it is not a rule of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends on the position of the affair as it stands on the undisputed facts,"³⁴⁰ or, as may be said, on the facts of the particular case according to whether they show a duty of care on plaintiff or defendant.³⁴¹

§ 110. Presumption against negligence: how overbalanced.—Slight circumstances may overbalance the presumption of freedom from negligence which we suppose to exist in favor of a plaintiff. Thus, his being found in a position of presumptively needless danger, unexplained,³⁴² his intoxication at the time of the acci-

³³⁹ This is now settled law in New York (*Lee v. Troy, etc. Gas Co.*, 98 N. Y. 115), and in England (*Wake-lin v. Southeastern R. Co.*, L. R. 12 App. Cas. 41). The contrary is settled in Indiana (*Rogers v. Over-ton*, 87 Ind. 411), and Iowa (*Gregory v. Woodworth*, 61 N. W. 962). As to Illinois, see § 113, *post*.

³⁴⁰ Denio, J., in *Johnson v. R. R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375, and note.

³⁴¹ *Am. & Eng. Encyc.* (1st ed.) vol. 4, p. 91, and authorities cited in note.

³⁴² See *Button v. Hudson River R. Co.*, 18 N. Y. 248 [injured person seen lying upon track, before train came along]. The slight presumption that deceased stopped, looked and listened before crossing a railroad track is overborne by evidence that he was struck by a moving train the instant he set foot upon the track, and that the view was unobstructed (*Pennsylvania R. Co. v. Mooney*, 126 Pa. St. 244, 17 Atl. 590). To the same effect, *Burke v. N. Y. Central, etc. R. Co.*, 73 Hun, 32, 25 N. Y. Supp. 1009.

dent,³⁴³ even to a slight degree,³⁴⁴ and any other circumstances which might cast doubt upon his care at the time, must be considered by the jury. If it appears that any defects in the things or faults in the persons employed by the plaintiff contributed to his injury, the burden is clearly upon him to show, not only that he did not know or suppose that such defects or faults existed, but also that he was in no fault for not knowing of their existence.³⁴⁵ Forgetfulness of that which was well known, and ought to have been remembered, is some evidence of negligence.³⁴⁶ And if it appears certain that the plaintiff

³⁴³ Intoxication is competent, but not conclusive, evidence of negligence (*Stuart v. Machiasport*, 48 Me. 477; *Baker v. Portland*, 58 Id. 199; *Wynn v. Allard*, 5 Watts & S. 524; see § 93, *ante*, and §§ 114, 472, *post.*) *Wright v. Crawfordsville*, 142 Ind. 636, 42 N. E. 227 (1895); *Fernbach v. Waterloo*, 76 Ia. 598, 41 N. W. 370 (1889); *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (1899); *Pittsburgh, etc. Ry. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969 (1908); *Lewis v. Houston Elec. Co.* 39 Tex. App. 625, 112 S. W. 593 (1908). But not that he was in the habit of becoming intoxicated (*Kingston v. Fort Wayne, etc. Ry. Co.*, 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131 (1897); *Lewis v. Houston Elec. Co.*, *supra*).

³⁴⁴ *Fitzgerald v. Weston*, 52 Wis. 354, 9 N. W. 13.

³⁴⁵ *Winship v. Enfield*, 42 N. H. 197. The fact that plaintiff was incapable by reason of years or of physical or mental infirmity of taking the same care of himself as ordinarily prudent persons take is competent evidence, but not enough of itself (*Curtis v. Avon, etc. R. Co.*, 49 Barb. 148; *Casey v. N. Y. Cen-*

tral R. Co., 6 Abb. N. C. 104 and 116, note). It cannot be laid down as a universal rule that it is negligence for a blind man to walk in public street unattended. It should be left to the jury (*Smith v. Wildes*, 143 Mass. 81, 10 N. E. 446 [trap door in sidewalk]; *Franklin v. Harter*, 127 Ind. 446, 26 N. E. 882 [cellar-way in sidewalk]); see § 375, *post.* When plaintiff's own evidence tends to show contributory negligence, the burden of proof is shifted to the plaintiff (*North Birmingham R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360; *Overby v. Chesapeake, etc. R. Co.*, 37 W. Va. 524, 16 S. E. 813); *Holman v. Boston Land, etc. Co.*, 8 Colo. App. 282, 45 Pac. 519 (1896).

³⁴⁶ Attempting in the dark to pass an open cellar-way in a sidewalk, with knowledge of, but for the time forgetting its existence, is contributory negligence (*Bruker v. Covington*, 69 Ind. 33), and will cast the burden on plaintiff to show that he was justified in exposing himself to the danger (*Coates v. Burlington, etc. R. Co.*, 62 Iowa, 486; *s. p.*, *King v. Thompson*, 87 Pa. St. 365; *Frost v. Waltham*, 12 Allen, 85; *Reed v. Northfield*, 13 Pick. 94; see *Driscoll v. New York*, 11 Hun, 101. See

neglected some duty, and highly probable that, if he had not neglected it, he would not have suffered the injury, the question of contributory negligence cannot be left to the jury, but must be decided adversely to the plaintiff.³⁴⁷ Evidence as to his general habits of negligence, unconnected with any proof that he gave way to such habits at a time when they might have contributed to his injury, is not usually competent.³⁴⁸

§ 101, *ante*, and § 476, *post*). A person running along a lighted street with which he was familiar and stumbling over a stepping-stone at the edge of the sidewalk, where there was abundant room for him to pass; held, guilty of contributory negligence (*Dubois v. Kingston*, 102 N. Y. 219, 6 N. E. 273).

³⁴⁷ *Sprong v. Boston, etc. R. Co.*, 60 Barb. 30; *Fink v. Coe*, 4 Greene [Iowa], 555; *Stoeckman v. Terre Haute, etc. R. Co.*, 15 Mo. App. 503.

³⁴⁸ There is no rule of evidence which authorizes the introduction of testimony to prove that the plaintiff, injured by a defect in a highway, was habitually reckless or careless (*Brennan v. Friendship*, 67 Wis. 223, 29 N. W. 902). On the other hand, evidence that plaintiff's driver had always been a very careful driver is inadmissible to show that the driver's negligence did not contribute to the injury (*Wooster v. Broadway, etc. Co.*, 72 Hun, 197, 25 N. Y. Supp. 378). In *Hampson v. Taylor* (15 R. I. 83, 8 Atl. 332) evidence of plaintiff's intemperate habits was held inadmissible, the court saying: "If the plaintiff was sober when he fell [on an icy sidewalk], the fact that he was of intemperate habits would not preclude his recovery, and we do not think that the mere proof that he was of intemperate habits would warrant the inference that he was not sober.

The accident occurred in the early morning, and the sidewalk was admittedly glazed with ice." Compare *Enright v. Atlanta*, 78 Ga. 288. Testimony as to plaintiff's habits of sobriety is inadmissible to contradict direct evidence that he was intoxicated at the time of the accident (*Carr v. West End R. Co.*, 163 Mass. 360, 40 N. E. 185). Intoxication may be proved by opinions of eye-witnesses (*People v. Eastwood*, 14 N. Y. 562), but not by declarations of a third person, not made a part of the *res gestæ* (*Chicago, etc. R. Co. v. Bell*, 79 Ill. 102). See § 60a, *ante*. Evidence of plaintiff's previous boasts as to his ability to keep out of the way of trains, and escape danger, is admissible as bearing upon his carelessness and readiness to take risks (*Brouillette v. Connecticut River R. Co.*, 162 Mass. 198, 38 N. E. 507); *Aiken v. Holyoke St. Ry. Co.*, 184 Mass. 269, 68 N. E. 238 (1903); *Louisville, etc. Ry. Co. v. McClish*, 115 Fed. 298, 53 C. C. A. 60; *Propsom v. Leathem*, 80 Wis. 608, 50 N. W. 586 (1891); *Junction City v. Blades*, 1 Kans. App. 85, 41 Pac. 677 (1895); *Birmingham Light, etc. Co. v. Selhorst*, 165 Ala. 475, 51 So. 568 (1910); *Stollery v. Cicero, etc. St. Ry. Co.*, 243 Ill. 290, 90 N. E. 709 (1909), ("Where there is no eye-witness to the killing of a person, his administrator may establish the exercise of ordinary

§ 111. **What proof of care sufficient.**—In the few courts which require the plaintiff to prove affirmatively the exercise of due care, it is nevertheless universally held that such proof need not be direct, but may be inferred from circumstances;³⁴⁹ and that the exercise of such care may be inferred from the absence of all appearance of fault on his part, under the circumstances of the case.³⁵⁰ The circumstances may be considered in connection with the ordinary habits, conduct and motives of men;³⁵¹ and the fact that, when last seen, a deceased

care on the part of deceased by the highest proof of which the case is capable, including the habits of the deceased and any other facts and circumstances from which the jury might rightfully find that he was exercising such care"), citing numerous other Illinois decisions.

³⁴⁹ So held in *Maine* (French v. Brunswick, 21 Me. 29; Foster v. Dixfield, 18 Id. 380); *Massachusetts* (Mayo v. Boston, etc. R. Co., 104 Mass. 137; Prentiss v. Boston, etc. R. Co., 112 Id. 43; Nichols v. Smith, 115 Id. 332; Hinckley v. Cape Cod R. Co., 120 Id. 257); *New York* (Johnson v. Hudson River R. Co., 20 N. Y. 64; Ernst v. Hudson River Co., 35 Id. 9; Wilds v. Hudson River Co., 24 Id. 430; Palmer v. Dearing, 93 Id. 7; Tolman v. Syracuse, etc. R. Co., 98 Id. 198; Lee v. Troy, etc. Gas Co., Id. 115; Taber v. Delaware, etc. R. Co., 71 Id. 489; Maher v. Central Park, etc. R. Co., 67 Id. 52; Galvin v. New York, 112 N. Y. 223, 19 N. E. 675; Chisholm v. State, 141 N. Y. 246, 36 N. E. 184; Sickles v. N. J. Ice Co., 80 Hun, 213, 30 N. Y. Supp. 10); *Iowa* (Nelson v. Chicago, etc. R. Co., 38 Iowa, 564; Murphy v. Chicago, etc. R. Co., 45 Id. 661); *Illinois* (Illinois Cent. R. Co. v. Cragin, 71 Ill. 177); *Indiana*

(Indiana, etc. R. Co. v. Greene, 106 Ind. 279; Terre Haute, etc. R. Co. v. Buck, 96 Id. 346, 363); *Louisiana* (Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51).

³⁵⁰ In a collision, the presumption is in favor of a plaintiff whose vessel lies at anchor, as against one in motion (Bill v. Smith, 39 Conn. 206). It is sufficient if all the circumstances attending the injury are proved and they exclude fault on his part (Wolpers v. New York, etc. Elec. Co., 91 App. Div. 424, 86 N. Y. Supp. 825 (1904); Swift v. O'Brien, 127 Ill. App. 26 (1906).

³⁵¹ Johnson v. Hudson River R. Co., 20 N. Y. 64, aff'g 6 Duer, 633. It is not indispensable that the plaintiff should produce eye-witnesses as to the manner in which the accident occurred to show due care on the part of one deceased; but that fact may be inferred from the circumstances, in connection with the ordinary habits and conduct of men in the presence of a known danger (Galvin v. New York, 112 N. Y. 223, 19 N. E. 675; Illinois Central R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358 [collision at railroad crossing]).

person was proceeding with due care,³⁵² or was found in a situation indicating the exercise of such care,³⁵³ will sustain a finding in his favor. An inference of care arises in favor of one deceased, from the instinct of self-preservation;³⁵⁴ though in some courts this alone is not enough to establish the fact; it is only where there is no reliable proof to the contrary, or there is a rational doubt upon the evidence as to the conduct of the party, that such a presumption can be invoked.³⁵⁵ Evidence that the injured person was careful and prudent, and that he had been careful on other occasions, is not competent to disprove contributory negligence, where he is living;³⁵⁶ but

³⁵² *Greenleaf v. Illinois Central R. Co.*, 29 Iowa, 14. Ore. 64, 23 Pac. 814, and cases *supra*. In *Reynolds v. Keokuk*, 72 Iowa, 371, 34 N. W. 167. Where plaintiff

³⁵³ *Johnson v. Hudson River R. Co.*, *supra*. In California it has been held that though there was some evidence showing negligence on the part of the deceased, for whose death the action was brought, yet a verdict for plaintiff might be supported on the theory that the jury did not consider such negligence the proximate cause of the accident, but as caused proximately by the unskillfulness and incompetency of the train engineer (*Brown v. Central Pac. R. Co.*, 68 Cal. 171, 7 Pac. 447, 8 Id. 828). was a witness on her own behalf, it was held that inferences of plaintiff's care arising from the instinct of self-preservation, were not to be indulged in. Where there are no eye-witnesses the natural instinct of self-preservation may be considered on the issue of the plaintiff's contributory negligence (*Stephenson v. Scheffield Brick, etc. Co.*, 130 N. W. (Ia.) 586 (1911).

³⁵⁴ *Texas, etc. R. Co. v. Gentry*, 163 U. S. 353, 16 S. Ct. 1104; *Ill. Central R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Northern Cent. R. Co. v. State*, 31 Md. 357; *Gay v. Winter*, 34 Cal. 153; *MacDougal v. Central R. Co.*, 63 Id. 431; *Morrison v. N. Y. Central R. Co.*, 63 N. Y. 643; *Greenleaf v. Illinois Central R. Co.*, 29 Iowa, 14; *Hopkinson v. Knapp, etc. Co.*, 92 Id. 328, 60 N. W. 653). See *Allen v. Willard*, 57 Pa. St. 374; *Cleveland, etc. R. Co. v. Rowan*, 66 Id. 393; *McBride v. Northern Pacific R. Co.*, 19

Philadelphia, etc. R. Co. v Stebbing, 62 Md. 504; *Pittsburgh, etc. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033. ³⁵⁵ *Morris v. East Haven*, 41 Conn. 254; *McDonald v. Savoy*, 110 Mass. 49. Compare *Dorman v. Kane*, 5 Allen, 38; *Atlanta, etc. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763 [train hand coupling cars]; *Wells v. Denver & R. G. W. Ry. Co.*, 7 Utah, 482, 27 Pac. 688 [brakeman coupling cars]. Evidence that a prudent man would have acted in the same manner as plaintiff acted has been held to be admissible (*Burkett v. Bond*, 12 Ill. 87). Evidence that one killed at a railroad crossing was a

if he is dead, such evidence is admissible,³⁵⁷ especially if no eye-witnesses can be found.³⁵⁸

sober and industrious man, possessed of all his faculties, and that his attention was probably distracted by two trains passing in opposite directions, made a *prima facie* case of due care on his part (Illinois Central R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358); so also that evidence that a person killed by the explosion of a boiler, under his management, was a competent and careful engineer, was sufficient to raise a presumption of due care on his part, at the time, there being no eye-witnesses of the occurrence (Toledo, etc. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089). See Chicago, etc. R. Co. v. Clark, 108 Ill. 113.

³⁵⁷ Overman Wheel Co. v. Griffin, 67 Fed. 659, 14 C. C. A. 609; Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358 (1893). The case was then of a night watchman found dead under an unrailed bridge connecting two buildings, which he customarily crossed in the performance of his duties. On first trial a verdict had been directed for defendant; reversed on writ of error. The witness had seen him when he went on duty the night of the accident. "The testimony of the witness Dubuque, admitted under objection, and excepted to, was competent for the purpose of showing to the jury what kind of a man the deceased was, in respect to health, vigor and activity, and his bodily and mental peculiarities. It was also admissible to show his condition as to sobriety and apparent health and vigor immediately before his death. If in the course of argument plaintiff's counsel made unwarrantable use of that evidence, the defendant

should at once have called the attention of the court to the objectionable argument and requested its prohibition (Overman Wheel Co. v. Griffin, *infra*).

³⁵⁸ Toledo, etc. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089 (1893). Brakeman killed while coupling cars, no one present. "Appellee in her declaration averred, as she was required to do, that the deceased was in the exercise of due care at the time he sustained the injury of which he died, and as no person was present, or knew how the accident occurred, we think the evidence tended to prove that averment if he was habitually prudent, cautious and temperate, it tended to prove he was so at the time of the injury, which, with the instinct of self-preservation, would be evidence for the consideration of the jury in determining whether he was in the exercise of due care. Had there been witnesses who saw the infliction of the injury, the jury could then have determined from such evidence whether he was careful or negligent, and in such case this evidence would not be admissible. When there are no witnesses to describe such an occurrence, the defendant would surely have the right to prove the person was habitually rash, imprudent and intemperate, to repel the presumption that he was in the exercise of proper care at the time he received the injury. If evidence is admissible for any purpose, it must be received, and the party against whom it is admitted, if it tends to mislead on some other question, is entitled to have it limited, by instruction to the purpose for which it is admissible"

§ 112. Inference from circumstances.—In the same courts, freedom from contributory fault may be inferred in favor of a deceased person, from the absence of all appearance of such fault.³⁵⁹ Though there was no eye-

(Chicago, etc. Ry. Co. v. Clark's Admr., 108 Ill. 113 (1883); Chicago, etc. Ry. Co. v. Houston, 196 Ill. 480, 63 N. E. 1028 (1902); Missouri, etc. Ry. Co. v. Moffatt, 60 Kans. 113, 55 Pac. 837 (1899). Locomotive engineer killed by exploding of engine boiler; the engineer and fireman were both killed, and there was no other person cognizant of the manner in which the engine was being operated. Said the court: "The jury might very well have found as a fact, if Barrett had been unskillful and incompetent, that his attempt to run and operate the engine was negligence. We are of opinion it was not error for the plaintiff to rebut any presumption arising from want of skill on his part; and especially is this so where, from the death of every person who could know of the degree of care and skill exercised in the operation of the locomotive, it was impossible for the plaintiff to prove affirmatively the exercise of due care and caution; and so in respect of the evidence tending to show the habit of Barrett in respect of care and caution, as tending to raise the presumption that he was in the exercise of due care and caution" (Toledo St. Ry. Co. v. Bailey, *supra*. Referring to Chicago, etc. Ry. Co. v. Clark's Admr., *supra*; Ill. Cent. Ry. Co. v. Prichett, 210 Ill. 140, 71 N. E. 435, aff'g 109 Ill. App. 468 (1904); Lee v. Internat., etc. Ry., 89 Tex. 583, 36 S. W. 63 (1896). In Way v. Railroad Co., 40 Iowa, 345 (1874), the trial court instructed the jury that the plaintiff was not required to produce direct and positive testimony showing just what the deceased was doing at the instant he received the injury causing his death; that the law requires only the highest proof of which the particular case is susceptible, and the jury might take into consideration, with other facts, the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives. It was objected that the instruction shifted the burden of proof on the defendant to show the contributory negligence of the deceased, but the court said: "We do not think the instruction vulnerable to this objection. The instincts prompting to the preservation of life are thrown into the scale as evidence, like the presumption of sanity and innocence. But when the whole evidence is considered, these instincts included, the plaintiff could not recover unless the preponderance of the evidence is in his favor." See, also, Gay v. Winter, 34 Cal. 153 (1867); also Mayo v. Ry. Co., 104 Mass. 137 (1870). Pedestrian killed at a crossing (Ill. Cent. Ry. Co. v. Nowicki, *supra*; Cogdell v. Wilmington, etc. Ry. Co., 132 N. C. 852, 44 S. E. 618 (1903); Davis v. Concord, etc. Ry. Co., 68 N. H. 247, 44 Atl. 388 (1900). But see Chase v. Maine Ry. Co., 77 Me. 62, 52 Am. Rep. (1885).

³⁵⁹ Mayo v. Boston, etc. R. Co., 104 Mass. 137; Prentiss v. Boston, 112 Id. 43; Cook v. Metropolitan R. Co., 98 Id. 361; Maguire v. Fitchburg R. Co., 146 Id. 379, 15 N. E. 904; McIntosh v. Chicago, etc. R. Co., 36

witness of the accident, and although its precise cause and manner of occurrence are unknown, an inference of freedom from fault on the part of the injured person becomes possible, if the surrounding circumstances indicate that the accident might have happened without such fault. In such a case, a question of fact arises, to be solved by the jury. But where the circumstances do not tend to establish the existence of some cause of the accident, consistent with care on the part of the injured person, and contributory negligence is the only and necessary inference to be drawn, the plaintiff has not successfully borne the burden resting upon him.³⁶⁰ Where the facts surrounding the occurrence of the accident are only partially disclosed, and they are equally consistent with the plaintiff's care on the one hand, and want of care on the other, the plaintiff must suffer a non-suit.³⁶¹

Fed. 661. In *Galvin v. New York*, 112 N. Y. 223, 19 N. E. 675, there being no affirmative evidence of negligence on the part of the deceased, and no eye-witness of the accident, and no question as to defendant's negligence, held it was for the jury to determine the degree of care which deceased was bound to exercise, to infer the motive which led him to the hatchway where he was killed, and to pass upon the question of negligence, and the court erred in directing a non-suit.

³⁶⁰ *Tolman v. Syracuse, etc. R. Co.*, 98 N. Y. 198; *Becht v. Corbin*, 92 N. Y. 658; *Connelly v. N. Y. Central R. Co.*, 88 Id. 346; *Greany v. Long Island R. Co.*, 101 Id. 419; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Ince v. East Boston Ferry Co.*, 106 Id. 149; *Barstow v. Old Colony R. Co.*, 143 Mass. 535, 10 N. E. 255; *Ryan v. Louisville, etc. R. Co.*, 44 La. Ann. 806, 11 So. 30. To similar effect, in courts holding to the other rule, *Pennsylvania R. Co. v. Richter*,

42 N. J. Law, 180; *N. J. Express Co. v. Nichols*, 33 Id. 434; *Flemming v. Western Pacific R. Co.*, 49 Cal. 253; *McQuilken v. Central Pacific R. Co.*, 50 Id. 7; *Donaldson v. Milwaukee, etc. R. Co.*, 21 Minn. 293; *Brown v. Milwaukee, etc. R. Co.*, 22 Id. 165; *Callahan v. Warne*, 40 Mo. 131; *Myers v. Kansas City*, 108 Id. 480, 18 S. W. 914; *Dougherty v. West Superior Iron Co.*, 88 Wis. 343, 60 N. W. 274.

³⁶¹ *Crafts v. Boston*, 109 Mass. 519. In New York this rule has been applied to deceased persons (*Hart v. Hudson River Bridge Co.*, 84 N. Y. 56; *Hale v. Smith*, 78 Id. 483; *Reynolds v. N. Y. Central R. Co.*, 58 Id. 248; *Cordell v. N. Y. Central R. Co.*, 75 Id. 330; *Riordan v. Ocean S. S. Co.*, 124 N. Y. 655; 26 N. E. 1027 [stevedore killed coming up from hold of vessel]; *Wiwirowski v. Lake Shore, etc. R. Co.*, 124 N. Y. 420, 26 N. E. 1023). But not so in some other States adhering to the general rule (*Teipel v. Hilsendegen*, 44 Mich.

§ 113. **Pleading absence of fault.** — In those courts which hold that the burden of proof is upon the plaintiff, it is nevertheless the general rule that the plaintiff need not expressly aver in his pleading the absence of contributory fault.³⁶² This inconsistency is explained by the courts on the ground that the absence of contributory negligence is necessarily implied in an averment that the defendant caused the injury, since (it is said) he did not cause it, if the plaintiff assisted in causing it. This is very unsatisfactory reasoning; and the logic of the Indiana and Iowa courts, which require the plaintiff expressly to aver in his pleading the fact of his due care, since he must prove it on the trial, is far more sound.³⁶³

465, 7 N. W. 82; Ill. Central R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Way v. R. R. Co., 40 Ia. 345; Gay v. Winter, 34 Cal. 153). The New York cases are mostly *obiter dicta*.

³⁶² So held in *Massachusetts* (Fuller v. Boston, etc. R. Co., 134 Mass. 491; May v. Princeton, 11 Metc. 442); *New York* (Lee v. Troy, etc. Gas Co., 98 N. Y. 115; Hackford v. N. Y. Central R. Co., 6 Lans. 381, *aff'd*, 53 N. Y. 654); though it is not improper to allege the fact (Lynch v. Second Ave. R. Co., 7 N. Y. App. Div. 164, 39 N. Y. Supp. 1103); *Illinois* (Consolidated Coal Co. v. Wombacher, 134 Ill. 57, 24 N. E. 627; Chicago, etc. R. Co. v. Hines, 132 Ill. 161, 23 N. E. 1021; *contra*, Calumet Co. v. Martin, 115 Ill. 358, 3 N. E. 456); *Mississippi* (Hickman v. Kansas City, etc. R. Co., 66 Miss. 154, 5 So. 225; Vicksburg v. McLain, 67 Miss. 4, 6 So. 774). Of course no such averment is required in States where contributory negligence is a mere defense (Smoot v. Wetumpka, 24 Ala. 112; Holt v. Whatley, 51 Id. 569; Thompson v. Duncan, 76 Id. 334; Columbus, etc. R. Co. v. Bradford, 86 Id. 574, 6 So. 90; Wilson v. Louisville, etc. R. Co., 85 Ala. 269, 4 So. 701; South-West Va. Co. v. Andrew, 86 Va. 270; Baltimore, etc. R. Co. v. Whittington, 30 Gratt. 805; Snyder v. Pittsburgh, etc. R. Co., 11 W. Va. 14; Georgia Midland, etc. R. Co. v. Evans, 87 Ga. 673, 13 S. E. 580; O'Connor v. Missouri Pac. R. Co., 94 Mo. 150, 7 S. W. 106; Thorpe v. Missouri Pac. R. Co., 89 Mo. 650, 2 S. W. 3; Texas, etc. R. Co. v. Murphy, 46 Tex. 356; Hocum v. Witherick, 22 Minn. 152; Smith v. Eastern R. Co., 35 N. H. 356; Chicago, etc. R. Co. v. Chicago, etc. R. Co., 20 Wis. 533; Gram v. Northern Pac. R. Co., 1 N. Dak. 252, 46 N. W. 972; Johnson v. Bellingham Bay Imp. Co., 13 Wash. St. 455, 43 Pac. 370; Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569; Robinson v. Western Pacific R. Co., 48 Cal. 409). But there is one strange decision to the contrary, *State v. Baltimore, etc. R. Co.* (Md.), 26 Atl. 865.

³⁶³ *Evansville, etc. R. Co. v. Hiatt*, 17 Ind. 102; *reaffirmed in Pennsylvania R. Co. v. Gallentine*, 77 Id. 322; *Rogers v. Overton*, 87 Id. 411; *Ohio, etc. R. Co. v. Walker*, 113 Id.

The defence of contributory negligence, where it is a matter of defence, is admissible under the general plea of not guilty or under a general denial in a few jurisdictions,³⁶⁴ but in a majority it must be specially pleaded.³⁶⁵

196, 15 N. E. 234; Louisville, etc. R. Co. v. Sandford, 117 Ind. 265, 19 N. E. 770. So in Iowa (Gregory v. Woodworth, 61 N. W. 962). It is sufficient to allege that the injury occurred without plaintiff's fault (Rogers v. Overton, *supra*; Gheens v. Golden, 90 Ind. 427; Ohio, etc. R. Co. v. Nickless, 71 Id. 271; Michigan, etc. v. Lautz, 29 Id. 528; Indiana, etc. R. Co. v. Overman, 110 Id. 538, 10 N. E. 575), or that the injury was caused wholly by the negligence of the defendant (Brinkman v. Bender, 92 Ind. 234; Wilson v. Railroad Co., 83 Ind. 326; Anderson v. Hervey, 67 Id. 420; Chicago, etc. R. Co. v. McDaniel, 134 Id. 166, 32 N. E. 728). In Texas it is held that where the petition discloses a state of facts, which if unexplained would make out a *prima facie* case of contributory negligence, freedom from fault must be averred (Tex., etc. R. Co. v. Murphy, 46 Tex. 356). In Kentucky, if plaintiff's contributory negligence appears on the face of the complaint, it is demurrable (Favre v. Louisville, etc. R. Co., 91 Ky. 541, 16 S. W. 370).

³⁶⁴ Holden v. Liverpool Gas Co., 3 C. B. 1; St. Anthony's Falls v. Eastman, 20 Minn. 277; Cunningham v. Lyness, 22 Wis. 245. Of course, contributory fault may be shown under a general denial in courts adhering to the minority rule (Jones v. Andover, 10 Allen, 18; New Albany v. McCulloch, 127 Ind. 500, 26 N. E. 1074). As to variance between proof and pleading, see McCoy v. Philadelphia, etc. R. Co., 5 Del. 599; and as to pleading contributory negli-

gence, see 12 Am. St. Rep. 75, note. New Castle Bridge Co. v. Doty, 37 Ind. App. 84, 76 N. E. 557 (1906); Levy v. Metropolitan St. Ry. Co., 34 Misc. 220, 68 N. Y. Supp. 944, *aff'd*, 34 Misc. 518, 69 N. Y. Supp. 973; Lee v. Leighton Co., 113 Minn. 373, 129 N. W. 767 (1911).

³⁶⁵ Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194 (1903); Western Union Tel. Co. v. Morris, 10 Kans. App. 61, 61 Pac. 972 (1900); Buechner v. New Orleans, 112 La. 509, 36 So. 603, 104 Am. St. Rep. 455, 66 L. R. A. 334 (1904); Westbrook v. Mobile, etc. Ry. Co., 66 Miss. 560, 6 So. 321 14 Am. St. Rep. 587 (1890); Hudson v. Wabash Ry. Co., 101 Mo. 13, 14 S. W. 15 (1890); Orient Ins. Co. v. Northern Pac. Ry. Co., 31 Mont. 502, 78 Pac. 1036 (1905); Scott v. Seaboard, etc. Ry. Co., 67 S. C. 136, 45 S. E. 126 (1904); Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 289, 42 S. W. 959 (1897); Gulf, etc. Ry. Co. v. Scheider, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538 (1895); Holland v. Oregon, etc. Ry., 26 Utah, 209, 72 Pac. 940 (1903); Clark v. Canadian Pac. Ry. Co., 69 Fed. 543 (1895). See Newport, etc. Turnpike Co. v. Pirmann, 26 Ky. L. R. 933, 82 S. W. 976 (1904); Ramp v. Metropolitan St. Ry. Co., 133 Mo. App. 700, 114 S. W. 59 (1908); O'Brien v. Omaha Water W. Co., 118 N. W. 1110 (Neb.) (1908); Am. Bolt Co. v. Fennell, 48 So. 97 (Ala.) (1908); Atchison, etc. Ry. Co. v. Peck, 100 Pac. (Kans.) 54 (1909); Braly v. Fresno City Ry. Co., 9 Cal. App. 417, 99 Pac. 400 (1909).

§ 114. **Questions of fact and law.**—The rule as to what evidence will suffice to go to the jury on the issue of contributory negligence, as a question of fact, is substantially the same as that which governs the submission to the jury of the defendant's negligence, subject, of course, to the rule held by the particular court as to the burden of proof. It is a general rule, applicable in all courts, that the question is to be submitted to the jury, not only where there is sufficient testimony as to the actual facts to leave a reasonable doubt,^{365a} but also where the inferences which might be fairly drawn from the facts are not certain and invariable, and might lead to different conclusions in different minds. The court is not at liberty to withhold the question from the jury, simply because it is fully convinced that a certain inference should be drawn, so long as persons of fair and

^{365a} Doyle v. Pennsylvania, etc. R. Co., 139 N. Y. 637, 34 N. E. 1063 [conflict as to ringing bell]; Hoffman v. Union Ferry Co., 68 N. Y. 385 [precautions of steamers]; Peil v. Reinhart, 127 Id. 381, 27 N. E. 1077 [knowledge of defect in stairway]; Parsons v. N. Y. Central R. Co., 113 N. Y. 355, 21 N. E. 145 [alighting from train]; Beckwith v. N. Y. Central R. Co., 54 Hun, 446, aff'd, 125 N. Y. 759, 27 N. E. 408 [railroad crossing]; Miller v. N. Y. Central R. Co., 82 Hun, 164, aff'd, 146 N. Y. 367 [railroad crossing]; Seeley v. N. Y. Central R. Co., 8 N. Y. App. Div. 402, 40 N. Y. Supp. 866 [same]; Keng v. Baltimore, etc. R. Co., 160 Pa. St. 644, 28 Atl. 940 [railroad crossing]; Smith v. Baltimore, etc. R. Co., 158 Pa. St. 82, 27 Atl. 847 [care at crossing]; Baker v. Maryland Coal Co., 84 Md. 19, 35 Atl. 10 [knowledge of new danger]; Georgia Pac. R. Co. v. Propst, 83 Ala. 518, 3 So. 764 [knowledge of rule]. To similar effect, North Chicago, etc. R. Co. v. Eldridge, 151 Ill. 542, 38 N. E. 246; Anderson v. Morrison, 22 Minn. 274; Garrett v. Chicago, etc. R. Co., 36 Ia. 121; Kelly v. Hannibal, etc. R. Co., 70 Mo. 604; Mauerman v. Siemerts, 71 Id. 101; Monroe v. Lattin, 25 Kans. 391; Swaboda v. Ward, 40 Mich. 420; Teipel v. Hilsendegen, 44 Id. 461, 7 N. W. 82; Kelley v. Chicago, etc. R. Co., 53 Wis. 74; Johnson v. Chicago, etc. R. Co., 49 Id. 529; Hoyt v. Hudson, 41 Id. 105; Kansas Pac. R. Co. v. Twombly, 3 Colo. 125; Fernandes v. Sacramento R. Co., 52 Cal. 45; International, etc. R. Co. v. Kindred, 57 Tex. 491; Bierbach v. Goodyear Rubber Co., 14 Fed. 826, 15 Id. 490. Even where plaintiff's own testimony is confused and contradictory as to whether he stopped, looked and listened at a place where he ought to have done so, yet he is entitled to go to the jury (Ely v. Pittsburgh, etc. R. Co., 158 Pa. St. 233, 27 Atl. 970).

sound minds might possibly come to a different conclusion.³⁶⁶ Where the evidence makes out a clear case, it is

³⁶⁶ Where evidence is conflicting, or is capable of different interpretations, or if the inferences to be drawn from it are doubtful, it is the province of the jury to pass upon it (*Belton v. Baxter*, 58 N. Y. 411; *Hart v. Hudson River Bridge Co.*, 80 Id. 622; *WeHer v. Chicago*, etc. R. Co., 120 Mo. 635, 23 S. W. 1061, 25 Id. 532; *Cincinnati*, etc. R. Co. v. *Grames*, 136 Ind. 39, 34 N. E. 714 [disapproving *Conner v. Citizens' R. Co.*, 105 Ind. 62, 4 N. E. 441]; *Cleveland*, etc. R. Co. v. *Crawford*, 24 Ohio St. 631; *Orr. v. Cedar Rapids*, etc. R. Co., 94 Ia. 423, 62 N. W. 851). This is probably the rule in England (see *Brown v. Great Western R. Co.*, 52 Law Times, 622; reviewing the cases). To the same effect, *Robertson v. Boston*, etc. R. Co., 160 Mass. 191, 35 N. E. 775 [continued use of defective locomotive while repairing]; *Emery v. Raleigh*, etc. R. Co., 102 N. C. 209, 9 S. E. 139 [continued use of brickyard made dangerous by defendant's negligence]; *Spaulding v. Chicago*, etc. R. Co., 98 Ia. 205, 67 N. W. 227 [uncoupling cars in motion]; *Rolseth v. Smith*, 38 Minn. 14, 35 N. W. 565 [demurrer to complaint]; and see *Greany v. Long Island R. Co.*, 101 N. Y. 419, 5 N. E. 425; *Kellogg v. N. Y. Central R. Co.*, 79 N. Y. 72; *Lee v. Troy*, etc. Gas Co., 98 Id. 115; *Sherry v. N. Y. Central*, etc. R. Co., 104 Id. 652, 10 N. E. 128; *Whittaker v. Delaware*, etc. Canal Co., 126 N. Y. 544, 27 N. E. 1042; *Galvin v. New York*, 112 N. Y. 223, 229, 19 N. E. 675; *Salter v. Utica*, etc. R. Co., 88 N. Y. 42; *Kain v. Smith*, 89 Id. 375; *Orange*, etc. R. Co. v. *Ward*, 47 N. J. Law, 560; *N. J. Express Co. v. Nichols*, 32 Id. 166; *Berry v. Pennsylvania R. Co.*, 48 Id. 141; *North Penn. R. Co. v. Kirk*, 90 Pa. St. 15; *Philadelphia*, etc. R. Co. v. *Long*, 75 Id. 257. In *Payne v. Reese*, 100 Pa. St. 301, a workman in a colliery walked into a cloud of steam which he saw coming out of hole in footpath where he was accustomed to walk, the steam in fact proceeding from a defective blowpipe which his employer should have kept in repair. Held, question of contributory negligence for jury, and it was error for court to decide it. To same effect, *Baltimore v. Holmes*, 39 Md. 243; *Sheff v. Huntington*, 16 W. Va. 307; *Central R. Co. v. Freeman*, 66 Ga. 170; *Louisville*, etc. R. Co. v. *Goetz*, 79 Ky. 442; *Hill v. Gust*, 55 Ind. 45; *Ramsey v. Rushville R. Co.*, 81 Id. 394; *Pittsburgh*, etc. R. Co. v. *Wright*, 80 Id. 182; *Albion v. Hetrick*, 90 Id. 545. The degree of care required under the circumstances is a question for the jury (*Palmer v. Dearing*, 93 N. Y. 7; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Finnegan v. Fall River Gas Works Co.*, 159 Mass. 311, 34 N. E. 523). The question of contributory negligence, as a general rule, cannot resolve itself into one of law, but must be submitted to jury, as question of fact (*O'Brien v. McGlinchy*, 68 Me. 552; *Brown v. European*, etc. R. Co., 58 Id. 384; *Sleeper v. Worcester*, etc. R. Co., 58 N. H. 520; *Ruland v. South Newmarket*, 59 Id. 291; *Fassett v. Roxbury*, 55 Vt. 552; *Willard v. Pinard*, 44 Id. 34; *Brooks v. Boston*, etc. R. Co., 135 Mass. 21; *Greenwood v. Callahan*, 111 Id. 298; *O'Connor v. Adams*, 120 Id. 427; *Beers v. Housa-*

a question of law.³⁶⁷ Where it is the rule that the burden of proof rests upon the plaintiff, the question cannot be

tonic R. Co., 19 Conn. 566; *Park v. O'Brien*, 23 Id. 339; *Smith v. Rio Grande R. Co.*, 9 Utah, 141, 33 Pac. 626). Where facts constituting contributory negligence are so disconnected from facts constituting defendant's negligence that it cannot be determined as a matter of law that the one was the cause or sequence of the other, their relation or dependence should be submitted to the jury (*Smith v. Occidental Co.*, 99 Cal. 462, 34 Pac. 84). If the evidence of contributory negligence is not so conclusive as to warrant setting aside a verdict, the question should be left to the jury (*Washington, etc. R. Co. v. Harmon*, 147 U. S. 571, 13 S. Ct. 557; *Northern Pacific R. Co. v. Amato*, 144 U. S. 465, 12 S. Ct. 740; *Crane Elevator Co. v. Lippert*, 11 C. C. A. 521, 63 Fed. 942; *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993 (1901); *Nugent v. Boston, etc. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151 (1888); *Leonard v. Minneapolis, etc. Ry. Co.*, 63 Minn. 489, 65 N. W. 1084 (1896); *Chicago, etc. Ry. Co. v. Landauer*, 36 Neb. 642, 54 N. W. 976 (1893); *Sharp v. Erie Ry. Co.*, 184 N. Y. 100, 76 N. E. 923 (1906); *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214 (1901); *Hemingway v. Illinois Cent. Ry. Co.*, 114 Fed. 843, 52 C. C. A. 477 (1902); *Milton's Admr. v. Norfolk, etc. Ry. Co.*, 108 Va. 752, 62 S. E. 960 (1908); *St. Louis, etc. Ry. Co. v. Gilbreath*, 113 S. W. (Ark.) 200 (1908); *Worth Bros. v. Kallas*, 162 Fed. 306, 80 C. C. A. 186 (1908); *Johnson v. So. Pac. Ry. Co.*, 97 Pac. 520 (1908); *Baltimore Refrg. Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066 (1909). Where the question was one of contributory negligence, it was said, "Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as matter of law, that negligence has been shown. As a very general rule it is a question for the jury—an inference to be deduced from the circumstances; it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which upon conflicting evidence, and, if there be room for such difference, the question must be left to the jury" (*Fox v. Oakland Cons. St. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216 (1897); *West Chicago St. Ry. Co. v. Liderman*, 187 Ill. 463, 58 N. E. 367 (1900); *Lamb v. Missouri Pac. Ry. Co.*, 147 Mo. 171, 48 S. W. 659, 51 S. W. 81 (1898); *Kimic v. San Jose, etc. Ry. Co.*, 150 Cal. 379, 104 Pac. 986 (1909); *Chesapeake, etc. Ry. Co. v. Paris*, 111 Va. 41, 68 S. E. 398, 28 L. R. A. (N. S.) 773 (1910); *Miller v. Missouri, etc. Ry. Co.*, 169 Fed. 567, 95 C. C. A. 65 (1909).

³⁶⁷ *Tolman v. Syracuse, etc. R. Co.*, 98 N. Y. 198; and other cases cited, see § 112; and in addition, *West Jersey R. Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064 [Ct. of Er-

left to the jury, if all the facts and all the inferences which could reasonably be drawn therefrom point just as much to the contributory negligence of the plaintiff as to its absence, or if the facts do not justify any inference upon the subject.³⁶⁸ But considerable difficulty is experienced in applying this principle to the case of de-

rors]; *Mynning v. Detroit, etc. R. Co.*, 67 Mich. 677, 35 N. W. 811; *Columbus, etc. R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90; *Gleason v. Excelsior Mfg. Co.*, 94 Mo. 201, 7 S. W. 188; *Missouri Pac. R. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641. *N. W.* 956 (1908); *Olsen v. Nebraska Tel. Co.*, 83 Neb. 735, 120 N. W. 421 (1909); *St. Louis, etc. Ry. Co. v. Loftis*, 25 Okla. 496, 106 Pac. 824 (1910); *O'Connor v. Armour Pkg. Co.*, 158 Fed. 241, 85 C. C. A. 459 (1908).

Where the fact is incontrovertible that a locomotive engineer was brought into the peril which caused his death, in part by his disregard of the company's known rules as to rate of speed, having observed which a collision would have been avoided, his co-operating negligence is an inference of law; and a nonsuit should be granted (*Sutherland v. Troy, etc. R. Co.*, 125 N. Y. 737, 26 N. E. 609; *Henderson Trust Co. v. Stuart*, 108 Ky. 167, 55 S. W. 1082, 48 L. R. A. 49 (1900); *Pennsylvania Ry. Co. v. Hammill*, 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531 (1894); *Pool v. Southern Pac. Co.*, 20 Utah, 210, 58 Pac. 326 (1899); *Pittsburg, etc. Ry. Co. v. Seivers*, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133 (1904); *Union Pac. Ry. Co. v. Brown*, 73 Kan. 233, 84 Pac. 1026 (1906); *Steindorff v. St. Paul Gaslight Co.*, 92 Minn. 496, 100 N. W. 221 (1904); *Whitfield v. Louisville, etc. Ry. Co.*, 7 Ga. App. 268, 66 S. E. 973 (1910); *Chicago, etc. Ry. Co. v. Cook*, 102 Pac. (Wyo.) 657 (1909); *Darby Candy Co. v. Hoffberger*, 111 Md. 84, 73 Atl. 565 (1909); *Sloan v. Little Rock, etc. Ry. Co.*, 89 Ark. 574, 117 S. W. 551 (1909); *Williams v. Chicago, etc. Ry. Co.*, 139 Ia. 552, 117 ³⁶⁸ *Barker v. Savage*, 45 N. Y. 191; *Ditchett v. Spuyten, etc. R. Co.*, 5 Hun, 105, 67 N. Y. 425; *Stuart v. Machias*, 48 Me. 477; *Alger v. Lowell*, 3 Allen, 402; *Thorp v. Brookfield*, 36 Conn. 321; *Baltimore, etc. R. Co. v. Boteler*, 38 Md. 568; *Burns v. Elba*, 32 Wis. 605; *Cramer v. Burlington*, 42 Ia. 315; *O'Keefe v. Chicago, etc. R. Co.*, 32 Id. 467; *Illinois, etc. R. Co. v. Cragin*, 71 Ill. 177; *Whalen v. St. Louis, etc. R. Co.*, 60 Mo. 323; *Wynn v. Allard*, 5 Watts & S. 534; *Southwestern, etc. R. Co. v. Hankerson*, 61 Ga. 114; and cases cited under § 112, *ante*. But in a recent Indiana case, it was held that where plaintiff alleges he was not negligent, and no facts appear to indicate that he was, the court cannot presume contributory negligence (*Bedford R. Co. v. Brown*, 142 Ind. 659, 42 N. E. 359); and, in New York, there being no proof of contributory negligence, the court will assume, after verdict for plaintiff, that he was without fault (*Rowe v. N. Y. Central R. Co.*, 82 Hun, 153, 31 N. Y. Supp. 304). The jury have the right to believe the plaintiff's unsupported testimony that he looked and listened for the train at a highway crossing

ceased persons; some cases applying it strictly,³⁶⁹ and others holding that it will not be presumed that the deceased did not look or listen, in the absence of any circumstances which tend to raise such a presumption.³⁷⁰ Of course, in those courts which hold that the burden of proof is upon the defendant, the presumption is in favor of a deceased person upon all such points.³⁷¹ In all

(Hickey v. N. Y. Central R. Co., 8 N. Y. App. Div. 123, 40 N. Y. Supp. 484). See Larsen v. Mortgage Co., 104 App. Div. 76, 93 N. Y. Supp. 610.

³⁶⁹ So held, where there was no direct testimony as to the care or negligence of the deceased; for his general reputation for carefulness and the natural instinct of self-preservation do not in such a case afford sufficient proof of the absence of contributory negligence (Indiana, etc. R. Co. v. Greene, 106 Ind. 279; Cordell v. N. Y. Central R. Co., 75 N. Y. 330 [a mere *obiter dictum*]; Peaslee v. Chatham, 69 Hun, 389, 23 N. Y. Supp. 628; see State v. Maine Cent. R. Co., 76 Me. 357; see § 111, *ante*). A boy of sixteen was found dead between tracks. The engine by which he was killed could have been seen 750 feet distant. It was a fair day and with little wind. Held, that the proof did not warrant a finding that there was no negligence on the part of the deceased (Reynolds v. N. Y. Central, etc. R. Co., 58 N. Y. 248; s. p., Wakelin v. Southeastern R. Co., L. R. 12 App. Cas. 41; Lee v. Publishers, 55 Mo. App. 390). Where the circumstances point as much to decedent's negligence as to its absence, or point in neither direction, a non-suit is proper (Dorr v. McCullough, 8 N. Y. App. Div. 327, 40 N. Y. Supp. 806 [railroad crossing]; Ward v. Southern Pac. R. Co., 25 Ore. 433,

36 Pac. 166; Kauffman v. Cleveland, etc. R. Co., 144 Ind. 456, 43 N. E. 446). On the consideration to be given, where there were no eye-witnesses to the accident causing death, to the natural instinct of self-preservation and the disposition of men to avoid danger, see elaborate note and review of many cases, 16 L. R. A. 261, also 48 L. R. A. 753; Jones on Evidence, § 185; Wigmore on Evidence, § 2510; Stephenson v. Sheffield Brick & Tile Co., 130 N. W. (Ia.) 586 (1911).

³⁷⁰ The fact that there is no affirmative evidence showing that one who was killed while crossing a railroad track, either looked or listened does not justify a presumption that he did *not* look, and was, therefore, negligent (Massoth v. Delaware, etc. Canal Co., 64 N. Y. 524). So, as to his care in general (Jones v. N. Y. Central R. Co., 28 Hun, 364, *aff'd*, 92 N. Y. 628); Oldenburg v. N. Y. Central R. Co., 124 N. Y. 414, 26 N. E. 1921 [deceased, looking at rough sidewalk, killed by backing engine]; Atkinson v. Abraham, 45 Hun, 238 [falling down dark hatchway]; Toy v. Cape Fear, etc. R. Co., 99 N. C. 298, 6 S. E. 77 [intoxicated man's foot caught in rail; run over at crossing].

³⁷¹ Where the plaintiff did not prove affirmatively that deceased had stopped and looked and listened, it was to be presumed that he had; and although a witness testified that de-

courts, when there is any evidence from which an inference of contributory negligence might reasonably be drawn, the court must instruct the jury that the plaintiff cannot recover, if his negligence contributed to produce the injury, in the manner hereinbefore stated.³⁷²

§ 114a. Where the defendant's negligence is willful or wanton.—It is universally conceded that where the defendant's conduct that occasioned the injury was willful or wanton the doctrine of contributory negligence as a defence has no application. In the language of another "when contributory negligence is relied on as a defence to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defence is vitiated and over-
come."³⁷³ The words wanton and reckless have been thought somewhat indefinite when applied to this class of cases generally; but when applied to the case of injury

ceased could have seen the train coming, if he had looked, this was held not to justify an instruction to find for defendant (Weiss v. Pennsylvania R. Co., 79 Pa. St. 387; see, also, Pennsylvania R. Co. v. Weber, 76 Id. 157).

³⁷² Pittsburgh, etc. R. Co. v. Krichbaum, 24 Ohio St. 119. Where there is evidence of contributory negligence an instruction ignoring it is erroneous (Guenther v. St. Louis, etc. R. Co., 95 Mo. 286, 8 S. W. 371). Where the court charged that the plaintiff cannot recover if his own negligence contributed to the injury, yet so instructed the jury that they might reasonably believe that this rule only applies when the defendant is not negligent; held, error (Baltimore, etc. R. Co. v. Whittaker, 24 Ohio St. 642; Dwinnell v. Abbott, 74 Wis. 514, 43 N. W. 496; see Patterson v. Philadelphia, etc. R. Co., 4 Houst. 103). As to necessity of ex-

PLICIT INSTRUCTIONS ON THIS POINT, see Hart v. Delaware, etc. R. Co., 67 Hun, 648, 22 N. Y. Supp. 3; Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513. An instruction that plaintiff is entitled to recover for injuries sustained by him, if caused solely by defendant's negligence and want of reasonable care, sufficiently implies that plaintiff must be free from contributory negligence (Hotel Ass'n v. Walter, 23 Neb. 280, 36 N. W. 561).³⁷³ Wood's Railway Law, p. 1258. "When the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others which may be justly characterized as recklessness, the doctrine of contributory negligence has no application whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury" (Cooley on Torts (2d ed.), 810).

to one whose peril was discovered by the defendant in time, with the means at hand, to avert the injury as a consequence of his own prior negligence, these terms have been universally approved.³⁷⁴ That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to will intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from.³⁷⁵ A question has sometimes been made whether the willfulness referred to relates to the act or the intention to injure; the better conclusion is that it may be either.

³⁷⁴ McDonald v. International, etc. Union Tel. Co., 72 S. C. 350, 51 S. E. Ry. Co., 86 Tex. 1, 20 S. W. 936, 40 913 (1905); Magar v. Hammond Am. St. Rep. 803 (1893). 76 N. E. (N. Y.) 474 (1906); Alger

³⁷⁵ Ala., etc. Ry. Co. v. Guest, 144 & Co. v. Duluth-Superior Tr. Co., 93 Ala. 373, 39 So. 654 (1906); Hol- Minn. 314, 101 N. W. 298 (1905); werson v. St. Louis, etc. Ry. Co., Harrington v. Los Angeles Ry. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. 140 Cal. 514, 74 Pac. 15, 63 L. R. A. A. 850 (1900); Tinsley v. Western 238 (1904).

CHAPTER VIa.

ASSUMED RISK AS A DEFENCE TO ACTIONS FOR NEGLIGENCE GENERALLY.

§ 114b. *Volenti non fit injuria*.—It is proposed to treat in this chapter the doctrine of assuming, taking or accepting the risk as a defense to actions founded on negligence generally, existing independently of contributory negligence and irrespective of the contractual relation of master and servant. It is well settled that, independently of the relation of master and servant, there may be a voluntary assumption of the risk of a known danger arising from the negligence of another, which will debar one from the recovery of compensation in case of injury to person or property therefrom, even though he is in the exercise of due care. “It may be consistent with due care to incur a known danger voluntarily and deliberately; and this may be so where the danger arises from the known or apprehended neglect of others. Ordinarily, in actions to recover damages for injuries to person or property, an instruction as to the effect of contributory negligence on the part of the plaintiff will cover all that need be said to the jury on this branch of the case. But the principle that one may be debarred from recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests. * * * One may, with his eyes open, undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circum-

stances.”¹ Where no contractual relation exists between the plaintiff and the defendant this assumption of risk rests on the general principle expressed in the maxim *volenti non fit injuria*, which is broad enough to cover all cases where an injury results from a risk knowingly and voluntarily incurred. It has been held in England in an action by the servant that the provision in the Employers’ Liability Act of 1880, abolishing the defence of assumed risk, does not apply to the assumption of extraordinary risks and that this defence may still be invoked.²

¹ *Miner v. Connecticut R. Ry. Co.*, 153 Mass. 403 (the plaintiff’s servant, going with a horse to defendant’s freight yard, saw a car in a dangerous position, and, without having the car removed, as he might have done, he led the horse in, resulting in the horse being killed. The following instruction was requested by the defendant: “If the jury find that the person in charge of the horse knew, or would by the use of due care have known, of the condition of the premises, and the use that was made of the same, and the danger incident thereto, and voluntarily assumed the risk, the plaintiff cannot recover.” The court instructed fully on contributory negligence, but refused the instruction asked in the opinion quoted from in the text). *Fitzgerald v. Connecticut Paper Co.*, 155 Mass. 155, 29 N. E. 464 (1891), (“One who knows of a danger from the negligence of another and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure”). *O’Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161 (1892); *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367 (1895); *Indiana Nat. Gas, etc. Co. v. O’Brien*, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742 (1903). *Dresser on Employers’ Liability*, § 82; *Elliott on Railroads*, § 1288a. See note, 3 L. R. A. (N. S.) 1097 (1905), and *Labatt on Master and Servant*, §§ 368-370, for discussion and citation of authorities. *Contra*, *Shoninger v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097 (1905), (where a tenant’s employee sued the landlord for injury received by falling into an open elevator well in an unlighted hall, responding to the suggestion that the plaintiff assumed the risk, the court says, “the doctrine of assumed risk rests upon and grows out of the contractual relation which exists between master and servant,” referring to *Pennsylvania Co. v. Backes*, 133 Ill. 255, 24 N. E. 563; *Chicago, etc. Ry. Co. v. Randolph*, 199 Ill. 126, 65 N. E. 142; *Chicago, etc. Ry. Co. v. Heery*, 203 Ill. 492, 68 N. E. 74). See *Webb’s Pollock on Torts*, pp. 195-197, 633.

² *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. (1887), (the action was by a servant against the master, the court said, ‘A confusion in applying the “first of these broad principles” (*volenti non fit injuria*) to the special case of master and servant has at times arisen out of the fact that, by

The effect, in this respect, of statutes of the same general character in this country must depend on the terms of the particular act and its interpretation by the courts of that State elsewhere treated in this work. The doctrine under consideration is said to have had its origin in the "spring gun case,"³ where it was held that a trespasser entering a wood, knowing there are spring guns in it, cannot recover for an injury thus received. This inhuman practice was made criminal by statute in 1827; the rule never was followed in this country.⁴ The doctrine has sometimes been applied in the case of a trespasser,⁵ frequently without express reference being made to it. In like manner it has been more frequently applied to risks voluntarily incurred by passengers and by travelers on highways. But the general recognition of the distinction between assumed risk and contributory negligence has itself been so recent and the former term had so long been considered as exclu-

the contract of service, the workman was deemed to have taken upon him the ordinary risks of a business lawfully carried on upon his master's premises; and it has been assumed as an *a fortiori* case that he took upon himself such risks as were visible or known. This is one way of putting such a defense, and may in many cases be sufficient, but there is another way of stating it, and another principle wholly independent of contract, on which a similar defense arises. The law is full of instances where duties assume a double aspect, and may be viewed concurrently as arising by implication out of contract, or as created by some wider principle of law, which happens to take effect and receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss

whether such duties are best treated as arising by implication from the contract or from the general law outside; and down to the Employers' Liability Act, 1880, it may have been less important in the case of visible and apparent risks, which explanation of the master's immunity was given. The Employers' Liability Act of 1880 makes precision on this point necessary, and renders it important to remember that, quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a dangerous risk not unlawful in itself, and voluntarily encountered by the injured person").

³ *Ilott v. Wilkes*, 3 Barn. & Ald. 304.

⁴ See § 720 *post*.

⁵ See § 97 and notes, *ante*.

sively appropriate as a defence in the relation of master and servant, that many cases properly referable to the maxim have been avowedly, but inadvertently, rested on contributory negligence. Nor has it received that distinct treatment as a defence to actions for negligence generally, separate from, and independent of the relation of master and servant and of the doctrine of contributory negligence, required for proper classification in text works and digests. The application of the defence *volenti non fit injuria* frequently, perhaps most frequently, arises where two or more railroads by traffic arrangements or lease or license between themselves or with a terminal company jointly use tracks, yards, depots, switches, etc., and the servant of one company sues one of the other companies for injury alleged to have been inflicted on him by its negligence. In such case the servants of each company generally remain the servants of the particular company employing them, but become bound to observe certain rules and regulations and perform certain duties for the benefit of the common safety, and, in respect of such service, every other company becomes bound to observe ordinary care for their safety, such care as they are bound to render to their own servants, in the performance of like service.⁶ A distinctive feature of the defence of assumed risk is that to prevail it must appear that the injury resulted solely from the risk assumed. Thus, where two or more actionable

⁶ Extract from the introduction to the monographic note to Cleveland, etc. Ry. Co. v. Berry, 152 Ind. 607, 53 N. E. 453, 46 L. R. A. 33 (1899), "The principal case exemplifies one particular type of a large and increasing class of actions for negligence, the common feature of which is that the plaintiff is an employee seeking indemnity for a personal injury not, as usually happens, from his own master, but from a stranger. The doctrines applied in the solution of the problems presented are sometimes clearly analogous to those which are controlling where the defendant is the plaintiff's own master, and sometimes so broad that the fact of the plaintiff's being in the position of a servant is not a material element in the determination of his legal rights." This note is supplemental to one in Hardy v. Shedden (C. C. A. 1897), 37 L. R. A. 33, and may be considered as itself supplemented by the note in Shoninger v.

causes contribute to produce the injury, the plaintiff's assumption of the risk as to one will not preclude his recovery for injury produced by any other cause; while his contributory negligence would debar him from recovery if it were but a concurring cause proximately contributing to his injury, and without which it would not have occurred.⁷ The essential elements of assumed risk are knowledge, actual or implied, by the plaintiff of a specific defect or dangerous condition caused by the negligence of the defendant in the violation of some duty owing to the plaintiff, the public or persons in his position, together with the plaintiff's appreciation of the danger to be encountered and his voluntary exposure of himself to it.⁸ These inquiries are more fully treated under the head of master and servant, to which treatment the reader is referred as there is no essential difference, and exposition here would only be repetition.

Mann, 3 L. R. A. (N. S.) 453 (1905). Texas, etc. Ry. Co. v. Kelly, 98 Tex. See § 459 and notes, *post*. See 123, 80 S. W. 79 (1905).

§ 114a, *ante*.

⁸Gulf, etc. Ry. Co. v. Brentford,

⁷Galveston, etc. Ry. Co. v. Manns, 79 Tex. 619, 15 S. W. 561, 23 Am. 37 Tex. App. 356, 84 S. W. 254 St. Rep. 377 (1891), and note (1895); Missouri, etc. Ry. Co. v. (knowledge of similar acts of the Somers, 78 Tex. 439, 14 S. W. 779; defendant imperiling his safety; held, not sufficient).

CHAPTER VII.

PARTIES TO ACTIONS FOR NEGLIGENCE.

<p>§ 115. Who may be plaintiffs at common law.</p> <p>116. Who may sue on breach of contract.</p> <p>117. Liability for selling dangerous goods.</p> <p>117a. Liability of manufacturers and others for selling dangerously defective machinery.</p> <p>118. Private actions upon public obligations.</p>	<p>§ 119. Reversioners and mortgagees, and others having a special interest.</p> <p>120. Landlords and tenants.</p> <p>120a. Railroads.</p> <p>120b. Receivers, assignees and trustees.</p> <p>121. Infants and lunatics.</p> <p>121a. Married women.</p> <p>122. Who are jointly liable.</p> <p>123. Who are not jointly liable.</p>
---	---

§ 115. Who may be plaintiffs at common law. — As a matter of course, one on whose person injury has been inflicted by the negligence of another, or whose property has been destroyed or damaged by such negligence, is a proper party plaintiff in an action for such injuries. But actionable negligence may also often vest a right of action in a third party who has been proximately injured thereby.¹ Thus, a master can recover compensation for a tort which deprives him of the labor of his servant,² although the servant can recover separate damages for his own personal loss; and it is upon this ground that a parent can recover for an injury to his child.³ So, at

¹ See cases cited under § 24a, *ante*. S. E. 529, 12 Am. St. Rep. 328, 2

² Hall v. Hollander, 4 Barn. & Cr. L. R. A. 843 (1889).

660; Martinez v. Gerber, 3 Man. & G. 88, 3 Scott N. R. 386; Gough v. Kennedy v. N. Y. Central, etc. R. Co., 35 Hun, 186; Gilligan v. Harlem R. Co., 1 E. D. Smith, 453; Stallebrass, 11 Ad. & El. 301; Woodward v. Washburn, 3 Den. 369. As to the measure of damages in such actions, see § 763, *post*. As to imputing servant's negligence to master, see § 71, *ante*. Fluker v. Georgia R., etc. Co., 81 Ga. 461, 8

³ White v. Nellis, 31 N. Y. 405; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372; Oakland R. Co. v. Fielding, 48 Id. 320; Birmingham v. Dorer, 3 Brews. 69. As the action is based upon the relation of master and servant which exists between the parent and child (Karr v. Parks,

common law, a husband can recover damages sustained by him for the loss of the service and society of his wife and for the expense of her care.⁴ An action may be maintained by the husband and wife for her own injuries, but no recovery can be had in such case for loss of service or the expenses incurred.⁵ But recovery for such loss of service and expense may, as above stated, be had in an action by the husband for his own personal injury.⁶ Nor is the husband's right of action for prior loss

44 Cal. 46; *Hoover v. Heim*, 7 Watts, 62; *Cowden v. Wright*, 24 Wend. 429), the relation must exist or the action does not lie, as where the parent has relinquished his right to the child's services, or the child is so young that his services are worthless (*Hall v. Hollander*, 4 Barn. & Cr. 660; compare *Franklin v. Southeastern R. Co.*, 3 Hurlst. & N. 211 [explained in *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671]; *Drew v. Sixth Av. R. Co.*, 26 N. Y. 49; *Abeles v. Bransfield*, 19 Kans. 16). A mother cannot sue for injuries to minor child where father was living at the time of the injury, though he died before action brought (*Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403). For actual loss of service only (*Kausz v. Ryan*, 51 Ia. 232, 1 N. W. 485 (1879). Right of action based on right to service and duty of maintenance (*McGarr v. National, etc. Worsted Mills*, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122 (1902); and expense incurred (*Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652 (1898); *Netherland, etc. Nav. Co. v. Hollander*, 59 Fed. 417, 8 C. C. A. 169 (1894).

⁴*Brockbank v. Whitehaven, etc. Ry. Co.*, 7 Hurlst. & N. 834; *Hyde v. Seyssor*, 3 Black. Com. 140; *Laughlin v. Eaton*, 54 Me. 156; *Whitcomb v. Barre*, 37 Vt. 148; *Kin-*

ney v. Western Stage Co., 4 Ia. 420; *Hendricks v. Butcher*, 144 Mo. App. 660, 129 S. W. 431 (1910). Loss of service and expense incurred (*Thompson v. Metropolitan St. Ry. Co.*, 135 Mo. 217, 36 S. W. 625 (1896); *Cincinnati, etc. Ry. Co. v. Cook*, 45 Ind. App. 401, 90 N. E. 1052 (1910). *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570 (1908), (by virtue of statute wife alone may maintain suit for personal injury, and proceeds become her separate property); *Lyons v. Railway Co.*, 49 Misc. 517, 97 N. Y. Supp. 1033; *Libaire v. Minneapolis, etc. Ry. Co.*, 113 Minn. 517, 130 N. W. 8 (1911); *Indiana Trac. Co. v. Menze*, 88 N. E. (Ind.) 929 (1909). See *Lindsay v. Oregon, etc. Ry. Co.*, 13 Idaho, 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184 (1907); *Marri v. Stamford St. Ry. Co.*, 78 Atl. (Conn.) 582 (1911); *Savage v. Steamship Co.*, 185 Fed. 778, 107 C. C. A. 648 (1911).

⁵*Fuller v. Nangatuck Ry. Co.*, 21 Conn. 557; *Smith v. St. Joseph*, 55 Mo. 456; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Brooks v. Schwerin*, 54 N. Y. 343; *King v. Thompson*, 87 Pa. St. 365, 30 Am. St. Rep. 364; *Thompson v. Met. St. Ry. Co.*, 135 Mo. 217, 36 S. W. 625 (1896).

⁶*Hopkins v. Atl. etc. R. Co.*, 36 N. H. 9; *Cincinnati, etc. Ry. Co. v. Chester*, 57 Ind. 297.

of service and expense affected by the fact that the wife subsequently died of her injuries.⁷ The subject is very generally regulated by statute.⁸ Owing to the frequent changes made, the laws of the particular State must be consulted. And a bailee can recover for the consequent loss of his hire.⁹

⁷ *Hoard v. Pick*, 56 Barb. (N. Y.) 202; *Nixon v. Ludman*, 50 Ill. App. 273.

⁸ The New York Code of Civil Procedure, § 450, provides that a married woman may sue and be sued as if she were a *feme sole*. And it has been held that the husband is not a necessary party to an action for personal injuries inflicted on her (*Well v. N. Y., etc. Ry. Co.*, 68 Hun (N. Y.), 249, 22 N. Y. Supp. 947. See also *Muser v. Lewis*, 50 N. Y. Super. Ct. 431, 6 N. Y. Civ. Proc. 135, 14 Abb. N. Cases, 333. The section of the Virginia Code, No. 2284 has been construed in like manner (*Norfolk, etc. Ry. v. Dougherty*, 92 Va. 372, 23 S. E. 777. The section of the Georgia Code, No. 2960, vesting in the husband the right of action for torts against the wife, has been held not to supersede the common law on the subject (*East Tenn., etc. Ry. Co. v. Cox*, 57 Ga. 252. For construction of code provision in their respective States see *Hennies v. Vogel*, 66 Ill. 401; *Michigan, etc. R. Co. v. Coleman*, 28 Mich. 440; *Tuttle v. Chicago, etc. R. Co.*, 42 Iowa, 518; *Musselman v. Gallagher*, 32 Id. 383. In Connecticut, under Gen. St. § 2673, providing that "any person injured in person or property by means of a defective road or bridge, may recover damages," etc., a husband cannot maintain an action against a city for the loss of his wife's services and society, resulting from injuries to her

so caused (*Lounsbury v. Bridgeport*, 66 Conn. 361, 34 Atl. 93). In Pennsylvania, the statute giving married women control of their property, and authorizing them to engage in business, does not authorize a woman to sue for loss of ability to do household work (*Walter v. Kensington*, 13 Pa. Co. Ct. 222). In New York, a married woman has such freedom of control over her own real property that her husband cannot without her consent, maintain a vicious domestic animal thereon, and she is liable for injuries committed by such animal, although it is owned by the husband (*Quilty v. Battie*, 135 N. Y. 201, 32 N. E. 47).

⁹ *McGill v. Monette*, 37 Ala. 49. Both the bailee and general owner of chattels may recover for their injury or loss; a recovery by one barring a recovery by the other (*Woodman v. Nottingham*, 49 N. H. 387; *Rindge v. Coleraine*, 11 Gray, 157). But a mere bailee of a chattel for hire cannot recover for injuries to it (*Buddin v. Fortunato*, 10 N. Y. Supp. 115 [carriage left with plaintiff to be painted]), unless he has undertaken to return it in good condition (*St. Louis, etc. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. 724 [agister of cattle]). Hence, an auctioneer, to whom a horse is entrusted for sale, cannot recover for defendant's negligent injury of the animal, he being under no liability therefor to the owner (*Claridge v. South Staffordshire Tr. Co.* [1892],

§ 116. Who may sue on breach of contract. — Negligence which consists merely in the breach of a contract will not afford ground for an action by any one, except a party to the contract, or a person for whose benefit the contract was avowedly made.¹⁰ Therefore, an unborn infant, injured by an injury to its mother, caused by negligence in her transportation by a common carrier, cannot, after his birth, sue the carrier on the contract.¹¹ But where, in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission.¹² As ad-

1 Q. B. 422). Two or more tenants in common may jointly maintain an action against a third tenant in common for his injury to the common property (*Chesley v. Thompson*, 3 N. H. 9). Trespass or trover is the proper form of action by a bailee against a stranger for injury to property in his possession (*Allen v. Barrett*, 100 Ia. 16, 69 N. W. 272 (1896); *Finn v. Western Ry. Corp.*, 122 Mass. 524, 17 Am. Rep. 128; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114 (1887).

¹⁰ See *Heaven v. Pender*, L. R. 11 Q. B. Div. 503. Thus, a master cannot sue upon injuries suffered by the servant from the negligence of a carrier of such servant (*Alton v. Midland R. Co.*, 19 C. B. [N. S.] 213; *Fairmount, etc. R. Co. v. Stutler*, 54 Pa. St. 375). In *Roddy v. Missouri Pac. R. Co.* (104 Mo. 234, 15 S. W. 1112), the employee of one with whom defendant had contracted to furnish, on his own side track, properly equipped, cars for the transportation of stone, was held not entitled to recover for injuries result-

ing to him from the defendant's failure to furnish cars with proper brakes, as agreed. See *Carriers of Passengers*, ch. XXII, § 486; *Telegraphs*, ch. XXIII, § 543; *Vendors and Bailors of Dangerous Material*, § 690, and next section.

¹¹ *Walker v. Great Northern R. Co.*, 28 L. R., Ir., 69, Q. B. D.

¹² This is substantially the rule which we stated in our earlier editions, modified slightly to conform to the opinion of Brett, M. R. (now Lord Esher), which will be presently quoted. In *Thomas v. Winchester* (6 N. Y. 397), the distinction was said to be between acts which were dangerous to human life, and those which were not. But in *Winterbottom v. Wright* (10 Mees. & W. 109), and *George v. Skivington* (L. R. 5 Exch. 1), the rule will be found nearly as we have stated it above. See *Longmeid v. Holliday*, 6 Exch. 761 [selling a lamp unfit for use by which buyer's wife was injured]; *Pippin v. Sheppard*, 11 Price, 400 [apothecary liable for administering improper medicines to one

mirably put by Mr. Horace Smith:¹³ "The true question always is: Has the defendant committed a breach of duty, apart from contract? If he has only committed a breach of contract, he is liable to those only with whom he has contracted; but if he has committed a breach of duty, he is not protected by setting up a contract in respect of the same matter with another person."¹⁴ This principle is stated in the masterly opinion of Lord Esher, in *Heaven v. Pender*,¹⁵ which was not concurred

other than the party contracting with him]; *Dixon v. Bell*, 5 Maule & Sel. 198.

¹³ Negligence, Am. Ed. 10.

¹⁴ Quoted, in connection with first part of this section, with approval, in *House v. Houston Water Works Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532 (1895).

¹⁵ L. R. 11 Q. B. Div. 503, given fully in Smith, 12-17. The material part of this opinion is as follows: "Plaintiff was a workman in the employ of Gray, a ship-painter. Gray entered into a contract with a ship-owner, whose ship was in the defendant's dock, to paint the outside of the ship. The defendant, the dock-owner, supplied, under a contract with the ship-owner, an ordinary stage, to be slung in the ordinary way outside of the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the ship-owner, but would be used by such a person as the plaintiff, a working ship-painter. The ropes by which the stage was slung, and which were supplied as part of the instrument by the defendant, had been scorched and were unfit for use, and were supplied without a reasonably

careful attention to their condition. When the plaintiff began to use the stage, the ropes broke, the stage fell, and the plaintiff was injured. The court below held that the plaintiff could not recover. * * * The questions which we have to solve in this case are, what is the proper definition of the relation of two persons, other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, it seems to me, because any one of ordinary sense, who did think, would at once recognize that if he did not use ordinary care and skill

in by a majority of the court; but their dissent turned rather on the particular language used than on the precise principle involved. In any event, we think that it is sound, and must be finally accepted everywhere. It has been applied in New Jersey¹⁶ and Virginia.¹⁷

§ 117. Liability for selling dangerous goods. — Applying this principle, most of the adjudged cases fall easily into line. Where a defective article is sold, with a warning to the buyer that it is dangerous, the seller is not liable to a third person; because it is the fault of the buyer in using it, not of the seller in selling it, which is the proximate cause of the stranger's injury.¹⁸ Danger-

under such circumstances there would be such danger. And every one ought, by the universally recognized rules of right and wrong, to think so much with regard to the safety of others who might be jeopardized by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care and skill and injury ensues, the law, which takes cognizance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. * * * The proposition which these recognized cases suggest, and which is therefore to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such injury."

¹⁶ In *Lechman v. Hooper*, 52 N. J.

Law, 253, 19 Atl. 215, plaintiff's employer and the defendant contracted for separate parts of a building, the latter to build a wall. The plaintiff, while at work on the building, was injured by the fall of the wall, of the insecure condition of which he had no notice. Held, the defendant was liable.

¹⁷ In *Johnson v. Richmond, etc. R. Co.*, 86 Va. 975, 11 S. E. 829, a railroad company had promised decedent's employer, with whom it had contracted to straighten its line, that its trains would not pass the scene of the work faster than six miles an hour. Held, that plaintiff was entitled to have the jury charged that if they believed such promise was made, and that decedent's death was caused by its violation, without his fault, they should find for plaintiff. See also *Kellny v. Missouri Pac. R. Co.*, 101 Mo. 67, 13 S. W. 806.

¹⁸ So held, as to a wheel, liable to burst at any time (*Loop v. Litchfield*, 42 N. Y. 351); and as to poison (*Wohlfhart v. Beckert*, 92 N. Y. 490; *Norton v. Sewall*, 106 Mass. 143; and as to gunpowder (*Abrahams v. California Powder*

ous things may lawfully be made and kept, if they are kept in places where it is not reasonable to expect that any one can be injured by them; and therefore the seller's responsibility ends, when he has parted with them to a person who knows as much about them as he does.¹⁹ Searchers of public records, whether public officials or not, do not owe any general duty to the public to leave no erroneous certificates of search lying about; and, therefore, they are not liable to any one for errors in searching, except the persons who directly employ them.²⁰ But one who knowingly sells an article intrinsically dangerous to human life or health, such as poison, explosive oils or diseased meat, concealing from the buyer knowledge of that fact, is responsible to any person who, without fault on the part of himself or any other person, sufficient to break the chain of causation, is injured thereby.²¹ And we see no reason why the same rule

Co., 5 N. Mex. 479, 23 Pac. 785). See *Glenn v. Winters*, 17 Misc. 597, 40 N. Y. Supp. 659 [unsafe coach].

¹⁹ A manufacturer of fireworks is not liable for damages resulting from the negligent use thereof by a third person (*Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381).

²⁰ *Savings Bank v. Ward*, 100 U. S. 195; *Houseman v. Girard, etc. Asso.*, 81 Pa. St. 256; *Day v. Reynolds*, 23 Hun, 131; see *Kahl v. Lene*, 37 N. J. Law, 5; and §§ 590, 616, *post*.

²¹ *Wellington v. Downer Oil Co.*, 104 Mass. 64; *Hourigan v. Nowell*, 110 Id. 470; *Elkins v. McKean*, 79 Pa. St. 493. In *Losee v. Clute* (51 N. Y. 494), the Commission of Appeals refused to apply this rule to the sale of a defective steam-boiler. But we agree with Judge Thompson (*Negl.* 233), that this decision cannot be sustained on this ground, if on any. The Commission's decisions, it may be well to mention, are not as binding as those of the regular

Court of Appeals. The rule of the text has been constantly affirmed (*Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118 [patent medicine]; *Schubert v. Clark Co.*, 49 Minn. 331, 51 N. W. 1103 [ladder]; *Craft v. Parker*, 96 Mich. 245, 55 N. W. 812 [spoiled meat]; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398). It must be shown that the article was dangerous (*Heizer v. Kingsland, etc. Mfg. Co.*, 110 Mo. 605, 19 S. W. 630). See *Hattermann v. Siemann*, 1 N. Y. App. Div. 486, 37 N. Y. Supp. 405 [bailment of infected clothing]; *Akers v. Overbeck*, 18 Misc. 198, 41 N. Y. Supp. 382 [bailor's knowledge of defect essential]. It has, however, been held that where one has merely been negligent in not making proper disclosure in the sale of a dangerous thing, but one not imminently so, his liability for injury is only to the party with whom he stands in privity, otherwise where the thing sold is imminently dangerous or

should not apply to articles known to be dangerous to property.

§ 117a. Liability of manufacturers and others for selling dangerously defective machinery. — As a general rule a manufacturer or vender of a machine or other instrumentality, rendered dangerous by the defective construction, is liable only to his customer or vendee, unless it is contemplated that the thing shall be resold, or it is, in its nature, imminently dangerous, or the act itself unlawful or recklessly dangerous.²² The general

when fraud or concealment has been practiced in its sale (*Thornton v. Dow*, 111 Pac. (Wash.) 899 (1910); *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1 (1903). But see *Fassbinder v. Missouri, etc. Ry. Co.*, 126 Mo. App. 563, 104 S. W. 1154 (1907); *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220 (1896); *Statler v. Ray Mfg. Co.*, 125 App. Div. 69, 109 N. Y. Supp. 172; *Hasbrouck v. Armour*, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 126 (1909). Where the action was by the purchaser of toilet soap from the dealer against the manufacturer for injury received from a needle negligently embedded in the soap, the court, admitting the general rule, held the defendant not liable on the ground that the injury was extraordinary, unusual and remote, and one that the manufacturer could not be held reasonably to have foreseen and guarded against (*Hasbrouck v. Armour*, 139 Wis. 357, 121 N. W. 157 (1909); *Torgeson v. Schultz*, 192 N. Y. 156, 84 N. E. 958, 18 L. R. A. (N. S.) 956 (1908). Where 87° gasoline, inflammable and explosive, and not in common use, was sold to one without knowledge of its dangerous quality, and without notice thereof, the vendor was held liable for the death of an employee of the purchaser caused thereby, without contributory negligence. It is held that where injury is caused by the sale and use of an article inherently dangerous to human life, the common law imposes a duty, independent of contract, upon the vender to give notice to the purchaser of the dangerous character of the article sold (*Waters Pierce Oil Co. v. Davis*, 24 Tex. App. 508, 60 S. W. 453 (1900).

²²The rule in this class of cases is satisfactorily reviewed and the result well stated in the case of *Statler v. George A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063 (1909). The plaintiff was severely scalded by the explosion of a coffee urn, manufactured by the defendant and defectively constructed. The defendant manufactured and sold to jobbers, who in turn sold to hotels. The plaintiff was an officer of a hotel company, a purchaser from the jobber. The article was "an inherently dangerous appliance." The defendant, knowing the uses for which the urn was intended when he marketed the same, and chargeable with a knowledge of its defective and unsafe construction, was held liable. The court, referring to the rule in

rule has been applied in the case of a manufacturer of a steam threshing machine, a steam boiler, a fly wheel, a drop press, a freight elevator, and a side saddle; the distinction being at the same time recognized.²³

§ 118. Private actions upon public obligations. — No right of action for damages by private parties exists for the non-performance of a public duty against a municipal corporation or other public body, as for the failure to furnish an adequate water supply, whereby it is charged plaintiff's premises were destroyed by fire;²⁴ nor does any such action exist against one with whom such public corporation has contracted for the construction or maintenance of public works for failure ade-

Heaven v. Pender, L. R. (11 Q. B. D.) 503, says: "This rule distinctly recognizes the principle that, in case of an article of an inherently dangerous nature, a manufacturer may become liable for a negligent construction which, when added to the inherent character of the appliance, makes it imminently dangerous, and causes or contributes to a resulting injury, not necessarily incident to the use of such an article if properly constructed, but naturally following from a defective construction." Accidents due to unskilled installation or improper use are of course excluded. See also *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Torgesen v. Schultz*, 192 N. Y. 156, 84 N. E. 958, 18 L. R. A. (N. S.) 726 (1908); *Kahner v. Otis Elevator Co.*, 96 App. Div. 169, 89 N. Y. Supp. 185; *Huset v. Case Threshing M. Co.*, 120 Fed. 865-871, 57 C. C. A. 237, 61 L. R. A. 301, aff'd, 183 N. Y. 512, 76 N. E. 1097 (1905); *Keep v. Nat. Tube Co.*, 154 Fed. 121 (1906).

²³ See *Lawson on Contracts*, § 352, and cases cited. Manufacturer or dealer, for want of privity, not gen-

erally liable to other than his customer if the article, machine or appliance is not intrinsically dangerous; a land roller (*Knelling v. Roderick Lion Mfg. Co.*, 88 App. Div. 309, 84 N. Y. Supp. 622; a drop press (*McCaffrey v. Mossberg, etc. Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 91 Am. St. Rep. 637, 55 L. R. A. 822 (1902); a threshing machine cylinder (*Heizer v. Kingsland Mfg. Co.*, 110 Mo. 605, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821 (1892); a gasoline pear burner (*Talley v. Beever & Hines*, 78 S. W. (Tex. App.) 23 (1904); a passenger elevator (*Field v. French*, 80 Ill. App. 78); a freight elevator (*Zeimann v. Kieckhefer Elev. Co.*, 90 Wis. 497, 63 N. W. 1021 (1895)).

²⁴ *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Grant v. Erie*, 69 Pa. St. 420, 8 Am. Rep. 272; *Block v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *U. S. v. City of Sault Ste. Marie*, 137 Fed. 258 (1905); *Judson v. Borough of Winstead*, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91 (1908).

quately to construct or maintain the same;²⁵ but the existence of such contract is no bar to an action against the contractor by a private party suffering special damage in consequence of a tort committed by the contractor, as by leaving the highway in an unsafe condition.²⁶ But private actions do arise on the violation of statutory duties in favor of those injured thereby for whose protection such statutes were enacted. If the statute is express in its terms in the designation of the class of persons intended to be protected, all courts are agreed that, if a right of action would not exist at common law, the right conferred by the statute is to be restricted to the class designated. But if a new duty is declared, or a penalty imposed for a particular act or omission not before actionable, and the intended beneficiaries not indicated, the question arises for whose benefit or protection the statute was passed. It may generally readily be seen that persons occupying a particular relation were, beyond doubt, intended to be embraced, but whether it applied to others because within the mischief intended to be remedied must be declared by the courts according to their notions of public policy and the intention of the legislature. Thus American fencing statutes obviously grow out of the danger to cattle of owners or occupants of land adjoining a railway track, and the requirement that the whistle be blown and the bell rung on approaching a public crossing out of the danger to those using the crossing; but is the benefit of the one to be confined to adjoining owners or may it be extended to embrace the cattle of others though trespassing on such premises? And may the other be held to apply to the protection of one driving on a wagon road running parallel to the

²⁵ *Nicherson v. Bridgeport Hy. S. W.* (Ky.) 478 (1896); *Marvin draulic Co.*, 46 Conn. 24; *Davis v. Safe Co. v. Ward et al.*, 46 N. J. L. Clinton Water Works, 54 Iowa, 58; 19; *House v. Houston Water Works Britton v. Green Bay Water Co.*, 81 Co., 88 Tex. 233, 31 S. W. 179, 28 Wis. 48, 51 N. W. 84 (1892); *L. R. A.* 532 (1895).

Owensboro Water Co. v. Duncan, 32 ²⁶ § 116, *ante*.

track, and to the farmer plowing near by? These inquiries have been variously answered.^{26a}

§ 119. Reversioners and mortgagees and others having a special interest.—One who has a fixed reversionary interest in property, whether real or personal,²⁷ has a right to sue immediately for any injury to such property which will depreciate its value when it comes into his hands;²⁸ and is entitled to recover damages to the extent of such probable depreciation.²⁹ Nor is it any bar to his recovery, that the injury of which he complains is one which may possibly cease before he comes into possession, if it is in its nature permanent, and will probably continue, in the absence of some affirmative action.³⁰ A mere trespass, however, having no permanent effect upon the property, constitutes no cause of action in favor of a reversioner, even though committed for the purpose of claiming title,³¹ much less where there

^{26a} §§ 448, 466a, 470, *post*. See *Manhattan R. Co.*, 130 N. Y. 360, remarks of Pollock, B., in *Williams v. Great W. Ry. Co.*, to L. R. 9, and

v. Justice Harland, in *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262.

²⁷ *Hawkins v. Phythian*, 8 B. Mon. 515.

²⁸ *Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown*, Sayer, 215. Building an adjoining house so that the rain drips upon the reversioner's land, is a permanent injury within this rule (*Tucker v. Newman*, 11 Ad. & El. 40). So is an excavation, causing a falling of the soil (*Raine v. Alderson*, 4 Bing. N. C. 702, 6 Scott, 691). So as to permanent overflow of land (*Kankakee, etc. R. Co. v. Horan*, 131 Ill. 288, 23 N. E. 621). As to a reversioner's right of action against an elevated railroad company for an infringement of the appurtenant easements of abutting land, during the existence of a preceding life estate, see *Thompson v.*

²⁹ Cases cited in last note. One in possession of land under a contract to purchase is considered the equitable owner, and may recover damages against one who negligently sets fire to woods and fences (*Rood v. N. Y. & Erie R. Co.*, 18 Barb. 80; *Hays v. Miller*, 6 Hun, 320).

³⁰ Thus, in an action by a reversioner for the obstruction of ancient lights, it was objected that the obstruction might be removed, either by the voluntary act of the defendant, or by process of law, before the reversioner came into possession. But this objection was overruled (*Jesser v. Gifford*, 4 Burr. 2141; *Tomlinson v. Brown*, Sayer, 215). To same effect see (*per Tenterden, C. J.*) *Shadwell v. Hutchinson*, 4 Carr. & P. 333; *Moo. & M.* 350.

³¹ Thus, a landlord cannot maintain an action for a mere entry upon his

was no such intention, as in a case of mere negligence there could not be. Nor does the continuous repetition of an injury make it permanent, within the meaning of this rule. Its continuance, however probable, cannot afford a present cause of action to the reversioner, if it depends upon the affirmative exercise of human volition.³² But though a mortgagee may sue for trespass³³ upon conversion³⁴ of the mortgaged property, he cannot maintain an action for a merely negligent injury to the mortgaged premises, even though he has thereby lost his security,³⁵ unless the insolvency of the mortgagor is alleged and proved.^{35a} The owner of the reversion, even after he enters into possession, is not responsible to strangers for defects in the condition of the premises existing when he took possession, if he had no notice thereof, or was not negligent in omitting to repair. The negligence of the former tenant in possession will not be imputed to him.³⁶ Much less is he liable *before* he takes

tenant's land, if no injury is done to the land itself; even though the entry was made for the purpose of claiming title (*Baxter v. Taylor*, 4 Barn. & Ad. 72). An apparently opposing opinion of Tenterden, C. J., in *Young v. Spencer* (10 Barn. & Cr. 152), has been restricted in its effect to the mutual relations of landlord and tenant (*Baxter v. Taylor*, 4 Barn. & Ad. 72; *Mumford v. Oxford*, etc. R. Co., 1 Hurlst. & N. 34).

³² Thus, the nuisance of perpetual hammering in a railway company's workshop, although morally certain to continue, affords no ground for an action by the landlord of adjoining leased land for the injury to his reversion (*Mumford v. Oxford*, etc. R. Co., 1 Hurlst. & N. 34). See this case for what constitutes "permanent injury."

³³ *Earle v. Hall*, 2 Metc. 353; *Page v. Robinson*, 10 Cush. 99; *Sanders v. Reed*, 12 N. H. 558.

³⁴ *Bellune v. Wallace*, 2 Rich. Law,

80; *Burton v. Tannehill*, 6 Blackf. 470. See *Coles v. Clark*, 3 Cush. 399; *White v. Webb*, 15 Conn. 302.

³⁵ *Gardner v. Heartt*, 3 Den. 232.

^{35a} *Lane v. Hitchcock*, 14 Johns. 213; *Yates v. Joyce*, 11 Johns. 136; *Carpenter v. Canal Co.*, 35 Ohio St. 307; *Van Pelt v. McGraw*, 4 N. Y. 110. But in an action by the mortgagee against a third party for impairment of his security, it has been held immaterial whether the mortgagor was or was not insolvent (*E. H. Ogden Lumber Co. v. Busee*, 86 N. Y. Supp. 1098, 92 App. Div. 143 (1904)).

³⁶ *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193. So held, where the defendant had purchased the land shortly before the plaintiff's injury, which arose from a defective cellar-cover, which it was the tenant's duty to repair, and of which the defendant had no notice (*Woram v. Noble*, 41 Hun, 398).

possession of the premises.³⁷

§ 120. Landlords and tenants. — Where injury results from the negligence of a landlord, either in constructing or upholding the property, he is responsible; but he is not, in general, responsible for the negligence of his tenant in the use of it. If an injury results from the negligence of the tenant, in any manner, the tenant is liable.³⁸ But both the landlord and the tenant may be liable for the same injury: the former for negligent construction, and the latter for negligent use of the premises.³⁹ The landlord is, of course, answerable for

³⁷ *Eisenbrey v. Pennsylvania Co.*, 141 Pa. St. 566, 21 Atl. 639. Special interest in property sufficient to support the action (*Brown Store Co. v. Chattahoochie Lumber Co.*, 121 Ga. 809, 49 S. E. 839 (1904); holder of chattel mortgage on personal property, exceeding its value, due and unpaid, entitled to maintain action against third party by whose negligence the property was destroyed (*Wohlwend v. J. I. Case Threshing Machine Co.*, 42 Minn. 500, 44 N. W. 517 (1890); one entitled to his improvements made in good faith, by statute, may sue for their destruction by negligence and establish his claim thereto as against the defendant, the owner of the land (*Milwaukee, etc. Ry. Co. v. Kellogg*, 24 U. S. 469, 24 L. Ed. 256); allegation of ownership of the land on which the hay was stacked, for the negligent destruction of which suit is brought, not sufficient to enable the plaintiff to maintain the action (*Mackey v. Monahan*, 13 Colo. App. 144, 56 Pac. 680 (1899); the mortgagor of personalty, still in his possession, may sue for injury thereto, notwithstanding the mortgage is past due (*Bank of Irwin v. Ameri-*

can Ex. Co., 127 Ia. 1, 102 N. W. 107 (1905); (*Weber v. Chicago, etc. Ry. Co.*, 69 Kans. 611, 77 Pac. 533 (1904).

³⁸ In the absence of covenant to repair the rule of *caveat emptor* applies (*Baker v. Moeller*, 52 Wash. 605, 101 Pac. 231 (1909); landlord liable for injuries from structural defects existing at time of demise, known or that should have been known (*Miner et al. v. McNamara*, 81 Conn. 690, 72 Atl. 138 (1909); defective poles for climbing to stretch clothes line (*Tracey v. Page*, 201 Mass. 62, 87 N. E. 491 (1909); coal hole defective at time of demise, landlord's liability to pedestrian (*Wells v. Ballou*, 201 Mass. 244, 87 N. E. 576 (1909).

³⁹ Per *Woodruff, J.*, *Eakin v. Brown*, 1 E. D. Smith, 44. See *Irvine v. Wood*, 51 N. Y. 224; *Swords v. Edgar*, 59 Id. 34; *Folsom v. Lewis*, 85 Ga. 146, 11 S. E. 606; *Gordon v. Peltzer*, 56 Mo. App. 599; *Weymouth v. New Orleans*, 40 La. Ann. 344, 4 So. 218 [grantee of franchise of public market]. Landlord and tenant may both be liable. (1) For negligent construction and use, as for defective wharf (*Joyce v.*

nuisances existing on the premises when he made the lease;⁴⁰ and of which he has had notice;⁴¹ but he is not answerable for a nuisance erected afterward on the premises by his tenant, unless he subsequently renews the lease with knowledge of the nuisance.⁴² The landlord is not responsible for a nuisance which existed on the land, when he first acquired the right of possession, until he has notice thereof.⁴³ Nor, in the absence of a covenant in the lease,⁴⁴ is he liable for the consequences of natural decay of the premises — as where fences are suffered by

Martin, 15 R. I. 558, 10 Atl. 620 (1887), and authorities cited. See also *Gordon v. Peltzner*, 56 Mo. App. 599; *Brogan v. Hanan*, 66 N. Y. Supp. 1066, 55 App. Div. 92; *Lusk v. Peck*, 116 N. Y. Supp. 1051, 132 App. Div. 926 (1909). (2) For nuisance existing on premises at time of demise and subsequently maintained (*Edgar v. Walker*, 106 Ga. 454, 32 S. E. 582 (1899); *Fehl-hauer v. City of St. Louis*, 178 Mo. 635, 77 S. W. 843 (1903); *Miller v. Fisher*, 111 Md. 91, 73 Atl. 891 (1909); *Lusk v. Peck*, *supra*; the liability of landlord rests on the principle that he cannot divest himself of social duty by contract, as by lease (*Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; while that of tenant rests on the simple principle that he who maintains a nuisance is as guilty as he who creates it (*Grogan v. Broadway Foundry Co.*, 87 Me. 321. (3) For neglect of landlord to repair, under covenant, after knowledge or notice (*Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. 264 (1898); *Booth v. Merri-man*, 155 Mass. 521, 30 N. E. 85 (1892); *Dollard v. Roberts*, 130 N. Y. 269-294, 29 N. E. 104, 14 L. R. A. 238 (1891), but in *Schick v. Fleischauer*, 26 App. Div. 210, 49 N. Y. Supp. 962, it is said that

the landlord does not become liable for personal injuries arising from defective condition of premises he had covenanted to repair, that the measure of damages as to him by reason of such covenant is the reasonable cost of the repairs.

⁴⁰ *Rosewell v. Prior*, 12 Mod. 635, 1 Ld. Raym. 713; *Congreve v. Smith*, 18 N. Y. 79, 84; *Clifford v. Dam*, 81 Id. 52; *Swords v. Edgar*, 59 Id. 34; *Clancy v. Byrne*, 56 Id. 129; *Davenport v. Ruckman*, 37 N. Y. 568; *Fish v. Dodge*, 4 Den. 312; *Anderson v. Dickie*, 26 How. Pr. 105; *Perez v. Raband*, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620 (1890). See §§ 709, 709a, *post*.

⁴¹ Not otherwise (*Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193).

⁴² Then he is (*Sandford v. Clarke*, L. R. 21 Q. B. Div. 398 [coal hole]); but not otherwise (*Ahern v. Steele*, 115 N. Y. 203; overruling *Rex v. Pedly*, 1 Ad. & E. 827). See *Gandy v. Jubber*, 5 Best & S. 78, 485, reversed, 9 Id. 15; *Owings v. Jones*, 9 Md. 108. In *Jessen v. Sweigert* (66 Cal. 182), a landlord was held responsible for an insecure awning which he "suffered" the tenant to put up. See §§ 708, 709, 709a, *post*.

⁴³ *Ahern v. Steele*, *supra*.

⁴⁴ *Payne v. Rogers*, 2 H. Blacks. 350.

the tenant to fall into decay, whereby a stranger's cattle stray and are injured.⁴⁵ If the owner of land constructs a nuisance (*e. g.*, an unauthorized excavation underneath the sidewalk connecting with his premises), he must, at his peril, notwithstanding a demise of the premises, keep it in such a condition as that the safety of travelers shall not be impaired by its being there. And the tenant of the premises, if he uses and enjoys the benefit of them, is bound to the same vigilance. Therefore, where one is injured by falling into a coal hole underneath the sidewalk in front of the premises, by reason of a defective cover, existing when the premises were let, being left unfastened, he has his remedy against the owner and the tenant jointly.⁴⁶ So where the lease reserved to the lessor the right to use as much of the premises as his business might require, it was held that the lessor was liable, jointly with the lessee, for injuries to the plaintiff resulting from their non-repair, both being in its joint possession.⁴⁷ But where, during the term, the tenant has surrendered exclusive possession to the landlord, for a brief period, for the purpose of repair-

⁴⁵ *Cheetham v. Hampson*, 4 T. R. 318; *Coupland v. Hardingham*, 3 Campb. 398; *Daniels v. Potter*, 4 Carr. & P. 266; *Staple v. Spring*, 10 Mass. 74. The lessee's liability is not affected by the fact that he had not covenanted to make repairs (*Timlin v. Standard Oil Co.*, 54 Hun, 44, 7 N. Y. Supp. 158). See § 708, *post*.

⁴⁶ *Irvine v. Fowler and Wood*, 5 Robertson, 482, 4 Id. 138, *aff'd*, 51 N. Y. 224; *Timlin v. Standard Oil Co.*, 54 Hun, 44, 7 N. Y. Supp. 158 [fall of demised building]. The landlord's liability was affirmed in *Calder v. Smalley*, 66 Iowa, 219. One who comes into possession of premises, attached to which there is an excavation encroaching upon the highway, may be regarded as so

sanctioning it as to be liable for an injury sustained by a passer-by in consequence of it (*Davenport v. Ruckman*, 10 Bosw. 20, *aff'd*, 37 N. Y. 568). To hold a lessee liable for injuries due to an original structural defect, he must be shown to have had notice or knowledge of the defect (*Silver v. Missouri Pac. R. Co.*, 101 Mo. 79, 13 S. W. 410 [bridge piers not built according to statutory requirements]). Actual notice, however acquired, is enough (*Timlin v. Standard Oil Co.*, 54 Hun, 44, 7 N. Y. Supp. 158 [ruinous wall]). For more extended discussion of landlord's liability in case stated in text see §§ 708-9-9a-10, notes, *post*.

⁴⁷ *Cannavan v. Conklin*, 1 Daly, 509.

ing, the landlord is solely responsible for the consequences of a negligent maintenance of the premises during the interim; his possession, irrespective of ownership, being the ground of his liability.⁴⁸ The tenant of part of a building, not personally in fault, is not liable to a tenant of another portion of the same building for damages resulting from the defective construction of the demised premises, or from the insufficiency of a fixture therein.⁴⁹ But the landlord is generally liable for personal injuries from a failure to keep such portions of the building as remain under his control in a reasonably safe condition, as where only offices, rooms, lofts or apartments are let, the entrances, halls, stairways, elevators, etc., remaining under the landlord's control;⁵⁰ but not for failure to keep such places lighted unless required by statute, except where they are otherwise dangerous.⁵¹

⁴⁸ *Leslie v. Pound*, 4 Taunt. 649 [uncovered cellar-way opening on highway]. In *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92, the lease of a building for public exhibition purposes provided that the lessor should take charge of the box office each night until the nightly rental was paid. Held, that lessor was liable to one who, waiting outside for the doors to open, was injured by a structural defect in the building.

⁴⁹ *Eakin v. Brown*, 1 E. D. Smith, 36. Owner of house not liable for unauthorized and improper throwing down by a third person of a chimney securely built (*Scullin v. Dolan*, 4 Daly, 163. Compare *Gray v. Boston Gaslight Co.*, 114 Mass. 149).

⁵⁰ Falling of fire escape (*Gallagher v. Button*, 73 Conn. 172, 46 Atl. 819 (1900)); falling of signboard (*Payne v. Irvin*, 144 Ill. 482, 33 N. E. 756 (1893)); leakage of gas pipes

(*Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 651, 64 N. E. 906, 95 Am. St. Rep. 330 (1902)); tripping on stair carpet with hose (*Peil v. Reinhart*, 147 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843 (1891)); defective roof (*Kneeland v. Beare*, 11 N. D. 233, 91 N. W. 56 (1902)); unsafe passageway (*Johnson v. Lenbeck, etc. Brewing Co.*, 72 Atl. (N. J.) 1118 (1909)); dangerous condition of yard from defective fence along edge of an open quarry (*Herd v. Koenig*, 107 Mo. App. 589, 119 S. W. 56 (1909)); defective hallway (*Greenburg v. Man*, 119 N. Y. Supp. 244 (1909)); elevator operated by landlord in use by tenants (*Rosenberg v. Schoolherr*, 90 N. E. 1165, confirming 101 N. Y. Supp. 505, 116 App. Div. 289 (1909)).

⁵¹ *Halpin v. Townsend*, 107 N. Y. 683, 14 N. E. 611; *Burgher v. Bucktinkirek*, 29 App. Div. 342, 51 N. Y. Supp. 464.

§ 120a. **Railroads.**—Railroad franchises, and property acquired thereunder, inasmuch as they are largely intended for the benefit of the public, stand on a different footing from private property, in respect to the continuing liability of the owner for their proper condition and management, notwithstanding their alienation. The principle is settled, that a railroad company cannot escape the performance of any duty imposed by the laws of its incorporation, or the general laws of the State, by voluntarily surrendering its franchises and property to another, by lease, mortgage or otherwise, without the consent of the legislature.⁵² And notwithstanding the State's consent to such alienation, the company will still continue to be liable for injuries to third persons, by reason of its failure to comply with a statutory requirement, as to the construction of its road, such as fencing its track, or placing suitable cattle guards at proper places.⁵³ But for injuries sustained in the operation of the road by the lessee, over which the lessor has no control, the lessee is solely liable,⁵⁴ unless the lease was

⁵² *Thomas v. Railroad*, 101 U. S. 71; *Railroad Company v. Brown*, 17 Wall. 445; *Pennsylvania R. Co. v. St. Louis, etc. R. Co.*, 118 U. S. 309, 6 S. Ct. 1094; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *Woodruff v. Erie R. Co.*, 25 Hun, 246; *Ohio, etc. R. Co. v. Dunbar*, 20 Ill. 623 [loss of goods]; *Transportation Co. v. Ullman*, 89 Id. 244; *Central R. Co. v. Morris*, 68 Tex. 50, 3 S. W. 457 [lessee refused facilities for shipping goods; lessor liable]; *Railroad Co. v. Hambleton*, 40 Ohio St. 496 [changing grade of city street]; *Rome, etc. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94; *Acker v. Alexandria, etc. R. Co.*, 84 Va. 648, 5 S. E. 688; *Ricketts v. Chesapeake, etc. R. Co.*, 33 W. Va. 433, 10 S. E. 801 [injury to passenger]. The principle, of course, applies to other public companies (*Quill v. Empire State Tel. Co.*, 92 Hun, 545, 35 N. Y. Supp. 470 [telegraph pole in highway]).
⁵³ *Arrowsmith v. Nashville, etc. R. Co.*, 57 Fed. 165 [lessor not liable to passenger]; *Hayes v. Northern Pac. R. Co.*, 20 C. C. A. 52, 74 Fed. 279 [lessor not liable to lessee's employee]; *Central, etc. R. Co. v. Morris*, 68 Tex. 50, 3 S. W. 457 [refusal of facilities for shipping freight]; *International, etc. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. 679 [injury to passenger]; *St. Louis, etc. R. Co. v. Curl*, 28 Kans. 622 [track without cattle guards]; *Whitney v. Atlantic, etc. R. Co.*, 44 Me. 362 [lack of fence]; *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645 [same]; and cases cited under § 445, *post*.
⁵⁴ See § 413, *post*.

unauthorized, in which case both lessor and lessee are liable; ⁵⁵ the latter, his servants and employees, being regarded as the servants and agents of the former. In some jurisdictions it has been held that an authorized lease implies the exemption of the lessor from the torts of the lessee or licensee; ⁵⁶ in others it has been held that no such exemption would exist, unless by express provision to that effect.⁵⁷ It has also been held that the duty owing by the lessor company to the general public is entirely distinct from that due by it to the employees of the lessee.⁵⁸

§ 120b. Receivers, assignees and trustees.—Receivers, assignees and trustees of a railway or other corporation appointed by the court and charged with the operation of the business are liable as such, to the extent of funds in their hands, within the limits of their authority, for their own and their employees' negligence in

⁵⁵ *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559 [collision at highway crossing]. See cases cited under § 413, *post*.

⁵⁶ *Missouri Pac. Ry. Co. v. Watts*, 63 Tex. 549 (1885).

⁵⁷ *Singleton v. South W. Ry. Co.*, 70 Ga. 464, 48 Am. Rep. 574; *Chicago, etc. Ry. v. Hart*, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75 (1904).

⁵⁸ *Willard v. Spartanburg, etc. Ry. Co.*, 124 Fed. 796 (1903); *So. Ry. Co. v. Sittason*, 74 N. E. (Ind. App.) 898 (1904); *Muntz v. Algiers, etc. Ry. Co.*, *supra*. See *White on Personal Injuries on Railroads*, § 235 and notes; *Travis v. Kansas City, etc. Ry. Co.*, 119 La. 489, 44 So. 274, 10 L. R. A. (N. S.) 1189 (1907); *Lee v. So. Pac. Ry. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 110 (1897); *East Linn Ry. Co. v. Culbertson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805 (1888); *Nugent v. Boston & M. Ry. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151 (1888). A suit for personal injuries may be brought against either (*Mayfield v. Atlanta, etc. Ry. Co.*, 79 S. C. 558, 61 S. E. 106 (1908); see *Johnson v. So. Pac. Ry. Co.*, 97 Pac. 520 (1908); lessor liable to same extent as lessee (*Offner v. Erie, etc. Ry. Co.*, 140 Ill. App. 502 (1908); *Booth v. St. Louis, etc. Ry. Co.*, 217 Mo. 710, 117 S. W. 1094 (1909); *Parker v. N. C. Ry. Co.*, 150 N. C. 433, 64 S. E. 186 (1909); *Logan v. Atlanta, etc. Ry. Co.*, 82 S. C. 518, 64 S. E. 515 (1909); *Rookard v. Atlanta, etc. Ry. Co.*, 65 S. E. (S. C.) 1047 (1909). Where locomotive and crew were permanently engaged in doing switching service for another concern, it was held that the lessor company was not liable (*Sexton v. N. Y. Cent., etc. Ry. Co.*, 189 N. Y. 518, 81 N. E. 1175 (1907)).

the same manner as the corporation itself would have been. They are not the agents of the company,⁵⁹ however, at least where the proceedings are involuntary, but the representatives of the court, holding the property and operating the business for the benefit of all parties in interest. But where the proceeding is against the lessee company, in possession, alone, the lessor company remains liable in the same manner and to the same extent as it would have been had no such proceeding been had.⁶⁰ Receivers are included in the Federal Safety Appliance Act, in Federal Employers' Liability Act of 1908, and in State statutes of like character generally.

§ 121. Infants and lunatics. — Infants⁶¹ and lunatics,⁶²

⁵⁹ A railroad company may be liable as a carrier, notwithstanding the appointment of trustees for it, where the road is not in their exclusive possession and control, to the exclusion of the officers and employees of the company (*Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 15 S. Ct. 136). The fact that the road was operated at the time of the injury, by trustees named in the company's mortgage, is no defense, where they were not acting under the order of any court (*Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412; *Lockhart v. Little Rock*, etc. R. Co., 40 Fed. 631; *Metz v. Buffalo*, etc. Ry. Co., 58 N. Y. 61, 17 Am. St. Rep. 201; *St. Louis*, etc. Ry. Co. v. *Bricker*, 65 Kans. 321, 69 Pac. 328 (1902); *Mo.*, etc. Ry. Co. v. *McFadden*, 89 Tex. 138, 33 S. W. 553 (1895).

⁶⁰ *Metz v. Buffalo*, etc. R. Co., 58 N. Y. 61 [assignee in bankruptcy]. In *Kain v. Smith*, 80 N. Y. 458, reversing 11 Hun, 552, defendant assumed management of property in addition to that of which we was appointed receiver. Held, he was personally liable for its mismanagement. To same effect *Turner v. Hannibal*, etc. R. Co., 74 Mo. 602; *Brockert v. Central R. Co.*, 82 Iowa, 369, 47 N. W. 1026; *Howe v. St. Clair*, 8 Tex. Civ. App. 101, 27 S. W. 800; and other cases cited in *Thompson on Corporations*, §§ 6366, 7128, 7148. *Harris v. Quincy*, etc. Ry. Co., 124 Mo. App. 45, 101 S. W. (1907); *Parr v. Spartenburg*, etc. Railway Co., 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826 (1895); *Pennsylvania*, etc. R. Co. v. *Jones*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176 (1894).

⁶¹ *Campbell v. Stakes*, 2 Wend. 139; *Bullock v. Babcock*, 3 Id. 391

⁶² *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449 [negligent order of shipmaster]; *Morse v. Crawford*, 17 Vt. 499 [killing ox]; *Morain v. Devlin*, 132 Mass. 88 [nuisance]; *Cross v. Kent*, 32 Md. 581 [burning barn]; *Brown v. Howe*, 9 Gray, 84 [burning house]; *Beals v. See*, 10 Pa. St. 56; *Krom v. Schoonmaker*, 3 Barb. 647 [false imprisonment]; see *Williams v. Cameron*, 26 Id. 172; *Weaver v. Wood*, Hobart, 134.

without regard to their degree of incapacity,⁶³ are liable, in a civil action, for the damage caused by such acts of theirs as would, in sane adults, amount to a tort, of either willful wrong⁶⁴ or culpable negligence.⁶⁵ This liability rests, not upon the usual principle of personal fault (for there may be none), but upon the broad ground that, where one of two innocent persons must bear a loss, he must bear it whose act caused it.⁶⁶ There is of course no liability by persons *non compos*, or children without discretion, where intent is a necessary element of liability, but such cases are, in no proper sense, cases of negligence; nor can liability where it exists extend beyond actual damages.

§ 121a. Married women.—In actions for negligence the usual common-law presumption obtains as in criminal proceedings, that if a married woman commits, a tort in

[“willful” injury]; *Green v. Burke*, 23 Conn. 437 [negligence]. An infant as the owner or occupant of lands is under the same responsibility as any other person [boy of fourteen throwing squib]; *Fish v. Ferris*, 5 Duer, 49 [overdriving horse]; *Walley v. Holt*, 35 Law Times, 631 [same]; *Burnard v. Haggis*, 14 C. B. N. S. 45 [same]; *Huchting v. Engel*, 17 Wis. 230 [child under seven trespassing]; *Neal v. Gillett*, 23 Conn. 437 [negligence]. An infant as the owner or occupant of lands is under the same responsibility as any other person for a nuisance or for the negligent use or management of the property, although he may have a general guardian (*McCabe v. O'Connor*, 4 N. Y. App. Div. 354, 38 N. Y. Supp. 572 [dangerous wall]).

⁶³ *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. 230 [child under seven]; overruling the opinion expressed in *Wharton*, Negl., § 88.

⁶⁴ Most of the cases cited belong to this category.

⁶⁵ *Williams v. Hays*, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153 (1894), quoting with approval our old § 57, in which we argued this point. The law is otherwise held in New Hampshire (*Stack v. Cavanaugh*, 30 Atl. (N. H.) 350.

⁶⁶ *Williams v. Hays*, *supra*. “A doubtful application of a doctrine at best difficult to apply and honey-combed with exceptions” (*Watson on Damages for Personal Injuries*, § 728. See also *Bigelow on Torts* (8th ed.), 110; *Cooley on Torts*, § 99; *Street on Personal Injuries in Texas*, §§ 94–95; *Karow v. Continental Ins. Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. St. Rep. 17; *Bindell v. Kenton County Ins. Co.*, 108 S. W. (Ky.), 325 (1908).

the presence of her husband it is presumed to be by his coercion, and that he, not she, is liable. But as respects her liability this must depend on the evidence in the particular case. "The true view," says Mr. Bishop, "is that when the husband is present during the commission of a tort by the wife, whether himself actually participating in it or not, *prima facie*, the wrong shall be deemed his alone; but, both in civil and criminal causes, this *prima facie* case may be rebutted, and each of the two may be deemed, in law, the doer of the wrong, the same as though they were unmarried."⁶⁷ Both may be liable for a tort committed by the wife in the husband's absence, if done at his instigation.⁶⁸ But as regards the liability of the husband, he is always responsible for the wife's torts, as at common law,⁶⁹ unless it is otherwise provided by statute.

§ 122. Who are jointly liable. — If several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform or for performing it negligently.⁷⁰ Persons who co-operate in an act directly causing injury are jointly and severally liable for its consequences, if they acted in concert,⁷¹ or united

⁶⁷ Bishop Law of Married Women, vol. 2, par. 259; citing Marshall v. Oakes, 51 Me. 308; Warner v. Moran, 60 Me. 227; State v. Cleaves, 59 Me. 298; Carlton v. Heywood, 49 N. H. 314; Simmons v. Brown, 5 R. I. 229; Tobey v. Smith, 15 Gray 535. And in case of a joint battery citing Rodecap v. Sipe, 6 Grot. 213; Drury v. Dennis, Yelv. 206. See also 4 Black. 463, 2 Dana, 237, 44 Ill. 42, 3 B. & A. 685, 4 Bing. (N. C.) 96.

be had to the laws of the particular state. ⁷⁰ Ferguson v. Kinnoull, 9 Clark & F. 251.

⁷¹ Kansas City v. Slangstrom, 53 Kans. 431, 36 Pac. 706 [city and private corporation]; Elliott v. Field, 21 Colo. 378, 41 Pac. 504 [city and individual]; Brookville v. Arthurs, 152 Pa. St. 334, 25 Atl. 551 [borough and landowner]; Holley v. Torrington, 63 Conn. 426, 28 Atl. 613 [borough and town]. In Maine and Massachusetts, a town is not liable for injuries caused by defects in the highways, arising partly from the negligence of the town, and partly from that of a private per-

⁶⁸ Handy v. Foley, 121 Mass. 259.

⁶⁹ McQueen v. Fulgam, 27 Tex. 464 (1864); Zelif v. Jennings, 61 Tex. 458 (1884). See note 72 Am. Dec. 428. The subject is so largely affected by statute, reference must

in causing a single injury, even though acting independently of each other.⁷² Thus the proprietors of two vehicles, both of which are managed so carelessly as to injure a third person by their collision, are jointly liable for the damage done, although in no way connected in business together.⁷³ Two municipal corporations, each own-

son (*Richards v. Enfield*, 13 Gray, 344; *Rowell v. Lowell*, 7 Id. 100; *Alger v. Lowell*, 3 Allen, 402; *Shepherd v. Chelsea*, 4 Id. 113; *Moulton v. Sanford*, 51 Me. 127). But this is on the special ground that municipal corporations are liable in such cases only by force of the statute, and that the statute does not cover cases of such joint negligence. We presume that the third party in fault would be held liable for the entire damage (see *Smith v. Smith*, 2 Pick. 621; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Powell v. Deveney*, 3 Cush. 300; *Mott v. Hudson River R. Co.*, 8 Bosw. 345; § 345, *post*). Where an injury is the result of two concurring causes, the person who is responsible for one of these causes is not exempt because the person who is responsible for the other may be equally culpable (*Lake v. Milliken*, 62 Me. 240; *Lane v. Atlantic Works*, 107 Mass. 104; *Booth v. Boston, etc. R. Co.*, 73 N. Y. 38; *Harrison v. Great Northern R. Co.*, 3 Hurlst. & C. 231). Two railroad companies, jointly maintaining a bridge over a stream, are jointly liable for the consequences of an original error in its construction, whereby ice backs up and destroys a bridge above (*Covington v. United States, etc. R. Co.*, 8 N. Y. App. Div. 223, 40 N. Y. Supp. 313). *s. p.*, *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 119 Id. 583, 21 N. E. 972 [railroads jointly maintaining defective platform]; *Chicago, etc. R. Co. v. Ransom*, 56 Kans. 559, 44 Pac. 6

[trains in collision]; *Consol. Ice Machine Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799 [owner and contractor]; *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363 [same]; *Van Winkle v. American Steam Boiler Ins. Co.*, 52 N. J. Law, 240, 19 Atl. 472 [inspector of boiler]; *Guille v. Swan*, 19 Johns. 381; see *Williams v. Sheldon*, 10 Wend. 654; *Hawksworth v. Thompson*, 99 Mass. 77.

⁷² *Colegrove v. Harlem R. Co.*, 6 Duer, 382, 20 N. Y. 492; *Slater v. Mersereau*, 64 N. Y. 138; *Gray v. Pullen*, 5 Best & S. 790; see *Wabash, etc. R. Co. v. Shacklet*, 105 Ill. 364; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32; *Schaefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922. All persons who aid or assist in creating and maintaining a nuisance are liable for the damages (*Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556). So held, where electric wires, maintained concurrently by different parties, are so related to each other and so erected that one is likely to fall across the other, and produce destructive consequences (*McKay v. Southern Tel. Co.*, 111 Ala. 337, 19 So. 695; *Southwestern Tel. Co. v. Crank* [Tex. Civ. App.], 27 S. W. 38); and where live electric wires became entangled through the fault of two owners (*United Electric R. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863).

⁷³ *Colegrove v. Harlem R. Co.*, 20 N. Y. 492; *N. Y., Phila., etc. R. Co. v. Cooper*, 85 Va. 939, 9 S. E. 321;

ing half a bridge uniting their territories, are both liable for its negligent construction or management.⁷⁴ And so the owners of a party wall, dividing their two lots, are jointly liable for injuries sustained in consequence of its falling, through decay and want of repair.⁷⁵ And, where a master is liable for the tortious negligence of his servant, the latter is jointly liable with him.⁷⁶ In all these cases, the liability is several, as well as joint. Any one of the parties in fault can, therefore, be sued alone, and is responsible for the entire damage.⁷⁷ Joint negligence exists where two or more persons are jointly concerned in the negligence causing an injury. They may be thus concerned by their co-operating or acting together, or by being joint enterprisers, engaged in a common enterprise. The definition of joint tortfeasors generally applies. Concurrent, as distinguished from joint negligence, arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of

Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 6 S. W. 441; *Tompkins v. Clay*, etc. R. Co., 66 Cal. 163; *Kansas*, etc.

R. Co. v. Stoner, 49 Fed. 209, 4 U. S. App. 109, 1 C. C. A. 231. And where A. lent a wagon to B. and C., who each furnished a horse, and

then, at their invitation, A. rode with them, B. driving, it was held that all three were jointly liable for the negligence of B. in driving too fast (*Bishop v. Ely*, 9 Johns. 294). To the same effect is *Davey v. Chamberlain*, 4 Esp. 229. In *Smith v. Dobson* (3 Man. & Gr. 59), plaintiff's barge was sunk by a swell in the river, caused by two steamers, only one of which was owned by the defendant. The jury gave a verdict for £20, on the ground that, the total damage being £80, this was a fair proportion for the defendant's share in the transaction; and the

court refused to interfere with the verdict on plaintiff's motion.

⁷⁴ *Weiserbeng v. Winneconne*, 56 Wis. 667, 14 N. W. 871; *Lyman v. Hampshire*, 140 Mass. 311, 3 N. E. 211; *Brown v. Fairhaven*, 47 Vt. 386. See § 394, *post*.

⁷⁵ *Klauder v. McGrath*, 35 Pa. St. 128; *Tucker v. N. Y. Central*, etc. R. Co., 124 N. Y. 308, 26 N. E. 916 [fall of part of front wall of three buildings owned by defendants in severalty; all liable].

⁷⁶ *Phelps v. Wait*, 30 N. Y. 78; *Michael v. Alestree*, 2 Levinz, 172; *Steel v. Lester*, L. R. 3 C. P. Div. 121; *Campbell v. Portland Sugar Co.*, 62 Me. 552; *Mayer v. Thompson*, etc. Bldg. Co., 104 Ala. 611, 16 So. 620; *Green v. Berge*, 105 Cal. 52, 38 Pac. 539. See § 248, *post*.

⁷⁷ *Kain v. Smith*, 80 N. Y. 458, 468; *Roberts v. Johnson*, 58 Id. 613;

another person than the defendant contributes, concurs or co-operates to produce the injury is of no consequence. Both are ordinarily liable.⁷⁸ And unless the damage caused by each is clearly separable, permitting the distinct assignment of responsibility to each, each is liable for the entire damage. The degree of culpability is im-

Lyman v. Hampshire, 140 Mass. 311; (1907). If both parties are negligent, that one is responsible between Hume v. Oldacre, 1 Stark. 352, and cases, *supra*. whose negligence and the injury

⁷⁸ Mine owner not discharged from there was no intervening cause liability for neglect of statutory requirement because there was another concurrent cause of injury (Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 51 L. Ed. 708, 27 S. W. 412 (1907). Negligence not excused because concurring with Act of God the negligence of another (Sea Ins. Co. v. Vicksburg, etc. Ry. Co., 159 Ill. App. 647 (1906); Fledderman v. St. L. Trans. Co., 134 Mo. App. 199, 113 S. W. 1143 (1908); Brown v. West Riverside Coal Co., 120 N. W. (Iowa) 732 (1909). Concurring negligence of third person of no consequence, if the injury would not have been inflicted but for defendant's negligence (Schell v. Town of German Flats, 104 N. Y. Supp. 116, 54 Misc. Rep. 445 (1906); Fleddermann v. St. Louis Trans. Co., *supra*; Krehmayer v. St. Louis Trans. Co., 220 Mo. 639, 120 S. W. 78 (1909). To same effect, where defendant's negligence concurs with mere accident (Ill. Cent. Ry. Co. v. Siler, 229 Ill. 390, 82 N. E. 362 (1907); Birsch v. Citizens' Elec. Co., 36 Mont. 574, 93 Pac. 940 (1908). That there were other concurring causes constitutes no defense (Miller v. Boston & M. Ry. Co., 83 N. E. (Mass.) 900 (1908). Defendant liable only for result of his own negligence, and not for that of an independent concurring cause (Holmes v. Mo. Pac. Ry. Co., 207 Mo. 149, 105 S. W. 624 (1907). If both parties are negligent, that one is responsible between (Smith v. Norfolk, etc. Ry., 145 N. C. 98, 58 S. E. 799 (1908). Where property is destroyed by concurrent negligence of bailee and a third party, bailor may sue either or both, and neither can interpose as defense the negligence of another (Sea Ins. Co. v. Vicksburg, etc. Ry. Co., 159 Fed. 676, 86 C. C. A. 544 (1908). If defendants are separate trespassers and not joint, they cannot be joined (Breaux Bridge Lbr. Co. v. Hebert, 121 La. 188, 46 So. 206 (1908). Contributing causes are concurring causes where both were necessary to produce the injury (Welch v. Jackson, etc. Ry., 154 Mich. 399, 117 N. W. 898 (1908). Where the plaintiff is in doubt which defendant, or whether both defendants are liable, though negligence independent, they may be joined (Keeley v. Great Northern Ry. Co., 139 Wis. 448, 121 N. W. 167 (1909). Presence of another concurring cause does not preclude action against defendant whose negligence was an efficient cause (Miller v. Kelly Coal Co., 145 Ill. App. 452; s. c., 88 N. E. 196 (1909); Beaning v. South Bend Elec. Co., 90 N. E. (Ill. App.) 786 (1910); O'Brien v. J. G. White & Co., 105 Me. 308, 74 Atl. 721 (1909); Sweet v. Perkins, 196 N. Y. 482, 90 N. E. 50 (1909).

material.⁷⁹ And so when the injury is the result of the neglect to perform a common duty. Whether charged with joint or concurrent negligence all parties contributing to produce the injury by their responsible acts or omissions, may, at the option of plaintiff, be joined as defendants in the same action.⁸⁰

§ 123. Who are not jointly liable. — Persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the injuries thus committed are all inflicted at one time, and are precisely similar in character.⁸¹ Thus where a stream is polluted

⁷⁹ Sec. 31 and notes; Cooley on Ky. L. Rep. 792, 111 S. W. 356 Torts, (1st ed.) par. 684; White on (1908); Sea Ins. Co. v. Vicksburg, Personal Inj. on Railroads, § 1041; etc. Ry. Co., 159 Fed. 679; Ferguson Beven on Negligence, (3d ed.) par. 79; v. Truax, 110 N. W. (Wis.) 395 29 Cyc. 487; Slater v. Mersevan, 64 (1906); Strauhal v. Asiatic S. S. N. Y. 138; Taylor v. Yonkers, 105 Co., 85 Pac. (Ore.) 230 (1906); N. Y. 202; San Marcos Elec. Light, Parmelee Co. v. Wheelock, 224 Ill. etc. Co. v. Compton, 48 Tex. App. 194, 79 N. E. 652 (1906). The au- 587 [writ of error refused] (1908); thorities are not in harmony on the Chicago, etc. Ry. Co. v. Marshall, question whether a joint duty is a 38 Ind. App. 973, 75 N. E. 973 prerequisite to a joint liability (1905); Siegel-Cooper, etc. Co. v. (Clinger's Admx. v. Chesapeake, etc. Treka, 115 Ill. App. 56; Demarest Ry. Co., 33 Ky. L. Rep. 86, 109 S. W. v. Forty-Second St., etc. Ry. Co., 104 315 (1908) (Though several are App. Div. 503, 93 N. Y. Supp. 663; guilty of distinct acts of negligence, Galveston, etc. Ry. Co. v. Vollrath, if their concurring effect is to pro- 89 S. W. (Tex. App.) 279 (1905); duce the injury, they are all liable, Dunn v. Newberry, 86 S. W. (Tex. the action being to recover damages App.) 626 (1904); Oulighan v. But- for the injury and not for the acts). ler, 189 Mass. 207, 75 N. E. 726 Mead v. Zang Brewing Co., 43 Colo. (1905); Memphis Consol. Gas. Co. 1, 95 Pac. 284 (1908); Stephens v. v. Creighton, 183 Fed. 552 (1910); Louisiana Long Leaf Lbr. Co., 47 So. Fliege v. Kansas, etc. Ry. Co., 82 (La.) 887 (1908).

⁸⁰ Martin v. Seaboard, etc. Ry. ⁸¹ Williams v. Sheldon, 10 Wend. Co., 148 N. C. 259, 61 S. E. 625 654. Where, through the sole negli- 22 Rep. 666). But several trespass- gence of one of two persons engaged in a common purpose, an injury is done, the person actually the cause of the injury is alone liable (Boyd v. Insurance Patrol, 113 Pa. St. 269, 1908); Paducah Tr. Co. v. Sine, 33 ers, if a part of the same transaction,

by the discharge of sewage therein, by different parties, each from his own premises, and each acting separately and independently of the others, each is liable to the extent of the injury inflicted only by him, and not for all the injury suffered by plaintiff.⁸² So separate owners of animals cannot at common law be made jointly liable for different injuries committed by their animals respectively, though all happening as part of a single transaction.⁸³ And persons who separately rent different portions of a single building are not jointly liable for their negligent use of the premises.⁸⁴ A sheriff and his predecessor in office cannot be made jointly liable for the loss of property taken or held by either.⁸⁵

may be joined as trespass *vi et armis* to the person, trespass to property and *de bonis asportatis*, where it was charged that defendant entered plaintiff's house, assaulted her, and carried away her goods (*Stowers Furniture Co. v. Brake*, 48 So. (Ala.) 89 (1908)). In Pennsylvania it is held that a municipality cannot be joined with one charged with obstructing the highway (*Wiest v. Electric Tr. Co.*, 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666 (1901)).

⁸² *Chipman v. Palmer*, 77 N. Y. 51. "The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one tortfeasor should be liable for the acts of others with whom he is not acting in concert" (per Miller, J., *Ib.*). A joint judgment against both defendants not sustained, where there was no concert of action between them, nor a concurrent neglect of a duty common to both (*Chicago, etc. R. Co. v. Rolvink*, 31 Ill. App. 596; see

Independence v. Ott, 135 Mo. 301, 36 S. W. 624).

⁸³ *Auchmuty v. Ham*, 1 Den. 495; *Van Steenburgh v. Tobias*, 17 Wend. 562.

⁸⁴ Where persons occupy the same building, and have each the privilege to use the water pipes under his own right of use or occupation, each is held responsible only for damages resulting from negligence on his own part; and neither is responsible for the negligence of the others, though they may be jointly liable where their right is joint (*Moore v. Goedel*, 7 Bosw. 591; see *Eakin v. Brown*, 1 E. D. Smith, 36; *Payne v. Rogers*, 2 H. Blacks. 349).

⁸⁵ *New Orleans Ins. Asso. v. Harper*, 32 La. Ann. 1165. A deputy constable levied an execution upon the goods of another than the execution debtor. Held, that the constable, the deputy and the constable's sureties could not be joined in one action for the tort of the deputy (*Hoge v. Raymond*, 25 Kans. 665).

CHAPTER VIII.

DECEASED PERSONS.

- | | |
|--|--|
| <p>§ 124. No common-law remedy for injuries causing death.</p> <p>125. The statutory remedy.</p> <p>126. The English statute (Lord Campbell's act).</p> <p>127. Constitutional provisions.</p> <p>128. State statutes. (Also see Appendix.)</p> <p>129. [Omitted.]</p> <p>130. [Omitted.]</p> <p>131. Actions; when brought where injury occurred.</p> <p>132. Actions; when may be brought in another State.</p> <p>132a. State statutes enforceable in the Federal courts.</p> <p>133. Who may bring action.</p> <p>134. For whose benefit action may be brought.</p> <p>134a. Non-resident aliens as plaintiffs or beneficiaries.</p> | <p>§ 135. No action without surviving statutory beneficiary.</p> <p>135a. Abatement of action on death of beneficiaries.</p> <p>135b. Abatement of action on death of the wrongdoer.</p> <p>136. Illegitimates; when entitled to benefit of act.</p> <p>137. Pecuniary injury; how far essential to action.</p> <p>138. Miscellaneous points.</p> <p>139. Action the deceased would have had; effect of survival statutes.</p> <p>140. Effect of releases and settlements out of court.</p> <p>140a. Contributory negligence.</p> <p style="text-align: right;">(For Act of Congress and statutes of the States and decisions construing them see Appendix).</p> |
|--|--|

§ 124. No common-law remedy for injuries causing death. — The common law allowed of no remedy, by way of a civil action, for an injury causing the death of a human being.¹ Such injury must necessarily precede

¹A private *criminal* action was another, the taking of his life, is allowed in cases of murder. The last instance of this kind was the famous case of *Ashford v. Thornton* (1 Barn. & Ald. 405), in which the defendant insisted upon his right to trial by battle. The right of action was soon afterward taken away by statute. "It is a singular fact that by the common law the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy" (*Goodsell v. Hartford, etc. R. Co.*, 33 Conn. 55). "Since it is now established that in the courts of the United States no action at law can be maintained for such a wrong [causing death], in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime [LAW OF NEG. VOL. I—21] [321]"

death; and the law did not allow any cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant; and the death of the servant, therefore, worked no injury to the master of which the law could take notice. And, if the act causing death amounted to a felony, the general rule of the common law, forbidding any civil suit upon a felony, would alone have sufficed to exclude a claim for damages. Whatever may be said of these arguments, the conclusions thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife, or child, or in any other right or capacity, could maintain an action for damages on account of the death of a human being.²

nations generally, has established a different rule for the government of courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the United States courts, under the general maritime law" (Waite, C. J., *The Harrisburgh*, 119 U. S. 199; reaffirmed, *The Alaska*, 130 U. S. 201, 9 S. Ct. 461).

²The earliest reported decision upon this point was in an action for the battery of the plaintiff's wife, "whereby she died." It was held that the right of action was merged in the felony (*Higgins v. Butcher*, *Yelv.* 89, 1 *Brownl. & G.* 205). The first reported case of negligence in which the question arose was before Lord Ellenborough (*Baker v. Bolton*, 1 *Campb.* 493), who instructed the jury that the plaintiff, who sued for the loss of his wife's services, could only recover for his loss during her lifetime, although her death was caused by the defendant's negli-

gence. All the decisions in cases where an executor or administrator sought to maintain the action have been one way (*Whitford v. Panama R. Co.*, 23 N. Y. 465, aff'g 3 *Bosw.* 67; *Crowley v. Panama R. Co.*, 30 *Barb.* 99; *Beach v. Bay State Steamboat Co.*, 30 *Id.* 433). A husband cannot sue for the death of his wife (*Green v. Hudson River R. Co.*, 2 *Abb. Ct. App.* 277, aff'g 28 *Barb.* 9; *Eden v. Lexington, etc. R. Co.*, 14 *B. Mon.* 204; *Womack v. Central R. Co.*, 80 *Ga.* 132, 5 *S. E.* 63; *Grosso v. Delaware, etc. R. Co.*, 50 *N. J. Law*, 317, 13 *Atl.* 233), nor a wife for the loss of her husband (*Carey v. Berkshire R. Co.*, 1 *Cush.* 475; *Palfrey v. Portland, etc. R. Co.*, 4 *Allen*, 55 *Wyatt v. Williams*, 43 *N. H.* 102; *Hubgh v. New Orleans, etc. R. Co.*, 6 *La. Ann.* 495; *Herman v. New Orleans, etc. R. Co.*, 11 *Id.* 5; *State v. Baltimore, etc. R. Co.*, 69 *Md.* 339, 17 *Atl.* 88), nor a parent for the loss of his child (*Carey v. Berkshire R. Co.*, 1 *Cush.*

§ 125. **The statutory remedy.** — The multiplication of fatal accidents in later times, and the practical impossibility of securing the punishment of mere carelessness by means of criminal proceedings, induced the British legislature to interfere; and, by the statute known as “Lord Campbell’s Act,” passed in 1846, a remedy by civil action was given to the personal representative of every person killed by the fault of another, and leaving a parent, husband, wife, or child. Beginning with New York, in 1847, this statute has been in substance incorporated into the legislation of every American State; the points of difference being only in relation to the persons by whom or for whose benefit the action may be brought, the form of action (which in some cases is by indictment), and the measure of damages. Under any of these statutes, proof of death by the defendant’s act is not, *per se*, enough to warrant a recovery. There must be some proof of the defendant’s wrongdoing in the matter.³ And the death must appear to be the proximate result of his wrongful act or neglect.⁴

§ 126. **The English statute (Lord Campbell’s act).** — The English statute after which our own statutes are

475; *Sherman v. Johnson*, 58 Vt. 40; whose life was insured by the plain-
Sullivan v. Union Pacific R. Co., 1 tiff, the latter sued for the amount
McCrary C. C. 301; *Sheffer v. Min-* of the policy paid by it, as damages
neapolis, etc. R. Co., 32 Minn. 125; caused to it by defendant’s act. The
compare Edgar v. Costello, 14 S. C. action was not sustained.

20), nor a master for the death of ³ *Evans v. Newland*, 34 Ind. 112.
 his servant (*Osborn v. Gillett*, L. R. ⁴ *Wagner v. Woolsey*, 1 Heisk. 235;

8 Exch. 88). Neither can any one *Thompson v. Louisville, etc. R. Co.*,
 maintain an action for any indirect 91 Ala. 496, 8 So. 406; *Randall v.*
 loss which he sustains by the death New Orleans, etc. R. Co., 45 La.
 of another person, such for example, Ann. 778, 13 So. 166. In South Caro-
 as the loss which an insurer of the lina the statute is held to create a
 life sustains by that event (*Conn. new cause of action (Osteen v.*
Life Ins. Co. v. New Haven R. Co., Southern Ry. Co., 76 S. C. 368, 57
 25 Conn. 265; see § 115, note 6, S. E. 106 (1907). To the same ef-
ante). In *Mobile Life Ins. Co. v.* fect in Indiana, see *Wabash R. Co.*
Brame, 95 U. S. 754, the defendant v. Hassett, 83 N. E. 705 (1908).
 having willfully killed a person But in the District of Columbia it

largely modeled, is as follows: "Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." ⁵

§ 127. Constitutional provisions. — New York, Oklahoma, Pennsylvania, Utah, Kentucky, Mississippi and Wyoming by their constitutions declare that the right of action for damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be limited by statute. The Texas Constitution ⁶ gives a right of action for exemplary damages for "homicide through willful act or omission, or gross negligence." And by the constitution of Mississippi, it is declared that "where death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons." ⁷

§ 128. State statutes, "Injuries resulting in death" or "Death by wrongful act." — The legislatures of the several States are not uniform in their enactments as to whether or not punitive or exemplary damages are re-

is said the statute only removes a fit, the action might be brought.
common-law obstacle to recovery ⁶ Art. 16, § 26. See *Winnt v. International, etc. R. Co.*, 74 Tex. 32, 312, 9 L. R. A. (N. S.) 1078 (1907). 11 S. W. 907 (1889); *Ritz v. Austin*, ⁹ 9 & 10 Vict., c. xciii, § 1. In 1 Tex. Civ. App. 455, 20 S. W. 1029 1864, 27 and 28 Vict. xcv, the statute was amended in respect to the ⁷ Const. 1890, § 193.
parties by whom, or for whose bene-

coverable under their acts; but, of course, only such rights can be enforced as the statutes provide. The amount recoverable is fixed by the statutes of some States. Expressions frequently used are "such damages as may be fair and just," or "such damages as the jury may assess." Of the States fixing a maximum recovery in case of death, that of Massachusetts is the lowest, \$4,000, though the sum may be \$5,000 if there was conscious suffering prior to the death. Porto Rico has a limit of \$3,000. The largest limit named is \$10,000, which is fixed by the laws of the District of Columbia, Illinois, Indiana, Kansas, Missouri, Ohio, Virginia, West Virginia, and Wisconsin. In Oregon the amount recoverable is limited to \$7,500 and in New Hampshire to \$7,000. Arizona, Colorado, Connecticut, Maine, Minnesota, and Wyoming limit recovery to a maximum of \$5,000. In the other States no sum is named. The time within which the action must be brought is generally fixed, ranging from six months in Porto Rico to three years in Montana. Sixteen States have a limitation of one year and twenty-five of two years. Persons properly classifiable as beneficiaries must be found to bring the action, the persons so named by the English act being the wife, husband, parent or child of the deceased person. In most States, however, the use of the words "personal representatives" implies a less restricted class of beneficiaries, though the action is for the benefit of the heirs, and the amount recovered is in most instances not liable for the debts of the decedent.⁸

The statutes of the several States and the decisions upon them are embraced in the Appendix.

§§ 129 and 130. — (Omitted.)

§ 131. Action; when brought where injury occurred.— These statutes are not to be construed as giving a right

⁸ For statute of U. S., see Employers' Liability Act of 1908, Appendix.

of action upon injuries which occur outside of the jurisdiction of the State enacting the statute, and in a territory where no such rule of law prevails.⁹ Being contrary to the common law, it will not be presumed that similar statutes exist elsewhere;¹⁰ and therefore an action of this kind cannot be maintained, if the fatal injury occurred outside of the jurisdiction of the State in which the statute relied upon was enacted. The complaint, in such an action, ought to show affirmatively that the injury occurred within a territory where the law gives the remedy in such cases; and it states no cause of action, if it leaves this in doubt;¹¹ much more, if it shows that the injury occurred outside of the State, without averring a law in that place, giving a remedy.¹² It makes no difference in this respect that both parties to the injury were citizens of the State by which the statute was enacted, or that the wrongdoer was a corporation chartered by that State,¹³ or that the injury was caused by breach of a contract en-

* *Debevoise v. N. Y., Lake Erie*, 16 N. W. 351; s. p., applied to actions, under foreign statutes, for injuries not resulting in death; *Njus v. Panama R. Co.*, 23 Id. 465 [injury in New Granada]; *Crowley v. Panama R. Co.*, 30 Barb. 99; *Beach v. Bay State Steamboat Co.*, 30 Id. 433; *Vanderwerken v. New Haven R. Co.*, 27 Id. 244; *State v. Pittsburgh, etc. R. Co.*, 45 Id. 41; *Selma, etc. R. Co. v. Lacy*, 43 Ga. 461; *Woodard v. Michigan, etc. R. Co.*, 10 Ohio St. 121; *Hover v. Pennsylvania R. Co.*, 25 Id. 667; *Nashville, etc. R. Co. v. Eakin*, 6 Coldw. 582; *McCarthy v. Chicago, etc. R. Co.*, 18 Kans. 46; *Willis v. Mo. Pacific R. Co.*, 61 Tex. 432; *Belt v. Gulf, etc. R. Co.*, 4 Tex. Civ. App. 231, 22 S. W. 1062 [text quoted and followed]; *Alabama, etc. R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803; *Herrick v. Minneapolis, etc. R. Co.*, 31 Minn. 11; *Hyde v. Wabash, etc. R. Co.*, 61 Ia. 441,

tions, under foreign statutes, for injuries not resulting in death; Njus v. Chicago, etc. R. Co., 47 Minn. 92, 49 N. W. 527; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. 69; *Alabama, etc. R. Co. v. Fulghum*, 87 Ga. 263, 13 S. E. 649.

¹⁰ *Debevoise v. N. Y., Lake Erie, etc. R. Co.*, 98 N. Y. 377; *Armstrong v. Beadle*, 5 Sawy. 484, and cases under last note.

¹¹ *Beach v. Bay State St. Co.*, 30 Barb. 433.

¹² *Debevoise v. N. Y., Lake Erie, etc. R. Co.*, 98 N. Y. 377; *Kahl v. Memphis, etc. R. Co.*, 95 Ala. 337, 10 So. 661; *Jackson v. Pittsburgh, etc. R. Co.*, 140 Ind. 241, 39 N. E. 663.

¹³ *Whitford v. Panama R. Co.*, 23 N. Y. 465, 3 Bosw. 67; *Crowley v. Panama R. Co.*, 30 Barb. 99.

tered into in that State,¹⁴ or (except in Michigan¹⁵) that the decedent was brought into the State while living.¹⁶ But if the injury happened at sea, the statutory action will lie, if the vessel was at the time within the maritime jurisdiction of a State having such a statute,¹⁷ or if the vessel was duly registered there.¹⁸

§ 132. Actions; when may be brought in another State. — If such an action is authorized by the law of the State where injury occurred, it may be brought in any State having a substantially similar law;¹⁹ unless

¹⁴ Cases under last note. In *Belt v. Gulf, etc. R. Co.*, 4 Tex. Civ. App. 231, 22 S. W. 1062, the injuries causing death were inflicted in the Indian Territory by decedent's fellow servant; both were employed in Texas by the defendant, which was chartered in Texas, and the road was operated by orders issued from offices in that State. Held, nevertheless, an action could not be maintained for the death in Texas, upon a dissimilar statute of the Indian Territory.

¹⁵ In Michigan, the statute provides that though the injury was inflicted on the high seas or in any other navigable waters, or on land without the State, yet if the injured person died within the State, in consequence of such injury, the criminal offense may be prosecuted in the State (*Howell's Stat.*, 1882, § 9420).

¹⁶ *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *De Ham v. Mexican R. Co.*, 22 S. W. (Tex. App.) 249 [injury occurred in Mexico, which gives no such remedy].

¹⁷ *Mahler v. Norwich, etc. Tr. Co.*, 35 N. Y. 352. In that case, the injury occurred on a sloop, sunk by a collision in Long Island Sound, within a short distance of the New York shore. Held (rev'g 45 Barb. 226),

that the State court had jurisdiction, as the sound was a mere inland arm of the sea. New York courts will entertain an action for death caused on board a British ship on the high seas, founded on the English statute (*Cavanagh v. Ocean Steam Nav. Co.* [Sp. T.], 13 N. Y. Supp. 540, 19 Civ. Pro. R. 391), or on board a vessel lying in a foreign port not more than two miles from shore, provided such death is actionable by the law of the foreign country (*Geoghegan v. Atlas S. S. Co.* [Com. Pl.], 3 Misc. 224, 22 N. Y. Supp. 749).

¹⁸ So held in England (*The Explorer*, L. R. 3 Adm. 289), and in New York (*McDonald v. Mallory*, 77 N. Y. 546). There the injury occurred on a New York registered steamer, on a voyage to Galveston. Held, that an action would lie under the statute in New York. "The *locus in quo* was not within the actual territorial limits of any State or nation, nor was it subject to the laws of any government, unless the rule which exists from necessity is applied, that every vessel on the high seas is constructively a part of the territory of the nation to which she belongs, and its laws are operative on board of her" (per *Rapallo, J.*).

¹⁹ *Texas, etc. R. Co. v. Cox*, 145

prohibited by statute of the State where brought, as in

U. S. 593, 12 S. Ct. 905; *Western, etc. Ry. v. Strong*, 52 Ga. 461; *So. Carolina R. Co. v. Nix*, 68 Id. 572; *Hanna v. Grand Trunk Ry. Co.*, 41 Ill. App. 116 (Illinois action entertained on the Canadian statute, the "policy of the statutes of both being the same"); *Burns v. Grand Rapids, etc. R. Co.*, 113 Ind. 169, 15 N. E. 230; *Cincinnati, etc. Ry. Co. v. McMullen*, 117 Ind. 439; *Morris v. Chicago, etc. Ry.*, 65 Iowa, 727; *Bruce v. Cincinnati, etc. Ry. Co.*, 83 Ky. 174; *Wooden v. Western, etc. Ry. Co.*, 126 N. Y. 10, 26 N. E. 1050; *Leonard v. Columbia Nav. Co.*, 84 N. Y. 48; *Debevoise v. N. Y., Lake Erie, etc. R. Co.*, 98 Id. 377, 50 Am. Rep. 683; *Nashville, etc. Ry. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852; *Nelson v. Chesapeake, etc. R. Co.*, 88 Va. 971. Since the right of action in Arkansas is so dissimilar to that in Texas, the Texas courts will not undertake to enforce a cause of action arising under the Arkansas statute (*St. Louis, etc. R. Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540; *Keep v. Nat. Tube Co.*, 154 Fed. 121 (1907)). Courts will enforce in such actions the statutes of another State unless contrary to the public policy of their own State (*Christensen v. Florentine Pulp Co.*, 92 Pac. (Nev.) 210 (1907)). In *Illinois* by an amendment of 1903 it is provided, "that no action shall be brought or presented in this State to recover damages for a death occurring outside of this State." This has been construed to prohibit the enforcement of the death statute of another State (*Stephen v. Ill. Cent. Ry.*, 128 Ill. App. 90 (1906)). But not to prohibit jurisdiction in Illinois where the wrongful act occurred in that State, though the injured party died in Indiana (*Crane v. Chicago, etc. Ry. Co.*, 233 Ill. 259, 84 N. E. 222 (1908)). With singular liberality it is held that such an action may be maintained in *Indiana* to enforce the Illinois statute, notwithstanding this act (*Wabash Ry. Co. v. Hassett*, 83 N. E. (Ind.) 705 (1908)). Suit will only lie, where the cause of action arose in another State, when action could be maintained there (*Gurofsky v. Lehigh Valley Ry. Co.*, 105 N. Y. Supp. 514, 121 App. Div. 126 (1907)); and must be brought in the names of the persons to whom the right of action is given by statute in the State where it [the injury] occurred (*Hoodmacher v. Lehigh Valley Ry. Co.*, 218 Pa. 21, 66 Atl. 975; *Le Bar v. New York, etc. Ry. Co.*, 218 Pa. 266, 67 Atl. 413 (1907)). In *Arkansas* to enforce the Missouri statute of 1899 (*Ann. St. 1908*, p. 1644); *St. Louis, etc. Ry. v. McNamara*, 91 Ark. 515, 122 S. W. 102 (1909); and for injury inflicted in the *Indian Territory* (*St. Louis, etc. Ry. v. Corman*, 122 S. W. (Sup. Ct. Ark.) 116 (1909)). In *Missouri* under the Kansas statute (*Newlin v. St. Louis, etc. Ry.*, 121 S. W. (Mo.) 125 (1909); *Piles v. Mo. Pac. Ry. Co.*, 125 S. W. (Mo.) 553 (1910)). In *New York* for death caused in *Canada* (*Johnson v. Phenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953 (1910)). In *Georgia* to enforce the Alabama statute (Code 1896, § 27; *So. Ry. Co. v. Decker*, 5 Ga. App. 21, 62 S. E. 678 (1908)). In *Massachusetts* on the New York and Connecticut statutes (*Chandler v. New Haven, etc. R. Co.*, 159 Mass. 589, 35 N. E. 89, and *Higgins v. Cent., etc. Ry. Co., infra*; *Walsh v. Boston, etc. Ry. Co.*, 201 Mass. 527, 88 N. E. 12 (1909)). In *Texas* on the Tennessee statute

Illinois, or the statute sought to be enforced is penal in its nature,²⁰ or contrary to the public policy of the State, to abstract justice or pure morality.²¹ The rationale of the rule allowing recovery in such cases is the exercise of comity and the promotion of justice.

§ 132a. State statutes enforceable in the Federal courts. — The Federal courts exercise an even greater liberality in the enforcement of State statutes than has been shown by some, at least, of the State courts. It has been said the general doctrine established is that liability is enforceable in the Federal forum, having jurisdiction of the subject-matter and the parties, whenever “a right of action has become fixed and a legal liability incurred.”²² Indeed, in the case last cited, the consideration, whether “the statute of the State in which the cause of action arose is in substance inconsistent with the statutes and public policy of the State in which the right of action is sought to be enforced,” was expressly pretermitted on the ground of its immateriality. The jurisdiction of the Federal courts in such case is not, it has been said, limited by a proviso in the State statute

(*St. Louis, etc. Ry. Co. v. Sizemore*, 116 S. W. (Tex. App.) 403 (1909). The statutes of West Virginia and the District of Columbia will not be enforced in *Maryland* on account of essential differences (*Ash v. Baltimore & O. Ry. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461 (1890); *Darenberg v. Harris et al.*, 72 Atl. (Md.) 81 (1909). In *New York* it has been held that where the injury was inflicted in another State and all the parties are *now* residents, though the defendant has a small amount of property within the State, the action will not be sustained (*Pietravoia v. N. J., etc. Ry. Co.*, 116 N. Y. Supp. 249, 131 App. Div. 829 (1909).

a railroad company may be punished by a fine or “assessed” for damages for negligently causing death. Being penal, no action will lie upon it in Rhode Island (*O'Reilly v. N. Y. & New England R. Co.*, 16 R. I. 388, 17 Atl. 906) or Vermont (*Adams v. Fitchburg R. Co.*, 67 Vt. 76, 30 Atl. 687).

²¹ *Higgins v. Central, etc. Ry. Co.*, 155 Mass. 176, 29 N. E. 574 (1892).

²² *Larussi v. Missouri Pac. Ry. Co.*, 155 Fed. 654; s. c. (C. C. A.), 161 Fed. 66 (1908). See, also, *Chicago, etc. R. Co. v. Whitton*, 13 Wall. 270; *American Steamboat Co. v. Chase*, 16 Id. 522; *Harper v. Norfolk, etc. R. Co.*, 36 Fed. 102; *Goff v. Norfolk, etc. R. Co.*, 36 Id. 299.

²⁰ By Mass. St. (ch. 112, § 212)

that the damages are recoverable in the State courts only.²³

§ 133. Who may bring action.—The action is to be brought by the party to whom the right of action is given by the statute. It is not thought of sufficient general interest to give, in this place, the diverse provisions of the several State statutes which designate the particular persons, or class of persons, to whom the right of action is given. The statutes are given in full in the appendix, together with the construction of the courts where enacted. In general, it may be said that most of the States give the right of action to the decedent's personal representatives, *i. e.*, the executor of his will or the administrator of his goods, etc.;²⁴ while in others it is given to his legal representatives, or else directly to the person or persons for whose benefit the remedy is afforded.

§ 134. For whose benefit action may be brought.—These statutes are not designed for the benefit of cred-

²³ Chicago, etc. Ry. Co. v. Whitlow, 23 Id. 900; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 563-605, 13 Wall. 270; American Steamboat Co. v. Chase, 16 Id. 522; Harper v. Norfolk, etc. Ry. Co., 36 Fed. 102; Goff v. Norfolk, etc. R. Co., 36 Fed. 299; Weaver v. Baltimore, etc. R. Co., 21 D. C. 499. The proviso of the Wisconsin statute, § 4255, requiring an action under it to be brought in a court of Wisconsin, has been held, by a Federal court, void as a condition on the right previously granted, which would operate to exclude the jurisdiction of Federal courts (Bigelow v. Nickerson, 17 C. C. A. 1, 70 Fed. 113). As to jurisdiction of admiralty courts, independent of statute, see The Harrisburg, 119 U. S. 199, 7 S. Ct. 140; The Alaska, 130 U. S. 201, 9 S. Ct. 461; The Columbia, 27 Fed. 704;

²⁴ This is the meaning of statutes giving "personal representatives" the right to sue (Kramer v. Market St. R. Co., 25 Cal. 435; Indianapolis, etc. R. Co. v. Stout, 53 Ind. 143; Needham v. Grand Trunk R. Co., 38 Vt. 294; Whiton v. Chicago, etc. R. Co., 21 Wis. 310). The "legal and personal representatives," as used in the Mississippi Constitution, are held to mean the executors or administrators (Illinois Cent. R. Co. v. Hunter, 70 Miss. 471, 12 So. 482).

itors of the deceased. By providing, as nearly all these statutes do, for a particular distribution of the recovery, creditors are excluded.

§ 134a. Non-resident aliens as plaintiffs or beneficiaries. — Non-resident aliens have been held entitled to recover in every State where the question has been presented,²⁵ except in Pennsylvania,²⁶ Wisconsin²⁷ and Indiana.²⁸ The statute of Pennsylvania, by its terms, extends the right of recovery to all the beneficiaries named without excepting aliens resident abroad. But aliens resident abroad are excluded by the construction placed on the act by the courts of that State, and this construction is followed by the Supreme Court of the United States, in conformity with the rule making such decisions binding on the Federal courts,²⁹ while in Illinois, where the terms of the statute are not materially different in this regard, pursuant to the same rule, the same court holds directly to the contrary.^{29a} In several States the right of non-resident aliens to sue is treated as too clear to require argument.^{29b}

²⁵ *Mahoning Ore, etc. Co. v. Blom-N. W. 433, 106 Am. St. Rep. 925, felt, 163 Fed. 827 (1908); Kanecko 66 L. R. A. 19 (1904).*

*v. Atchison, etc. Ry. Co., 164 Fed. 163 (1908); Saveljick v. Lytle Logging, etc. Co., 173 Fed. 277, 97 C. C. A. 443 (1909); Philes v. Missouri, etc. Ry. Co., 141 Mo. App. 561, 125 S. W. 553 (1910); Anustasakas v. International Const. Co., 41 Wash. 119, 98 Pac. 93 (1908), (previously the statute had been different construed in *Roberts v. Great Northern Ry. Co., 161 Fed. 239 (1908).**

²⁶ *Deni v. Pennsylvania, etc. Ry. Co., 181 Pa. St. 525, 37 Atl. 558, 59 Am. St. Rep. 676 (1897).*

²⁷ *McMillan v. Spider, etc. Lbr. Co., 115 Wis. 322, 91 N. W. 979, 95 Am. St. Rep. 947, 60 L. R. A. 589 (1902).* But see *Robertson v. Chicago, etc. Ry. Co., 122 Wis. 66, 99*

N. E. (Ind. App.) 839 (1904); Mudhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934 (1900).

²⁸ *Maiorano v. Baltimore, etc. Ry. Co., 213 U. S. 268 (1909); Zeiger v. Pennsylvania Ry. Co., 158 Fed. 809, 86 C. C. A. 69 (1908); Fulco v. Schuylkill Stone Co., 163 Fed. 124 (1908).*

^{29a} *Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 199 (1902).*

^{29b} *Philpot v. Ry. Co., 85 Mo. 164; Chesapeake Ry. Co. v. Higgins, 85 Tenn. 620, 4 S. W. 47; Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Luke v. Calhoun County, 52*

§ 135. No action without surviving statutory beneficiary.—The action cannot be maintained at all under the statutes of England, New York, Indiana or any similar ones, unless the deceased left at least one surviving relative of the class specified in the statute.³⁰ Where, as in New York, Vermont, New Jersey, North Carolina, Ohio, Illinois and Michigan, the statute uses the conjunctive form, and allows an action for the benefit of “a widow and next of kin,” the action can be sustained where there is a widow but no kindred of the deceased,³¹

Ala. 115; Pittsburg, etc. Ry. Co. v. (Stewart v. Terre Haute, etc. R. Co., Naylor, 73 Ohio St. 115, 76 N. E. 103 Ind. 44, 2 N. E. 208; Missouri 505, 3 L. R. A. (N. S.) 473, 112 Am. Pac. R. Co. v. Barber, 44 Kans. 612, St. Rep. 701 (1906); Szymansky v. 24 Pac. 969; Louisville, etc. R. Co. v. Bloomingthal, 3 Pennw. (Del.) 558, Pitt, 91 Tenn. 86, 18 S. W. 118; East 52 Atl. 347 (1902); Romano v. Capital City, etc. Co., 124 Ia. 591, 101 Tenn. 563, 18 S. W. 243; Lilly v. N. W. 437, 68 L. R. A. 132, 106 Am. Charlotte, etc. R. Co., 32 S. C. 142, St. Rep. 323 (1904); Tanas v. Municipal Co., 88 App. Div. 251, 84 N. Y. Pac. R. Co., 45 Fed. 407 [a Montana case]]. Where all beneficiaries perished in a common disaster, no right of action accrued (Gibbs v. Hannibal, etc. Ry. Co., 82 Mo. 143. Webster v. Norwegian Min. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 218, 51 S. E. 449 (1905); Vetahoro v. Perkins, 101 Fed. 393 (1900); Min. Co., 13 S. D. 489, 83 N. W. 370 Ferrara v. Aurie Min. Co., 95 Pac. (1900); Willis, etc. Co. v. Grizzell, (Colo.) 925 (1908); Davidson v. 198 Ill. 313, 65 N. E. 74, rev'g Hill, 2 K. B. D. 606 (1901), superseding Adam v. British, etc. S. S. Chicago, etc. Ry. Co., 102 Wis. 137, Co., 2 Q. B. 430 (1898); Mulhall v. 77 N. W. 748, 78 N. W. 771, 44 L. Fallon, 176 Mass. 266, 57 N. E. 386, R. A. 579 (1899); Chicago, etc. Ry. 79 Am. St. Rep. 309, 54 L. R. A. 934 Co. v. La Porte, 33 Ind. App. 691, (1900). 71 N. E. 166 (1904); Western Union Tel. Co. v. McGill, 57 Fed.

³⁰ Safford v. Drew, 3 Duer, 627; Lucas v. N. Y. Central R. Co., 21 Barb. 245; Commonwealth v. Boston, etc. R. Co., 121 Mass. 36; Chicago, etc. R. Co. v. Morris, 26 Ill. 400; see Andrews v. Hartford, etc. R. Co., 34 Conn. 57. The complaint must allege the existence of such kin

699, 6 C. C. A. 521, 21 L. R. A. 818; Thompson v. Chicago, etc. Ry. Co., 104 Fed. 845. See Walton v. Burchel, 121 Tenn. 715, 121 S. W. 391 (1907).
³¹ See Oldfield v. Harlem R. Co., 14 N. Y. 310.

or where he leaves kindred but no widow.³² In Vermont, New Jersey, Ohio, Illinois, Michigan and Indiana, the statute mentions only widows and next of kin as entitled to its benefits. A husband, not being, as such, of kin to his wife, is therefore not within the benefit of the statute; if the deceased left a husband only the action cannot be maintained.³³ Such was the law in New York until April, 1870, when an act was passed including husbands among the beneficiaries of the statute.³⁴

§ 135a. Abatement of action on death of beneficiary.—

Some of the statutes provide that the action shall abate on death of the beneficiaries. Where there is no such provision the decisions, being interpretative of statutes, variously expressed, are not uniform.³⁵

³² *Oldfield v. Harlem R. Co.*, 14 N. Y. 310; *Quin v. Moore*, 15 Id. 432; *Tilley v. Hudson River R. Co.*, 24 Id. 471; *McMahon v. New York*, 33 Id. 642; *Lyons v. Cleveland, etc. R. Co.*, 7 Ohio St. 336; *Chicago v. Major*, 18 Ill. 349.

³³ *Lucas v. N. Y. Central R. Co.*, 21 Barb. 245; *Georgia R. Co. v. Wynn*, 42 Ga. 331; *Scott v. Central R. Co.*, 77 Id. 450; *Snell v. Smith*, 78 Id. 355; see *Dickins v. N. Y. Central R. Co.*, 23 N. Y. 158; *Watson v. St. Paul City Ry. Co.*, 70 Minn. 514, 73 N. W. 400 (1902); *Gottlieb v. New Jersey, etc. Ry. Co.*, 71 N. J. L. 47, 58 Atl. 1088 (1904).

³⁴ In New York, "next of kin" includes all those entitled to a share of unbequeathed assets, under the statute of distributions, except a husband or wife (*Code Civ. Pro.*, § 1870).

³⁵ (*Ala.*) Under Alabama Code of 1907, §§ 2486, 3912, the personal representative can only sue for acts or omissions causing death; allegations of pain and suffering are demurrable, such cause of action not surviving to administrator (*Whit-*

man v. Ala. Consol. Coal & I. Co., 51 So. (Ala.) 397 (1909). (*Conn.*) Action survives for the exclusive benefit of the estate of the beneficiary who was entitled at the date of the death negligently caused (*Waldo v. Goodsell*, 33 Conn. 432. (*Ga.*) Georgia code of 1895, § 3825, provides action shall not abate by death of either "plaintiff" or "defendant," and has reference to pending litigation; hence, if parent entitled to bring suit for death of his son shall die without doing so, the action abates (*Frazier v. Georgia Ry. Co.*, 101 Ga. 77, 28 S. E. 662 (1898). (*Ind.*) The Indiana statute provides, "A father (or in case of his death, etc.) may maintain an action," etc.; held, that the action survives the death of the father and rests in his executor (*Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425 (1892). (*La.*) In Louisiana, where the statute reads, "in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or

§ 135b. Abatement of action on death of the wrongdoer. — In conformity with the common-law rule in personal injury cases, it is generally held that the action abates on the death of the wrongdoer unless otherwise

either of them;" held, on death of the widow not to survive for the benefit of children of full age (*Huberwald v. Orleans Ry. Co.*, 50 La. Ann. 477, 23 So. 474 (1898). (*Mo.*) The Missouri statute provides, if the deceased be a minor, and unmarried, the action may be brought by the father and mother, or, "if either of them be dead, then by the survivor," and that "each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor;" held, the mother having died pending the suit, the father was entitled to continue the action and recover the full amount of the penalty prescribed, \$5,000 (*Seen v. Southern Ry. Co.*, 124 Mo. 621, 28 S. W. 66 (1895); construing the statute of Missouri, *Rev. St.* 1899, §§ 2864-65; *Ann. St.* 1906, pp. 1637-1644, and *Act of* 1897, p. 96; *McMurray v. St. Louis, etc. Ry. Co.*, 225 Mo. 272, 125 S. W. 751 (1910), where injury was caused by the negligence of a fellow servant; but not being a fellow servant with the employee causing the fatal injury, such right did not abate his death (*Id.*). (*Mont.*) The statutes of survival do not create a new cause of action, and are, therefore, only applicable to pre-existing rights; hence do not apply to the action for recovery of damages which the deceased himself had unless such right of action is elsewhere given by statute (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960 (1909), but holding that such action does survive, in case of an employee negligently killed by a railroad company, under *Act of* 1905, *Rev. Codes*, § 5221. (*N. J.*) Action survives for the exclusive benefit of the estate of the beneficiary who was entitled at the date of the death negligently caused (*Cooper v. Shore Elec. Co.*, 63 N. J. Law, 558, 44 Atl. 633 (1899). (*N. Y.*) Under the New York code, where the terms used are "has left, him or her surviving, a husband, wife, or next of kin," etc., where the father died pending an action for recovery on account of his daughter's death; held, that the action would survive for the exclusive benefit of his estate (*Meekin v. Brooklyn, etc. Ry. Co.*, 164 N. Y. 165, 58 N. E. 50, 31 N. Y. Civ. Proc. 239, 79 Am. St. Rep. 635, 51 L. R. A. 235 (1900). (*Ohio*) The right of action for death (*Rev. St.* Ohio, §§ 6134-6135) is not such a "property" right as will pass to him or next of kin (*Doyle v. Baltimore & O. Ry. Co.*, 81 Ohio St. 184, 90 N. E. 165 (1910). (*Tenn.*) The beneficial interest rests in the "widow, and, in case there is no widow, to his children," etc.; and where, pending an action for the use of the widow, she dies; held, the action cannot be revived for the benefit of the children (*Louisville, etc. Ry. Co. v. Bean*, 94 Tenn. 388, 29 S. W. 370 (1895), and *Saunders v. Louisville, etc. Ry. Co.*, 111 Fed. 708, 49 C. C. A. 595 (1901). (*Texas*) The Texas statute provides, "The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused," etc.; held, the right of action sur-

provided by statute.³⁶ In Alabama, Arizona, Georgia, Iowa, Mississippi, North Carolina, Texas and Virginia, and perhaps a few other States, it is specially provided by statute that the action shall not abate on the death of the wrongdoer, but shall survive against his estate. In Texas it is held, in construing the peculiar terms of the statute, that the action does not survive against the estate unless it was commenced in the lifetime of the wrongdoer.³⁷

§ 136. Illegitimates; when entitled to benefit of act. —

Where, as in England, Maine, New Hampshire, Massachusetts, Maryland, Pennsylvania, Louisiana, Georgia, Alabama, Missouri and Kansas, and other States, the statute specifies the "child" of the deceased, an illegitimate child is not within the description;³⁸ but in Ohio, where the statute gives the recovery to the "next of

vives to the remaining beneficiaries upon the death of any one of them pending an action by all, to the exclusion of the heirs and personal representatives of the deceased beneficiary (*Texas Loan Agency v. Fleming*, 18 Tex. App. 668, 46 S. W. 63 (1898)). (Wis.) Where parent alone is entitled and dies without having instituted suit, the action abates (*Schmidt v. Menasha Wood-eware Co.*, 99 Wis. 333, 74 N. W. 816 (1898)).

³⁶ *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192 (1891); *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25 (1885); *Moe v. Smiley*, 125 Pa. St. 136, 17 Atl. 228, 3 L. R. A. 341 (1889); *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73 (1907).

³⁷ *Johnson v. Farmer*, 89 Tex. 610, 35 S. W. 1062 (1897).

³⁸ An illegitimate child is not within the 9 & 10 Viet. ch. 93, giving a right of action for the benefit of

the wife, husband, parent, or child of a person whose death has been caused by wrongful act, neglect, or default (*Dickinson v. Northeastern R. Co.*, 2 Hurlst. & C. 735). A bastard is not a child, within the Indiana statute giving a father a right of action for death of a child (*McDonald v. Pittsburgh, etc. R. Co.*, 144 Ind. 459, 43 N. E. 447). One who marries the mother of a bastard child, which he receives into his home as a member of his family, cannot sue for the death of the child (*Thornburg v. American Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062). Under the Missouri statute, 1889, § 4425, providing that if the deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, the father and mother may join in the suit, and each shall have an equal interest in the judgment; only natural born legitimate children are intended, and no action can be

kin," and another statute makes an illegitimate child heir to its mother, if the latter leaves no lawful child, an illegitimate child so left is entitled to the benefit of the statute.³⁹ And the statute being the same in New York,⁴⁰ we have no doubt that the same decision will be made there whenever the case arises, inasmuch as the reasoning appears to us conclusive. In Texas it has been held that the mother is entitled to recover for the death of her illegitimate child.⁴¹ The contrary is held in Louisiana.⁴²

§ 137. Pecuniary injury; how far essential to action.—

Although the statutes of New York and of most other States upon this subject are substantially like that of England, they have not been construed with entire uniformity. In England, it is held that pecuniary injury to some one of the relatives of the deceased, specified in the statute, is an indispensable element of the cause of action, and that, without evidence of such injury, the action is not maintainable, even for nominal damages; indeed, nominal damages in such an action are deemed inadmissible.⁴³ In New York, however (the words of the statute upon this point being at that time exactly the same as in the English statute), it was held that such evidence was not at all essential to the cause of action, and that nominal damages, at least, were recoverable in every case of death by a wrongful act or default; and this is the universal law in this country.⁴⁴ It follows, as

maintained by a mother for the death of her bastard child (Marshall v. Wabash R. Co., 46 Fed. 269). ⁴³ Duckworth v. Johnson, 4 Hurlst. & N. 653.

³⁹ Muhl v. Southern, etc. R. Co., 10 Ohio St. 272. ⁴⁴ Oldfield v. Harlem R. Co., 14 N. Y. 310; Quin v. Moore, 15 Id. 432; Tilley v. Hudson River R. Co., 24 Id. 471; s. c., 29 Id. 252; McIntyre v. N. Y. Central R. Co., 37 Id. 287; O'Mara v. Hudson River R. Co., 38 Id. 445; Ihl v. Forty-second St. R. Co., 47 Id. 317; Bierbauer v. N. Y. Central R. Co., 15 Hun, 559,

⁴⁰ N. Y. Stat. 1855, ch. 547.

⁴¹ Galveston, etc. Ry. Co. v. Walker, 106 S. W. (Tex. App.) 705 (1908).

⁴² Lynch v. Knoop, 118 La. 611, 43 So. 252, 8 L. R. A. (N. S.) 480 (1907).

a matter of course, that the action can be sustained without showing that any of the relatives for whose benefit the action is brought were dependent upon the decedent for support,⁴⁵ and although the decedent left neither widow nor children having a legal claim for support. It is only necessary to show that some one of such beneficiaries exists.⁴⁶ It is not necessary, even in England, to show that the relatives have lost by the death something to which they had a legal title. The action is maintainable if they had a reasonable expectation of an advantage from the continuance of the life of the de-

77 N. Y. 588; *Harlinger v. N. Y. Central R. Co.*, 92 Id. 661; *Houghkirk v. Delaware, etc. Canal Co.*, 92 Id. 219. The fact that next of kin are not able to show any direct, specific pecuniary loss arising from the death of a person by negligent act, does not affect their right to recover, but the condition and circumstances both of deceased and of the next of kin are to be considered, and the best estimate possible made therefrom (*Lockwood v. N. Y., Lake Erie, etc. R. Co.*, 98 N. Y. 523); *s. p.*, *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Lyons v. Cleveland, etc. R. Co.*, 7 Ohio St. 336; *Donaldson v. Mississippi, etc. R. Co.*, 18 Ia. 280; *Andrews v. Chicago, etc. R. Co.*, 86 Id. 677, 53 N. W. 399; *Atchison, etc. R. Co. v. Weber*, 33 Kans. 543, 6 Pac. 877; *Chicago, etc. R. Co. v. Shannon*, 43 Ill. 338; *Chicago v. Keefe*, 114 Id. 222; *Illinois Cent. R. Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *Korraday v. Lake Shore, etc. R. Co.*, 131 Ind. 261, 29 N. E. 1069. To the same effect, *Barksdale v. Seaboard Air L. Ry. Co.*, 78 S. C. 183, 56 S. E. 906 (1907).

⁴⁵ *Keller v. N. Y. Central R. Co.*, 2 Abb. Ct. App. 480. This proposition was necessarily involved in the de-

cision of *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. Harlem R. Co.*, 14 Id. 310; *Birkett v. Knickerbocker Ice Co.*, 110 Id. 504, 18 N. E. 108; *Keenan v. Brooklyn R. Co.*, 145 N. Y. 348, 40 N. E. 15. The same decision has been made in other States (*Chicago v. Major*, 18 Ill. 349, and cases cited under last note). In Michigan, Wisconsin, Nebraska and Colorado, whose statutes, substantially identical, allow damages "with reference to the pecuniary injury," it is held that pecuniary injury must be alleged and proved (*Coops v. Lake Shore, etc. R. Co.*, 66 Mich. 448; *Hurst v. Detroit R. Co.*, 84 Id. 539, 48 N. W. 44; *Charlebois v. Gogebic, etc. R. Co.*, 91 Mich. 59, 51 N. W. 812; *Topping v. St. Lawrence*, 86 Wis. 526; *Orgall v. Burlington, etc. R. Co.*, 46 Neb. 4, 64 N. W. 450; *Denver, etc. R. Co. v. Wilson*, 12 Colo. 20, 20 Pac. 340). On the question of the damages recoverable in an action for death, see §§ 766-772, *post*.

⁴⁶ *Safford v. Drew*, 3 Duer, 627; *Chicago, etc. R. Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 Id. 68; *Lake Shore, etc. R. Co. v. Hes-sions*, 150 Id. 546; *Indianapolis, etc. R. Co. v. Keeley*, 23 Ind. 133.

ceased, capable of appreciation in pecuniary values.⁴⁷ And as the English statute contemplates the injury to individuals, rather than to a class, an action may be maintained where the death causes a pecuniary loss to one or more of the relatives, even though it should cause a gain to the others equal to or exceeding the loss of the former.⁴⁸ In States where the remedy is given directly, *e. g.*, to a father or mother for the death of a child, but upon condition of being dependent upon the decedent for support, proof of such dependence is necessary to maintain the action.⁴⁹

§ 138. Miscellaneous points.—In some of the States the statute specifies the time within which an action for injuries causing death should be begun. In others the statute is silent on the subject. Where this is the case, the rule is that the time begins to run from the date of the death.⁵⁰ The time is governed by the law of the place where the injury occurred, not by that of the State where the action is brought.⁵¹ Such statutes are gen-

⁴⁷ *Franklin v. Southeastern R. Co.*, 3 Hurlst. & N. 211; *Dalton v. Southeastern R. Co.*, 4 C. B. N. S. 296; *Pym v. Great Northern R. Co.*, 4 Best & S. 396. Compensation for pecuniary injury (*Bremer v. Minneapolis, etc. Ry. Co.*, 96 Minn. 469, 105 N. W. 494 (1905); *Hach v. St. Louis, etc. Ry. Co.*, 208 Mo. 581, 106 S. W. 525 (1907); *Fowler v. Chicago, etc. Ry. Co.*, 234 Ill. 619, 85 N. E. 298 (1908); *Atchison, etc. Ry. Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205 (1905); *Hirschkovitz v. Pennsylvania Ry. Co.*, 138 Fed. 438 (1905); *Hopper v. Denver, etc. Ry. Co.*, 155 Fed. 273, 84 C. C. A. 21 (1907).

⁴⁸ *Pym v. Great Northern R. Co.*, 4 Best & S. 396.

⁴⁹ The Georgia Code gives the right of recovery to a father or mother for

death of a child on whom he or she was dependent, or who contributed to his or her support. It is not enough to show merely that decedent contributed to a parent's support. (*Clay v. Central R. Co.*, 84 Ga. 345; 10 S. E. 967); though it is not necessary that the parent should have been wholly dependent (*Daniels v. Savannah, etc. R. Co.*, 86 Ga. 236, 12 S. E. 365). See decisions under *McCarthy v. New England Order, etc.*, 153 Mass. 314; *Daly v. New Jersey Steel Co.*, 155 Id. 1; *Hodnett v. Boston, etc. R. Co.*, 156 Id. 86, 30 N. E. 224.

⁵⁰ *Waldo v. Goodsell*, 33 Conn. 432; see *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Atlanta, etc. R. Co. v. Venable*, 67 Ga. 697.

⁵¹ *Weaver v. Baltimore, etc. R. Co.*,

erally construed as a condition precedent.⁵² In a suit by minor child for death of the father, it has been held, under the Arkansas statute, that the loss sustained in care, instruction, training and attention might be considered.⁵³ And so it has been held in California that minor children were entitled to recover value of mother's "nurture, instruction, moral and physical, and intellectual training."⁵⁴ It has also been held in Idaho and Montana that loss of comfort, happiness and companionship may be considered in estimating amount of damages.⁵⁵ The general rule, however, is that loss of comfort, happiness and companionship cannot be considered in suit by either husband or wife,⁵⁶ but that the measure of damages, where the action is by the wife, is the pecuniary value of what the husband would have contributed for her maintenance and support;⁵⁷ and in case of suit by the husband, the value of her services less the cost of her maintenance;⁵⁸ and in case of suit by the minor child the value of such maintenance, nurture and education as the deceased parent would probably have contributed;⁵⁹ and in case of an action by the surviving parent or parents on account of the loss of a minor child, the value of his services during minority, less cost of nurture, maintenance and education, and such further

21 D. C. 499; *DeValla DeCosta v.* (1903); *I. & G. N. Ry. Co. v. Mac-So. Pac. Co.*, 167 Fed. 654 (1909); *Veaugh*, 99 Tex. 28, 87 S. W. 328 (1905).

Johnson v. Phenix Bridge Co., 118 N. Y. Supp. 88, 133 App. Div. 807 (1909). ⁵⁷*Gray v. Phillips*, 117 S. W. (Tex.) 870 (1909).

⁵²Stat. 1842, ch. 89, Stat. 1882, ch. 165. ⁵⁸*Gorton v. Harmon*, 152 Mich. 473, 116 N. W. 443 (1908); *Gulf, Colorado, etc. Ry. Co. v. Southwick*, 30 S. W. 592 (1895); *Stevenson v. W. M. Ritter Lbr. Co.*, 108 Va. 575, 62 S. E. 351, 18 L. R. A. (N. S.) 316 (1908). But see *Duncan v. St. Luke's Hosp.*, 98 N. Y. Supp. 867, 113 App. Div. 68, aff'd, 192 N. Y. Mont. 521, 100 Pac. 971 (1909). 580, 85 N. E. 1109 (1908).

⁵³*Duke v. St. Louis, etc. Ry.* 172 Fed. 684 (1909).

⁵⁴*Johnson v. Southern Pac. Ry. Co.*, 97 Pac. (Cal.) 520 (1908).

⁵⁵*Anderson v. Great Northern Ry. Co.*, 15 Ida. 513, 90 Pac. 91 (1908). *Mize v. Rocky Mount. Tel. Co.*, 38 Mont. 521, 100 Pac. 971 (1909).

⁵⁶*Merchants & Planters' Oil Co. v. Burns*, 96 Tex. 573, 74 S. W. 758 (1906). ⁵⁹*Tex., etc. Ry. Co. v. Green*, 42 Tex. App. 216, 95 S. W. 694 (1906).

contributions, if any, as he would probably have made to them.⁶⁰ It has been held in Texas that failure to instruct that cost of maintenance and education of minor should be deducted from damages allowed for killing parent is reversible error.⁶¹ Where particular susceptibility to disease exists, and such disease has in truth been super-induced by defendant's negligence, the statute applies.⁶² Many questions arising under the various statutes relating to the measure of damages, the right to exemplary and punitive damages, are reserved, as more properly belonging to the chapter on Damages. The subject of contributory negligence, in connection with this class of actions, has already been treated (§ 62).

§ 139. Action the deceased would have had; effect of survival statutes. — Statutes have been enacted in several States, beginning with Massachusetts⁶² and followed in New Hampshire, Connecticut, Delaware, Kentucky, Tennessee, Arkansas, Iowa, Louisiana and South Dakota, providing for the survival and continuance, to his personal representative, of the right of action which a person killed by an injury would have had in case he had not died as distinguished from that given in behalf of enumerated beneficiaries for death caused by wrongful act or omission. In Massachusetts, Montana and Mississippi, it is held that such a statute does not give to the representatives a right to sue upon an injury which caused instantaneous death, upon the ground that the deceased could never have had a cause of action for his own death.⁶³ If the deceased lingered, even for the shortest appreciable space of time, it is held that he had

⁶⁰ *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85 (1888).

^{62a} Stat. 1842, ch. 89; Stat. 1882, ch. 165.

⁶¹ *Galveston, etc. Ry. Co. v. Olds*, 112 S. W. (Tex. App.) 787 (1908).

⁶³ *Hollenbeck v. Berkshire R. Co.*, 9 Cush. 478; *Kearney v. Boston &*

⁶² N. Y. Code of Civ. Proc., § 1902; *Worce. R. Co.*, Id. 108; followed in *McCahill v. N. Y. Trans. Co.*, 120 N. Y. Supp. 135, — App. Div. 322 (1909).

many cases, *e. g.*, *Mulcahey v. Washburn Car Wheel Co.*, 145 Mass. 281, 14 N. E. 106; *Beckman v. Georgia*

clearly indicates an intention on the part of the legislature to exclude from the recovery of the representative all compensation for death, since otherwise the party in fault would be required to pay for the same injury twice over.⁶⁸ In Kentucky this difficulty is solved by holding that the representative can recover only actual damages while the family can recover exemplary damages.⁶⁹ The latter reasoning would not be satisfactory where, as is generally the case, exemplary damages are not recoverable at all. In Iowa where the statute provides in the simplest possible terms for a survival of the right of action, the representative is entitled to recover full (though not punitive) damages, even in case of instantaneous death;⁷⁰ and such also is the rule in Louisiana.⁷¹ Under any of the other statutes that we have mentioned, it is of no importance whether the decedent died instantly from the effect of the injury or lingered for some time.⁷²

⁶⁸ *Belding v. Black Hills, etc. R. Co.*, 3 S. Dak. 369, 53 N. W. 750.

⁶⁹ *Givens v. Kentucky Cent. R. Co.*, 89 Ky. 231, 12 S. W. 257.

⁷⁰ *Connors v. Burlington, etc. R. Co.*, 71 Iowa, 490, 32 N. W. 465.

⁷¹ In Louisiana, where an infant child is negligently run over by an engine, and instantly killed, a cause of action accrues to the child and survives to the parents; but the right to recover punitive damages does not survive (*Hamilton v. Morgan's S. S. Co.*, 42 La. Ann. 824, 8 So. 586).

⁷² *Brown v. Buffalo, etc. R. Co.*, 22 N. Y. 191; *Reed v. Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289; *Haley v. Mobile, etc. R. Co.*, 7 Baxter, 239; *International R. Co. v. Kindred*, 57 Texas, 491; *Nashville, etc. R. Co. v. Prince*, 2 Heisk. 580; *overruling Louisville, etc. R. Co. v. Burke*, 6 Coldw. 45. In Maine, the death *must* be instantaneous to give

a statutory right of action; because, if it were *not* instantaneous, the cause of action survived, independent of statute (*Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660; *State v. Grand Trunk R. Co.*, 61 Me. 114); *Broughel v. Southern, etc. Tel. Co.*, 72 Conn. 617, 45 Atl. 435 (1900); *Worden v. Humeston, etc. Ry. Co.*, 72 Iowa, 201, 33 N. W. 629 (1893); *International, etc. Ry. Co. v. Kindred*, 57 Tex. 491; *Sternenberg v. Mailhos*, 99 Fed. 43, 39 C. C. A. 409 (1900); *Malott v. Shimer*, 54 N. E. (Ind.) 101 (1909). Where the parents sued for the value of the services of a minor child, employed without consent in a dangerous service, death being instantaneous, held that such an action could not be maintained at common law, and that as an action under the statute it would be subject to the defense of contributory negligence (*Gulf, etc. Ry. Co. v. Beall*, 91 Tex. 310, 42 S. W. 1054,

§ 140. **Effect of releases and settlements out of court.** — Where the right of action is given only by a survival statute (that is, continuing the right of the injured person, after his death), it is too plain for argument that a release from the deceased in his lifetime is a bar to any action.⁷³ But, furthermore, it has been held, under the broader statutes, that the foundation of every action of this kind is in the injury which caused the death, and not merely in the fact of death itself; and, therefore, that if an injured person recovers damages for that injury during his lifetime,⁷⁴ or releases his claim,⁷⁵ or (under peculiar English statutes) if he had contracted with his employer that the benefit of the statute should not be claimed,⁷⁶ his representatives cannot maintain any action upon his subsequent death resulting from the injury. A release given to the person liable, by all those entitled to the amount recoverable for death caused by a wrongful act, has been held, in Minnesota, a bar to a subsequent action brought by the personal repre-

66 Am. St. Rep. 892, 41 L. R. A. 807 (1899); Perkins v. Oxford Paper Co., 104 Me. 109, 71 Atl. 476 (1908).

⁷³ Price v. Richmond, etc. R. Co., 33 S. C. 556, 12 S. E. 413.

⁷⁴ Littlewood v. New York, 89 N. Y. 24; overruling Schlichting v. Wintgen, 25 Hun, 626.

⁷⁵ Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Dibble v. N. Y. & Erie R. Co., 25 Barb. 183; see the result of the appeal in this case, 23 N. Y. 484; Fowlkes v. Nashville, etc. R. Co., 5 Baxt. (Tenn.) 663; see, however, Southern, etc. R. Co. v. Sullivan, 59 Ala. 272. The effect of the decision in Robinson v. Canadian Pac. R. Co. (1892 App. Cas. 481,

rev'g 19 Can. S. C. 292) on these cases is worth consideration; for it recognizes death as a new and separate cause of action.

⁷⁶ Griffiths v. Earl Dudley, L. R. 9 Q. B. Div. 357. In Iowa, where the statute gives a remedy to railroad employees for injuries caused by negligence of other employees, it is expressly provided that no agreement exempting the company from liability shall be binding (Iowa Stat. 1888, § 1307; so by Wis. Rev. Stat. 1878, § 1816; repealed in 1880). Under the Iowa statute, a contract exempting a railroad company from liability for injury to a passenger is invalid (Rose v. Des Moines Valley R. Co., 39 Iowa, 246).

sentative of deceased.⁷⁷ But not so in Indiana.⁷⁸ Certainly all the parties in interest must unite in such release to make it an effectual bar.⁷⁹ A release from the party having the first right to sue is conclusive against others, having only a subordinate right.⁸⁰ The effect of a recovery by one person upon the right of action of another upon the same death varies, under different statutes.⁸¹

§ 140a. Contributory negligence. — As the action can only be maintained where the deceased if he had survived could have recovered for injury wrongfully inflicted, it follows that contributory negligence of the deceased is a complete defence; and it has so been uniformly held.⁸² It also follows that the same variant rules apply in different jurisdictions in determining the contributory negligence of children, with and without discretion, and of imputing or not imputing to them the negligence of the parent as would be applied in those jurisdictions had the child survived and the action have been for its own benefit. Contributory negligence on

⁷⁷ *Sykora v. Casé Mach. Co.*, 59 Minn. 130, 60 N. W. 1008. Where the contract of membership in the relief department of a railroad provides that the acceptance of benefits should bar all claims for damages, the surviving wife receiving such benefits is thereby debarred from recovery in her own right, but such receipt will not bar her action as administratrix for the benefit of her minor children (*Chicago, etc. Ry. Co. v. Healy*, 111 N. W. (Neb.) 598, 10 L. R. A. (N. S.) 198 (1907); *Gipe v. Pittsburgh, etc. Ry. Co.*, 82 N. E. (Ind.) 471 (1907). Settlement in good faith by administrator, having authority, binding, though made without knowledge of beneficiary (*Aho v. Jesmore*, 101 Minn. 449, 112 N. W. 538, 10 L. R. A. (N. S.) 998 (1907).

⁷⁸ *Yelton v. Evansville, etc. R. Co.*, 134 Ind. 414, 33 N. E. 629.

⁷⁹ An action by an administrator for the wrongful death of his intestate "for the use and benefit of the widow and children," cannot be compromised by the widow without the consent of the children or administrator (*Knoxville, etc. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. 348).
⁸⁰ *Holder v. Nashville, etc. R. Co.*, 92 Tenn. 142, 20 S. W. 537.

⁸¹ Compare *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016; *Hecht v. Ohio, etc. R. Co.*, 132 Ind. 507, 32 N. E. 302; *Nelson v. Galveston, etc. R. Co.*, 78 Tex. 621, 14 S. W. 1021; *Putnam v. Southern Pac. R. Co.*, 21 Oreg. 230, 27 Pac. 1033.

⁸² Construing the Alabama statute (*Moore v. Carter*, 152 Fed. 146, 81 C. C. A. 365 (1907)). See also

the part of a particular beneficiary will defeat his right to recover, but will not affect that of others so entitled.⁸³

The rule in New York, and some other States, requiring the plaintiff to prove freedom from contributory negligence has not been abrogated in its application to injuries resulting in death, though there were no witnesses; yet, in such cases, it is said, slight evidence will suffice to support the issue.⁸⁴ In like manner it has been held in Massachusetts, where the same rule obtains, that while the burden of proof is on plaintiff to show that deceased exercised due care, yet, when there are no witnesses to the accident, due care may be inferred from circumstances fairly excluding negligence.⁸⁵ Elsewhere it has been said that the presumption of due care by deceased is one of fact and it is for the jury to say whether it has been overcome.⁸⁶

Shannon v. Chicago, etc. Ry. Co., 125 Ill. App. 537 (1907).

⁸³ Alabama, etc. Ry. Co. v. Burgess, 116 Ala. 509, 22 So. 913 (1897); St. Louis, etc. Ry. Co. v. Dawson, 68 Ark. 1, 56 S. W. 46 (1900); Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206 (1895); Wiese v. Remme, 140 Mo. 289, 41 S. W. 797 (1897); Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321 (1901); Wolf v. Lake Erie, etc. Ry. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812 (1897); Bomberger v. Citizens St. Ry. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486 (1895); Mo., etc. Ry. Co. v. Evans, 16 Tex. App. 68, 41 S. W. 80 (1897); Ploof v. Burlington Tr. Co., 70 Vt. 509, 41 Atl. 1017, 45 L. R. A. 108 (1899).

⁸⁴ Jones v. Ryon, 109 N. Y. Supp. 156, 125 App. Div. 282 (1908); Gallagher v. N. Y. City Ry. Co., 109 N. Y. Supp. 515, 124 App. Div. 868 (1908); Boye v. N. Y. City Ry. Co., 110 N. Y. Supp. 393, 126 App. Div.

248. Where the evidence points as much to the negligence of the deceased as to its absence, or in neither direction, there can be no recovery (Lamb v. Union Ry. Co., 195 N. Y. 260, 88 N. E. 37 (1909)).

⁸⁵ Prince v. Lowell Elec., etc. Corp., 201 Mass. 276, 87 N. E. 558 (1909); Haynes v. Boston Elev. Ry. Co., 204 Mass. 249, 90 N. E. 419 (1910); Harrison v. N. Y., etc. Ry. Co., 196 N. Y. 86, 87 N. E. 802 (1909). There must be, however, some evidence of the exercise of ordinary care by deceased (City of Chicago v. Carlin, 141 Ill. App. 118 (1908); Stollery v. Cicero, etc. Ry. Co., 243 Ill. 290, 90 N. E. 709 (1910); but Illinois has altered the rule by amendment of the statute, § 362, placing the burden of showing contributory negligence on the defendant (Chicago, etc. Ry. Co. v. Ginther, 90 N. E. (Ind. App.) 911 (1910)).

⁸⁶ Gray v. Chicago, etc. Ry. Co., 121 N. W. (Ia.) 1097 (1909); Brown v. West Riverside Coal Co., 120 N. W. (Ia.) 732 (1909).

PART II.

LIABILITIES ARISING OUT OF PERSONAL RELATIONS.

CHAPTER IX. LIABILITY OF MASTERS FOR SERVANTS.

X. LIABILITY OF MASTERS TO SERVANTS.

XI. LIABILITY OF SERVANTS.

CHAPTER IX.

LIABILITY OF MASTERS FOR SERVANTS.

- | | |
|--|--|
| <p>§ 141. General rule of liability.
142. Principle of the rule.
143. Relation of master and servant.
144. Agency necessary to create responsibility.
145. Master's liability for servant's acts under implied authority.
146. Master liable for acts in course of employment.</p> | <p>§ 147. What acts are within employment.
147a. Deviation by the servant.
148. Master not liable for acts outside of employment.
149. [Omitted.]
150. Liability for servant's willful acts.
151. Ostensible authority for willful acts.
152. [Omitted.]</p> |
|--|--|

- | | |
|--|--|
| <p>§ 153. Willful acts; when consequence of negligence.</p> <p>154. Liability or negative results of willful acts.</p> <p>154a. Dangerous agencies and instrumentalities entrusted to servant.</p> <p>155. Disobedience of master's orders.</p> <p>156. [Omitted.]</p> <p>157. Liability for sub-agents or strangers.</p> <p>158. Implied liability of owner of vehicle.</p> <p>159. Ownership of other property; how far implies liability.</p> <p>160. Who is to be deemed master.</p> <p>160a. There cannot be two masters as to the same act.</p> <p>161. Nominal master when not liable.</p> <p>162. Liability for servant hired out.</p> <p>163. Liability of trustees and receivers for employee's acts.</p> <p>164. Who is a "contractor."</p> <p>165. When contractor and when servant.</p> | <p>§ 166. Effect of employer's control over contractor.</p> <p>167. Effect of right of dismissal.</p> <p>168. Employer not liable for contractor's negligence.</p> <p>169. Negligence of subcontractor and part contractor.</p> <p>170. [Omitted.]</p> <p>171. Employer liable for servants selected by him.</p> <p>172. Liability for servant compulsorily employed.</p> <p>173. Liability of owner for persons employed on land.</p> <p>174. Liability of employer for his own fault.</p> <p>175. Employer liable for the act contracted for.</p> <p>176. Omission of duty not excused by contracting to have it done.</p> <p>(The compensation Acts of Wisconsin and Massachusetts are given in full in the Appendix as specimens of this legislation).</p> |
|--|--|

§ 141. General rule of liability. — It is an old and thoroughly established doctrine that, where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants, in the course of their employment as such.¹ This liability is not confined to the

¹ *Whiteley v. Pepper*, L. R. 2 Q. B. 67 Id. 379; *Simonton v. Loring*, 68 Me. Div. 276; *Coughtry v. Globe Woolen* 164; *The Rheola*, 22 Blatchf. 124; *Co.*, 56 N. Y. 124; *Kennedy v. Ryall*, 124; *Tuel v. Weston*, 47 Vt. 634;

mere negligence of servants, but extends also to their willful acts, though unauthorized or even forbidden by the master, so far as such acts deprive third persons of a benefit which the master was bound to confer upon them, or, for any other reason, have occurred in the course of the servant's employment. This responsibility for willful wrongs, not authorized by the master, may still fall under the law of negligence. The master may be considered in such case guilty, not of the wrongful act itself, but only of neglect to restrain his servant from committing it.²

§ 142. Principle of the rule.—The principle which lies at the foundation of this rule has been differently stated in several judicial opinions;³ and the abstract

Phelon v. Stiles, 43 Conn. 426; Oil for him, assumes all the risks of a Creek, etc. R. Co. v. Keighron, 74 wrongful execution of his duties" Pa. St. 316 [servant let oil car come into collision with a locomotive (per Allen, J., in Mott v. Consumers' Ice Co., 73 N. Y. 543). The master's which set fire to the car, burning liability "is wholly irrespective of plaintiff's house]; Andrews v. Boe- any contract, express or implied, or decker, 126 Ill. 605, 18 N. E. 651, any other relation between the and cases, *infra*. injured party and the master" (per

² See §§ 153, 154, *post*.

³ "The reason of [the rule] is that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act" (per Lord Chelmsford, in Bartonshill Coal Co. v. McGuire, 3 Macq. H. L. 306). "The responsibility of the master for the acts of a servant rests upon the express or implied authorization of the act by the master, who, in the employment of another to act the defendant. A servant is an

Grier, J., in Philadelphia, etc. R. Co. v. Derby, 14 How. U. S. 468, 485). "It is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant" (N. Y., Lake Erie, etc. R. Co. v. Steinbrenner, 47 N. J. Law, 161). In Wilson v. Owens (16 L. R. Ir. 225), Dowse, B., says: "There is no material difference whether the party committing the injury is a servant or agent of the defendant. A servant is an

justice of the rule itself has been occasionally questioned.* But the soundness of the principle and the necessity of the rule, which we have inherited from the Roman law,⁵ have received new and convincing illustrations in the immense development of modern corporations. If the rule of *respondeat superior*⁶ were now to be abrogated, it would be almost impossible to carry on the present

agent. The principal is responsible for the act of his agent, and this case is only an application of the doctrine of '*respondent superior*.' See Cooley on Torts, 539. The rule "is founded on the soundest considerations of public policy, and which the courts are not at liberty to relax" (per Thompson, J., in Siegrist v. Arnot, 10 Mo. App. 197). "The rule is necessary to prevent fraud and encourage confidence in dealing" (per Tenney, C. J., Stickney v. Munroe, 44 Me. 204).

"We never apply this rule [*respondeat superior*] without a sense of its hardships on the master; but it has been settled on a broad balancing of reason and equities, and *judicis est dicere, non donare, legem*" (per Fenner, J., Shea v. Reems, 36 La. Ann. 966). "It is very important that the principle [*respondeat superior*] should be upheld and maintained for the sake of the general security of society, yet it is often attended with much seeming hardship. To visit a man with heavy damages for the negligence of a servant, when he is able to show that he exercised all possible care and precaution in the selection of him, is apt to strike the common mind as unjust" (per Sharswood, J., Hays v. Millar, 77 Pa. St. 238). In

Collett v. Foster, 2 Hurlst. & N. 356, where a client was made liable for the tortious acts of his attorney in the conduct of a suit, though he was wholly ignorant of the particular act, Bramwell, B., expressed a great desire to limit the doctrine of *respondeat superior*, so as to make the actual wrongdoer alone responsible. See also Smith v. Keal, L. R. 9 Q. B. Div. 340.

"The true explanation of the doctrine seems to be historical, dating back to the period of the Roman law when servants were slaves, for whom the *pater familias* was responsible, as part of his general responsibility for the family which he represented and governed" (2 Kent Com. (12th ed.) 260, note 1).

The term *respondeat superior* is not, in truth, the statement of a rule at all; it is rather the statement of the result or consequence of applying the legal maxim *qui facit per alium, facit per se* in the law of torts. Jurists of the historical school insist that it is an exception to the juristic maxim *culpa tenet suos auctores tantum*; but, says Mr. Beven, "There is no reason to doubt that the recognition of a liability of the master for the torts of the servant is pretty well coeval with the recognition of the master's liability

complex business of society. Every person having any pecuniary responsibility would shelter himself behind the forms of a corporation, which would, in such case, be free from all responsibility for the negligence and violence of its agents, without direct evidence of authority for their acts; while such evidence could be, in almost every instance, suppressed. In short, the rule is one of those elementary ones, established so early in the history of civil society that the evils which led to its establishment have utterly passed away, leaving scarcely a trace in history; and it is precisely such rules and principles which are most questioned in modern times, simply because no human memory and no written record enables us to recall the state of facts out of which reason developed them.⁷

§ 143. Relation of master and servant. — Who may be masters and servants? All persons and corporations employing others may be masters, and all natural persons agreeing for a valuable consideration to render service to another and obey his instructions in any lawful business may be servants. The characteristic distinguishing the relation is the retention by the master of the right to determine “not only what shall be done, but how it shall be done.”⁸ The test at any particular time

in contract.” He adds that it was applied in the Year Books, 2 H. IV, 18, pl. 6.

⁷“No reason for the rule, or at any rate no satisfactory one, is commonly given in the books” (Pollock on Torts (8th ed.) p. 77). For its historical development see Prof. Wigmore’s article, 7 Har. Law Rev. 315–385. Also admirable exposition by Prof. Floyd R. Mechem, “Employer’s Liability,” American Law Review, March and April, 1910.

⁸26 Cyc. 966–7; New Orleans, etc. Ry. Co. v. Hanning, 15 Wall. 649, 21 Ed. 220; Indiana Iron Co. v. Cray,

19 Ind. App. 565, 48 N. E. 803 (1897); Moffet v. Koch, 106 La. 371, 31 So. 40 (1900); Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017 (1891). The construction in Singer Mfg. Co. v. Rahn, 132 U. S. 518, holding that the relation was created by a “canvasser’s salary contract,” seems at variance with the general rule that capacity to make contracts for his employer differentiates the agent from the servant. But the facts of the case are so imperfectly reported as greatly to detract from its authority (see Bigelow on Torts (8th ed.) p. 54; Wal-

is said to be whether one has subjected himself to the orders of another and become liable to his discharge for disobedience or misconduct.⁹ It has been held that, as regards the public, one who holds out another as his servant, or who knowingly accepts his services, may be liable as master by virtue of the doctrine of estoppel.

§ 144. Agency necessary to create responsibility.—

No one is responsible for the act or omission of another unless that other is his agent.¹⁰ The relation of parent or child is not of itself enough to make the parent re-

lace v. Southern Oil Co., 91 Tex. 18, 40 S. W. 389 (1897); Jacobs v. Phillip-Henrici Co., 137 Ill. App. 171 (1907); Walker v. Tex. & N. O. R., 112 S. W. (Tex. App.) 430 (1908).
⁹ Frerker v. Nicholson, 41 Colo. 12, 92 Pac. 224, 13 L. R. A. (N. S.) 1122 (1907); Chicago v. Gothman, 139 Ill. App. 253, aff'd, 226 Ill. 9, 86 N. E. 152 (1908); Yeates v. Ill. Cent. R. Co., 241 Ill. 205, 89 N. E. 338 (1909). Authority to control at the very time and in respect to the very transaction, is the test (Bryson v. Phila. Brewing Co., 209 Pa. 40, 57 Atl. 1105 (1904); Riggs v. Standard Oil Co., 130 Fed. 199 (1904); Thayer v. Checkly (C. C. A.), 127 Fed. 556 (1904); Thorn v. Williams, 84 N. Y. Supp. 296. *Post*, § 160a.

¹⁰ See § 65, *ante*. To render one liable for the negligence of another, the relation of master and servant, or principal and agent, must exist (Stevens v. Armstrong, 6 N. Y. 435; McGuire v. Grant, 25 N. J. Law, 356; Penn. R. Co. v. Russ, 57 Id. 126, 30 Atl. 524; Larock v. Ogdensburgh, etc. R. Co., 26 Hun, 382; Fisher v. Metropolitan R. Co., 34 Id. 433). "It is absolutely essential, in order to establish a liability

against a party for the negligence of others, that the relation of master and servant should exist" (Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755). *s. p.*, McCullough v. Shoneman, 105 Pa. St. 169; Thorp v. Minor, 109 N. C. 152, 13 S. E. 702. The fact that a railway company permitted an engine to be run on its tracks by a contractor in performing his contract with third parties does not render it liable for an injury occurring through his negligent operation of such engine (City, etc. R. Co. v. Moores, 80 Md. 348, 30 Atl. 643); Holmes v. Union Tel. Co., 62 Hun, 618, 16 N. Y. Supp. 563 [licensor of use of telegraph poles not liable for licensee's negligence]; Fluker v. Georgia R. Co., 81 Ga. 461, 8 S. E. 529 [license]. The superintendent and an inmate of a hospital do not sustain towards each other the relation of master and servant (Schrubbe v. Connell, 69 Wis. 476, 34 N. W. 503). A servant may so serve two independent masters that both shall be liable (Illinois Cent. R. Co. v. King, 69 Miss. 852, 13 So. 824; Fisher v. Cook, 125 Ill. 280, 17 N. E. 763). *s. p.*, Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834 [leased mine].

sponsible for the negligence of even a minor child¹¹ in his custody and care, much less for that of an adult child.¹² Nor is the child responsible for any act of the parent, as such.¹³ Neither does the relation of husband and wife, of itself, bring either of them within the scope and meaning of this chapter. Under the rules of the common law the husband was often liable for his wife's torts; but that liability stands upon a different ground from the liability of a master for the act of his servant; and it does not now exist in most of the United States. The wife never was liable for the torts of the husband; and there is no principle under which she can be made so liable now.^{13a} Nor is the mere fact of employment always

¹¹ *Baker v. Morris*, 33 Kans. 580, 7 Pac. 267 [minor son negligently fired a gun, killing plaintiff's horse; father not liable]; *Brohl v. Lingeman*, 41 Mich. 711, 3 N. W. 199; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. App. 228 (1908), (motor car driven by son of owner); *Muller v. Shufeldt*, 114 N. Y. Supp. 1012 (1909), (father not liable for injuries caused by a dog owned by his son); *Lessoff v. Gordon*, 124 S. W. (Tex. App.) 182 (1910), (father's liability must depend on the application in the particular case of the rules governing the relation of master and servant and not on parental relationship); (*Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958 (1904); *Ritter v. Thibodeaux*, 41 S. W. (Tex. App.) 492 (1897); *Taylor v. Seil*, 120 Wis. 32, 97 N. W. 498 (1903); *Smith v. Davenport*, 45 Kans. 423, 25 Pac. 851, 23 Am. St. Rep. 737, 11 L. R. A. 429 (1891); *McCarthy v. Heiselman*, 140 App. Div. 240, 125 N. Y. Supp. 13; *Brittingham v. Stadiem*, 151 N. C. 299, 66 S. E. 128 (1909); *Dally v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351 (1895), (not liable as matter of law on account of relationship, but is liable for minor son's negligence in operating an automobile with his permission). On the same point see *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296 (1908).

¹² *Way v. Powers*, 57 Vt. 135.

¹³ See cases on Contributory Negligence, *ante*, §§ 70-79.

^{13a} At common law neither a husband nor wife can maintain an action of tort against the other, whether for injury to person or property (*Hobbs v. Hobbs*, 70 Me. 383). And for her torts committed before marriage (*Knowing v. Manly*, 49 N. Y. 192, 10 Am. Rep. 346); and after marriage (*Cox v. Hoffman*, 20 N. C. 319), if in his presence, he alone is generally responsible (*Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270). His liability for her ante-nuptial torts is devolved on him in consideration of his becoming entitled to all of her personal estate and to choses in action reduced to possession. The other rules rest on the doctrine of the merger of the wife's identity and the husband's presumed coercion.

sufficient to make the employer responsible for the acts of the person employed.¹⁴ Every one with whom a contract is made to do or to furnish a thing may be said to be employed for this purpose by the person for whom the act is to be performed; but such a contract does not necessarily create the relation of master and servant or principal and agent; and, where that relation is not created, the responsibility here defined does not arise.¹⁵ It makes no difference that the employer, in such a case, puts some of his property, whether real or personal, into the charge or control of the employed, and that the latter uses that identical property in such a wrongful manner as to injure a stranger therewith.¹⁶ Much less can the owner of the property be made responsible for injuries caused by the contract of such property with the person or property of another, without proof or presumption of any other circumstance, and on the mere ground of his ownership.¹⁷ The relation of landlord and tenant, therefore, does not impose upon the landlord any liability for the negligent use of the leased premises by the tenant to the injury of a stranger.¹⁸

¹⁴ *King v. N. Y. Central R. Co.*, 66 N. Y. 181, where Andrews, J., said: "It is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them." 610, 12 Jur. N. S. 705; *Samuelson v. Cleveland, etc. Mining Co.*, 49 Mich. 164; *Pettigrew v. St. Louis, etc. Steel Co.*, 14 Mo. App. 441; *Cincinnati, etc. R. Co. v. Wright*, 54 Ohio St. 181, 43 N. E. 688. A. was injured by collision with a car, driven by a servant of B., the car being owned by C. Held, that action was properly brought against B. (*Weyant v. Harlem R. Co.*, 3 Duer, 360).

¹⁵ See *post*, §§ 164, 168.

¹⁶ See *post*, §§ 158, 159, 173; *Brohl v. Lingeman*, 41 Mich. 711, 3 N. W. 199; *Byrne v. Kansas City, etc. R. Co.*, 61 Fed. 605, 9 C. C. A. 666.

¹⁷ See *Kelly v. New York*, 11 N. Y. 432; *Pack v. Same*, 8 Id. 222; *Gour-dier v. Cormack*, 2 E. D. Smith, 254; *Higgs v. Maynard*, 14 Weekly Rep.

¹⁸ *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188; *Edwards v. Harlem R. Co.*, 98 N. Y. 249; *Miller v. N. Y. Lackawanna, etc. R. Co.*, 125 Id. 118, 26 N. E. 35 [lessor of railroad not liable for injuries to adjacent property by embankment built by lessee, though bound by terms of lease to pay latter for its

§ 145. **Master's liability for servant's acts under implied authority.** — A master is, of course, responsible for any act of his servants committed by his express command, however unlawful it may be. He is also responsible for the acts of a servant under an implied authority — that is to say, an authority which he gave the servant himself, or the person dealing with him, reasonable ground to believe had been given, or which is usually given under similar circumstances.¹⁹ It may well be that a servant can have no implied authority to do that which it cannot be lawful, under any circumstances, or in any manner, for either him or his master to do.²⁰ But that does not justify the proposition that a master is never

new construction work]. *s. p.*, Mich. 492). *Compare* Northeastern Philips v. Northern R. Co., 62 Hun, 233, 16 N. Y. Supp. 909 [lessor of a railroad]. But the lessor of a railroad, in whose exclusive interest it is operated by the lessee, is liable for injuries received through the negligent operation of the road (Southern R. Co. v. Bouknight, 17 C. C. A. 181, 70 Fed. 442; see § 120a, *ante*, and § 413, *post*). The defendant, having a license to run a ferry, leased it to another; and through the negligence of the lessee's servant, A. was drowned. Held, that the relation of master and servant did not exist between lessee and defendant, who was therefore not liable (Blackwell v. Wiswall, 24 Barb. 355). To same effect, Felton v. Deall, 22 Vt. 171. The lessor of a quarry was held not liable to an employee of the lessee, for the lessee's negligence; it not appearing that any duty of the lessor remained unperformed, even though the one injured was originally a servant of the lessor, and supposed that he was so at the time of the accident (Crusselle v. Pugh, 67 Ga. 430; distinguishing Lake Superior Iron Co. v. Erickson, 39

post). *Compare* Northeastern Philips v. Northern R. Co., 62 Hun, 233, 16 N. Y. Supp. 909 [lessor of a railroad]. But the lessor of a railroad, in whose exclusive interest it is operated by the lessee, is liable for injuries received through the negligent operation of the road (Southern R. Co. v. Bouknight, 17 C. C. A. 181, 70 Fed. 442; see § 120a, *ante*, and § 413, *post*). The defendant, having a license to run a ferry, leased it to another; and through the negligence of the lessee's servant, A. was drowned. Held, that the relation of master and servant did not exist between lessee and defendant, who was therefore not liable (Blackwell v. Wiswall, 24 Barb. 355). To same effect, Felton v. Deall, 22 Vt. 171. The lessor of a quarry was held not liable to an employee of the lessee, for the lessee's negligence; it not appearing that any duty of the lessor remained unperformed, even though the one injured was originally a servant of the lessor, and supposed that he was so at the time of the accident (Crusselle v. Pugh, 67 Ga. 430; distinguishing Lake Superior Iron Co. v. Erickson, 39

¹⁹ Allen v. Southwestern R. Co., L. R. 6 Q. B. 65, per Blackburn, J.; Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259; *post*, § 160a.

²⁰ In *Mali v. Lord*, 39 N. Y. 381, the superintendent of defendant's store called in a policeman and directed him to arrest and *examine the person* of the plaintiff, a lady, suspected of stealing goods, which was done, without defendant's express authority. Held, that the servant was not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do. See § 151,

liable for the act of his servant in doing that which, under the particular circumstances, would have been entirely unlawful for his master to do, or, where the master is a corporation, an act beyond its corporate power. On this point some confusion has arisen. Thus it has been held that where a railway corporation had no power to cause the arrest of the plaintiff upon a certain specified ground, it could not be held responsible for the act of its agent in arresting the plaintiff on that ground, although the agent acted in good faith, for the purpose of protecting his employer's interest.²¹ But this decision was clearly wrong. There is not, and never could have been, any doubt that such a corporation had power to cause persons to be arrested and detained for *some* offenses; and, such being the case, it is uniformly held that the corporation is responsible for the act of an agent who, in good faith, believed that there was sufficient ground for making the arrest.²² For, where a servant is authorized

²¹ *Poulton v. Southwestern R. Co.*, was in accordance with the view that L. R. 2 Q. B. 534. In this case, the station master having authority by statute only to arrest one not paying fare, Blackburn, J., said: "In the present case an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. *Having no power themselves they cannot give the station master any power to do the act.*" In the learned Mr. Beven's 3d ed. (1908) of his work on Torts, p. 321, discussing this case (criticised in a previous edition of this work), and italicizing the opinion of Blackburn, J., as above, he questions its authority where the act done was committed about a matter necessarily incident to the corporation business, but says: "This

²² Where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprisoned persons who are supposed to come within the terms of the by-laws, the companies are liable (*Goff v. Great Northern R. Co.*, 3 El. & El. 672, explaining *Roe v. Birkenhead R. Co.*, 7 Ex. 36; and see *Barry v. Midland R. Co.*, Irish Rep. 1 C. L. 130). In *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, defendant was held liable for the unlawful detention of a passenger by a gate-keeper, who refused to allow him to leave the station without producing his ticket or paying his fare. S. P., *Moore v.*

to do acts which may or may not be lawful, according to circumstances, the master may be liable for such an act, although no circumstances existed to justify it.²³ The master is clearly liable for the servant's negligence in incomplete performance of an authorized act, even though by reason of such omission, the act becomes criminal.²⁴

§ 146. Master liable for acts in course of employment.

—The master is responsible for the negligent acts or

Metropolitan R. Co., L. R. 8 Q. B. 36 [false imprisonment of passenger not paying proper fare]; Bayley v. Manchester, etc. R. Co., L. R. 8 C. P. 148 [porter pulling passenger back from train in motion]; Seymour v. Greenwood, 7 Hurlst. & N. 356 [assault of passenger by omnibus guard]. There are many similar decisions, but as they mainly lie outside of our province, we only refer to a few, holding the master liable for arrest (Staples v. Schmid, 18 R. I. 224, 26 Atl. 193 [salesman in charge of store]; Mallach v. Ridley, 24 Abb. N. C. 172, 9 N. Y. Supp. 922; qualifying s. c., before, 43 Hun, 336; Clark v. Starin, 47 Id. 345; Toomey v. Delaware, etc. R. Co., 4 Misc. 392, 24 N. Y. Supp. 108; Atchison, etc. R. Co. v. Henry, 55 Kans. 715, 41 Pac. 952 [train conductor]; Laffitte v. New Orleans R. Co., 43 La. Ann. 34, 8 So. 701 [car driver]; compare Central R. Co. v. Brewer, 78 Md. 394, 28 Atl. 615 [president not authorized; a strange decision]; see Abrahams v. Deakin (1891), 1 Q. B. 516, 60 L. J. Q. B. 238. The master is liable for an arrest and imprisonment caused by his employee for the protection of the master's business in his charge, if within the scope of his employment, and the authority of the agent or servant may be implied from the fact (Gulf, etc. Ry. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743 (1889), (action for malicious prosecution against railway company, original proceeding having been instituted on affidavit of general manager); Cobb v. Simon, 124 Wis. 467, 102 N. W. 891, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909 (1903), (floor-walker); Eichen-green v. Louisville, etc. Ry. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702 (1896), (railway detective). But see St. Louis, etc. Ry. Co. v. Wyatt, 84 Ark. 193, 105 S. W. 72 (1907).

²³ See § 148, *post*. *Limpus v. London Omnibus Co.*, 1 Hurlst. & C., 526 [racing omnibuses]; *Regina v. Stephens*, L. R. 1 Q. B. 702; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 Id. 1 [assault by special policeman]. A servant employed "to do general farm work," negligently driving out of the field a trespassing cow, killed it with a stone. The master was held liable, though he had given no orders in regard to driving cattle out of the field (*Evans v. Davidson*, 53 Md. 245).

²⁴ *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543 [selling poison without label].

omissions of his servants in the course of their employment, though unauthorized²⁵ or even forbidden²⁶ by him,

²⁵ *Limpus v. London Omnibus Co.*, 1 Hurlst. & C. 526; *Croft v. Alison*, 4 Barn. & Ald. 590; *Page v. Defries*, 7 Best & S. 137; *Luttrell v. Hazen*, 3 Sneed, 20. To same effect, *Southwick v. Estes*, 7 Cush. 385; *Cosgrove v. Ogden*, 49 N. Y. 255. The test of the liability of a master for the torts of his servant is, whether the latter was at the time acting within the scope of his authority, and not whether the act was done in accordance with instructions (*Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. 819; *Clark v. Koehler*, 46 Hun, 536; *Tierney v. Syracuse*, etc. R. Co., 85 Id. 146, 32 N. Y. Supp. 627). The fact that the engine was moved by a brakeman, without authority, is immaterial (*Houston*, etc. R. Co. v. *Stewart* [Tex. Sup.], 17 S. W. 33). Choppers directed to cut only large trees, but cutting smaller ones, though the cutting of the latter

may not have been necessary for the removal of the former, the master is liable (*Avery v. White*, 79 Conn. 705, 66 Atl. 517 (1907)). Corporation is liable where servant in seeking to carry out orders makes an assault (*Coal Belt Elec. Ry. Co. v. Young*, 126 Ill. App. 651 (1906)). Street railway company is liable where a servant charged with the duty of examining into personal injury cases, while so engaged inflicted the indignity of laying his hands on an alleged injured woman (*South Covington*, etc. Ry. Co. v. *Cleveland*, 30 Ky. L. R. 1072, 100 S. W. 283, 11 L. R. A. (N. S.) 583 (1907)). Proprietor is liable when employee of saloon inflicts injuries resulting in death in ejecting one from saloon (*Merrill v. Cates*, 101 Minn. 43, 111 N. W. 836 (1907)). Company is liable where its servant in the protection of those digging holes for

²⁶ *Philadelphia*, etc. R. Co. v. *Derby*, 14 How. U. S. 468; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Columbus*, etc. R. Co. v. *Powell*, 40 Ind. 37 [conductor putting aged passenger off train in motion]; *Houston*, etc. R. Co. v. *Gorbett*, 49 Tex. 573 [brakeman putting passenger off train]; *Dolan v. Delaware*, etc. Canal Co., 71 N. Y. 285 [negligence of flagman at railroad crossing]; *Duggins v. Watson*, 15 Ark. 118; *McClung v. Dearborne*, 134 Pa. St. 396, 19 Atl. 698; *Driscoll v. Carlin*, 50 N. J. Law, 28, 11 Atl. 482; *Mound City Paint Co. v. Conlon*, 92 Mo. 221, 4 S. W. 922; *Bileu v. Paisley*, 18 Oreg. 47, 21 Pac. 934; *Gross v. Pennsylvania*, etc. R. Co., 62 Hun, 619, 16 N. Y. Supp. 616; *Consolidated Ice*, etc. Co. v. *Keifer*, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696 (1890); *McCann v. Consolidated Trac. Co.*, 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236 (1897); *Houston*, etc. Ry. Co. v. *Bulger*, 35 Tex. App. 478, 80 S. W. 557 (1904); *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909 (1903); *Robards v. Bannon Sewer Pipe Co.*, 130 Ky. 380, 113 S. W. 429, 132 Am. St. Rep. 394, 18 L. R. A. (N. S.) 923 (1908); *Grant v. Singer Mfg. Co.*, 190 Mass. 489, 77 N. E. 480, 6 L. R. A. (N. S.) 567 (1906); *Western Real Est. Trustees v. Hughes*, 172 Fed. 206, 96 C. C. A. 658 (1909).

and although outside of their "line of duty,"²⁷ and with-

trolley pole committed violence on one attempting to prevent the tearing up of her pavement for that purpose (*Moore v. Camden, etc. R. Co.*, 65 Atl. 1021 (1907) (N. J.)). That the owner of an automobile may be held liable when servant ran down another, it must be shown that servant was engaged in the owner's business at the time (*Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) (1907)). Master is liable for negligence of a stranger permitted by a servant to assist him in his work (*Thyssen v. Davenport, etc. Co.*, 112 N. W. (Ia.) 177. When servant permits a boy to drive who negligently injures another, the master is liable (*Bomberg v. International Ry. Co.*, 103 N. Y. Supp. 297, 53 Misc. 403, rev'd, 105 N. Y. Supp. 621, 121 App. Div. 1 (1907)). Owner of passenger elevator whose operator permits a boy to ride on top, is liable for injury thus incurred (*Davis' Admr. v. Ohio Valley Banking Co.*, 32 Ky. Law Rep. 627, 106 S. W. 843 (1908)). Where the superintendent of cotton mill had one who had come on premises to entice away employees tied and thrown into a pond, the company was held liable (*Fields v. Lancaster Cotton Mill*, 77 S. C. 546, 58 S. E. 608, 11 L. R. A. (N. S.) 822 (1907)). Railway company is liable where the engineer left an incompetent person in charge of engine, by whose attempt to operate it another was injured (*Lewis v. Mammoth Min. Co.*, 93 Pac. (Utah) 732 (1908)). Coal company is liable for the neglect of its driver in leaving coal hole in sidewalk in dangerous condition (*Wakefield v. Boston Coal Co.*, 197 Mass. 527, 83 N. E. 1116 (1908)). The company is liable where its employee authorized to eject trespassers injured a trespasser by negligently firing on him, his personal malice is not material (*Tex. & N. O. Ry. Co. v. Parsons*, 109 S. W. (Tex. App.) 240, aff'd, 113 S. W. (Sup.) 914 (1908)). Where the plaintiff after taking a drink at the bar fell asleep, and barkeeper poured alcohol in his shoe and set it afire, the master is liable (*Beilke v. Carroll*, 51 Wash. 395, 98 Pac. 1119 (1909)). Sewing machine company is liable where an agent employed to retake machines commits an assault in doing so (*Shear v. Singer Sewing Machine Co.*, 171 Fed. 678 (1909)); but where one was employed to collect the purchase money of machine sold on the installment plan, his act in seizing and carrying away a machine for non-payment, held not within the scope of his employment, and company not liable (*Fennevan v. Singer Mfg. Co.*, 47 N. Y. Supp. 284, 20 App. Div. 574). The master is liable for injuries arising from a caretaker's untying plaintiff's sloop from a private wharf in a storm (*Ploof v. Putnam*, 83 Vt. 252, 75 Atl. 277 (1910)). For additional instances, see *Thompson on Negligence*, § 521 and notes.

²⁷ It is not correct, and leads to an erroneous result, to describe the master's freedom from liability as arising where the servant has departed from his "line of duty in" his master's business. Such a statement of the law might excuse every deviation from the master's orders, and substitute a new and very dangerous test of liability (*Quinn v. Power*, 87

out regard to their motives.²⁸ He cannot limit his responsibility for any servant by employing him only with reference to a single branch of the business. If a servant under such limited employment nevertheless undertakes to serve his master in any other matter connected with the general business, and the limitation of his employment is not clear or is not known to the persons with whom he deals, the master is responsible for the acts of such a servant, in those matters, as much as for those of any other servant.²⁹ There is no difference, in this re-

N. Y. 535; approved in *Pittsburgh, etc. R. Co. v. Kirk*, 102 Ind. 399, 1 N. E. 849). Master liable for act of foreman in stretching a guy rope across a railroad to aid in taking down a derrick when foreman had general charge of the work, though instructed to employ a derrick specialist when moving derricks (*Reinke v. Bentley*, 90 Wis. 457, 63 N. W. 1055; see *Burns v. Poulson*, L. R. 8 C. P. 563).

²⁸ *Stewart v. Brooklyn, etc. R. Co.*, 90 N. Y. 588; *Bryant v. Rich*, 106 Mass. 180; *Phelon v. Stiles*, 43 Conn. 426. Yet the motive is often taken into account, as an element of proof on the main question (see *The Polaria*, 25 Fed. 735; *Burns v. Poulson*, L. R. 8 C. P. 563; *Birmingham Water Works Co. v. Hubbard*, 85 Ala. 179, 4 So. 607). A master instructed his servant to go to a certain place and "kill a beef." The servant, finding no animal there but the plaintiff's bull, killed it, honestly attempting to carry out the master's order. The master was held liable (*Maier v. Randolph*, 33 Kans. 340, 6 Pac. 625).

²⁹ It is no defense that the servant's duties were in another department of the business, and that his act was without the express authority of the master (*Hardegg v.*

Willards, 12 Misc. 17, 33 N. Y. Supp. 25). In *Courtney v. Baker* (60 N. Y. 1), the master was held liable for injuries caused by a clerk watching for thefts, without orders. *Rapallo, J.*, said: "It may be that he was not bound to watch for thieves, there being a watchman charged with that duty; but if, casually, suspicious signs came to his notice, we think his general duty to his employers justified him in endeavoring to ascertain what was being done." Defendant, a blacksmith, had only two men working, one of whom shod the horse and injured him. Held, that defendant was liable, though he swore that the man was employed as a mere helper and not to put on shoes (*Leviness v. Post*, 6 Daly, 321). Plaintiff was employed by a shipper to load a car with lumber; it was the duty of defendant's yard master to enter cars on his shipping book, when reported ready for transportation, and see that they were properly loaded and securely staked; the yard master inspected the car in question, and required other stakes to be placed thereon; and while plaintiff was removing a defective stake the yard master broke off another stake, causing the lumber to fall on plaintiff. The car had been entered in the shipping book by the

spect, between a servant who is a general agent and one who is employed for a particular purpose; provided the latter is acting with the seeming consent of the master and within the apparent scope of his employment. Such a distinction has, however, been sometimes taken.³⁰ The fact that the servant is employed only for a single purpose may be material in determining whether his negligence or other misconduct happens in the course of his employment; but if it does, the master's liability is exactly the same as if the servant were a general agent.³¹

§ 147. What acts are within employment.—In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master.³² If the act is done while the servant is at

yard master, who understood that it was to be ready to go on the morning of the accident. Held, proper to refuse to instruct that if, at the time of the accident, the car had not been reported to defendant as ready for shipment, but was at that time under plaintiff's control, then the yard master, when he broke the stake, was not acting in the line of his duty, and defendant would not be liable (*Pollard v. Maine Cent. R. Co.*, 87 Me. 51, 32 Atl. 735). But see *Sweeden v. Atkinson, etc. Co.*, 125 S. W. (Ark.) 439 (1910), (but the mere fact that one is in the service of another generally, and that such employment has enabled him to take possession of certain facilities, by the negligent use of which plaintiff was injured, will not render the master liable).

³⁰ See *Wilson v. Peverly*, 2 N. H. 548; *Oxford v. Peter*, 28 Ill. 434. These cases have been overruled (*Schmidt v. Adams*, 18 Mo. App. 432).

³¹ Cases cited in note 29, *supra*, and under next section.

³² A master, who permits his servant to go to a fair for his own pleasure with the master's horse and cart, is not liable for damages arising from the servant's negligent management of the horse (*Bard v. Yohn*, 26 Pa. St. 482). In *Aycrigg v. N. Y. & Erie R. Co.*, 30 N. J. Law, 460, master of a ferry-boat, without authority, took a burning barge in tow. Held, owners not liable for injuries done by the barge. The gatekeeper of a toll-road company, who had charge of the gate at all times, but was not required to collect toll after 9 o'clock p. m., negligently let the beam of the gate down upon a traveler, who was attempting to pass after that hour, and injured him. Held, the act was in the course of his employment, and the company responsible (*Noblesville, etc. R. Co. v. Gause*, 76 Ind. 142). In *Marrier v. St. Paul, etc. R. Co.* (31 Minn. 351, 17 N. W.

liberty from service, and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility,³³ even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master.³⁴ On the other hand, where a servant is allowed

952), it was sought to hold a railroad company liable for the destruction of the plaintiff's hay by fire, communicated from a fire negligently left burning by the company's section men, which fire they had kindled for the purpose of warming their coffee. But the court held the company not liable. Where a servant, whose duty was to peddle goods for his master, was driving to the store, in a team of his own, to get goods, the master was held liable for an injury inflicted upon a third person by negligent driving, though no goods were then in the wagon (*Shea v. Reems*, 36 La. Ann. 966). See cases under next section.

³³ A servant of a railroad company was driving the company's horses home in the usual way, when another servant of the company, not at the time actually engaged in its service, struck them, rendering them unmanageable, in consequence of which they ran over the plaintiff. Held, that the company was not responsible (*Weldon v. Harlem R. Co.*, 5 Bosw. 576). *s. p.*, *Dells v. Stollenwerk*, 78 Wis. 339, 47 N. W. 431.

³⁴ Where a carman, whose duty it was to attend to putting up a horse and cart, drove in an opposite direction without the consent of his employer, and, on his way back, injured a third person, it was held that his employer was not liable (*Mitchell v. Crassweller*, 13 C. B. 237). *s. p.*, *Storey v. Ashton*, L. R.

4 Q. B. 476. These cases were distinguished in *Stevens v. Woodward*, L. R. 6 Q. B. Div. 318, which was the case of a clerk of a solicitor who, contrary to express orders not to enter a room, went in to wash his hands, and negligently left water turned on, so that premises underneath were flooded. Held, the employer was not liable. But where a servant was not forbidden to use a lavatory, the master was held liable (*Ruddiman v. Smith*, 60 L. T. 708, 37 W. R. 528). *Mitchell v. Crassweller* was further distinguished in *Mulvehill v. Bates*, 31 Minn. 364, where the owner of a horse and wagon intrusted them generally to a driver, with authority to secure such business as he could, and the latter, after having delivered a trunk, went out of his direct return route to get a load of poles for himself, and while taking them back, negligently ran over plaintiff. The owner was held liable. To same effect, *Venables v. Smith*, L. R. 2 Q. B. Div. 279. *Mitchell v. Crassweller* was followed in *Sheridan v. Charlick*, 4 Daly, 338, where a coachman, after having used his master's team upon an errand for his master, used it upon an errand of his own, without his master's knowledge or consent, and while doing so, injured plaintiff's horse. Held, that the master was not liable. To precisely same effect, *Cavanagh v. Dinsmore*, 12 Hun, 465; also *Rayner v. Mitchell*, L. R. 2 C. P. Div. 357; *Chicago*

by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured by his negligence; but the master will be held responsible, unless it clearly appears that the servant could not have been, directly or indirectly, serving his master in the act, the negligent performance of which caused the injury.³⁵

§ 147a. Deviation by the servant. — Undoubtedly the general rule is, as expressed in a much quoted case, “ In determining whether a particular act is done in the course of a servant’s employment it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and as his own master *pro tempore*, the master is not liable. If the servant step aside from the master’s business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all the authorities.”³⁶ There is, however, a line of cases to the effect that slight

Bottling Co. v. McGinnis, 51 Ill. App. 325. To similar effect, see *Way* though without his express assent, *v. Powers*, 57 Vt. 135; *Stone v. Hills*, to stop on the way upon defendant’s business, and, before so stopping, 45 Conn. 44. So in *Cousins v. Hannibal*, etc. R. Co., 66 Mo. 572, ran against plaintiff’s horse. Held, where the superintendent of defendant’s roundhouse took a locomotive, that the defendant was liable (Patten v. Rea, 2 C. B. N. S. 606). without authority, ran it on defendant’s track to get a doctor and killed plaintiff’s mule on the trip. Held, defendant not liable.

³⁵ The defendant’s agent was driving with his own horse and gig, for his own purpose, but proposed, with the knowledge of the defendant, to stop on the way upon defendant’s business, and, before so stopping, ran against plaintiff’s horse. Held, that the defendant was liable (*Patten v. Rea*, 2 C. B. N. S. 606). ³⁶ *Marrier v. St. Paul, etc. Ry. Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. St. Rep. 795; quoted with approval in *Davis v. Houghtelin*, 33 Neb. 582; in *Galveston, H. & S. A. Ry. Co. v. Currie*, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367

deviation from the master's service will not defeat his liability. Such indeed seems to be the established rule in the English courts.^{36a} There does not, however, seem to have been any attempt to reconcile this rule as to what may be termed immaterial deviations or deflections with the general rule as stated above. The English cases are not cases of very high authority, and but for the opinion stated by Mr. Bevan, as given in the note, would scarcely justify the statement here made as to the established rule in the English courts. Neither are the American cases sufficiently numerous to establish a rule; nor in them is there any such recognition as might be desired of the general rule, that though the servant turn aside completely but for a moment from his master's service the master shall not be held liable. It would seem, therefore, that probably all that the commentator is authorized to say is that the rule on this subject is in a state of transition with a tendency to hold slight deviations immaterial. This, too, it must be recognized, is consistent with the generally received doctrine that the mere mingling by the servant of some purpose of his own with that of the master will not relieve the master of liability. One does not cease to be acting in the course of his master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual, or

(1906), and in *Thompson on Negligence*, § 526. See *Pittsburg, etc. Ry. v. Shields*, 47 Ohio St. 394.

^{36a} In *Joel v. Morison*, 6 Carr. & P. 501, a servant, driving his master's cart on his master's business, made a slight detour for some purpose of his own. Held, the master was liable for an injury done by him on the way. This case was apparently approved in *Burns v. Poulson*, L. R. 8 C. P. 563; and the same decision was made in *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29. Where the pilot in charge of the defendant's ferry-boat, diverg-

ing from his course to favor a passenger, collided with a canal-boat, the defendants were held liable, though they neither knew of nor consented to their servant's acts (*Quinn v. Power*, 87 N. Y. 535. Compare *Brown v. Purviance*, 2 Harr. & G. 316). "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on the master's business" (*Mitchell v. Crassweller*, 13 Q. B. 246, per Jervis, C. J.). "The master is liable if the servant, being

incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be his controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably anticipated, to which therefore the master's assent may be fairly assumed; or they are, in many instances, but the mingling with the pursuit of the master's business some purpose of the servant's own. Moreover, it must often be proper to submit the question to a jury upon the issue of materiality, hence it is not to be expected that the decisions will in all cases be harmonious. It has been held that where the chauffer, waiting at a ferry, takes another back some distance in the machine for accommodation, and negligently runs into a horse and buggy, the owner is not liable.³⁷ And it has recently been held that where the chauffer used his master's automobile in going to his dinner at his own home, but without the owner's knowledge, the master is not liable for an injury negligently inflicted at such time.³⁸

§ 148. Master not liable for acts outside of employment.³⁹ — The fact that the servant was, at the time of the injury, engaged in the service of his master, is not

on the master's business, takes a detour to call on a friend" (Beven on Negligence (3d ed.), 582-3, note).

³⁷ Patterson v. Kates, 152 Fed. 481 (1907).

³⁸ Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016 (1910); see also Reamer v. Davis, 85 Ind. 201; Healy v. Johnson, 127 Ia. 221, 103 N. W. 92 (1906); Loomis v. Hollister, 75 Conn. 718, 55 Atl. 561 (1903); Kirzikowsky v. Speering, 107 Ill.

App. 463; Williams v. Koehler, 58 N. Y. Supp. 863, 41 App. Div. 426; Lovejoy v. Campbell, 16 S. D. 231, 92 N. W. 24 (1902). *Contra*, Cavanagh v. Dinsmore, 12 Hun, 465.

³⁹ For fire negligently set by a railroad employee, when not on duty and having no relation to his work, the company is not liable (Southern Ry. Co. v. Power Fuel Co., 152 Fed. 917, 88 C. C. A. 65 (1907)); corporation held not liable when strike

conclusive of the master's liability. The mere fact that one is master and the other servant does not, of itself,⁴⁰

breakers fired on mob without authority (*Shay v. American Iron & S. Mfg. Co.*, 218 Pa. 172, 67 Atl. 54 (1907)). Railway company is not liable for assault of railway policeman unless made so by statute (*Hirst v. Fitchburg, etc. Ry. Co.*, 196 Mass. 533, 82 N. E. 10 (1907)); company is not liable where switchman, who is not on duty, assaults a proposed passenger (*St. Louis, etc. Ry. Co. v. Wyatt*, 84 Ark. 193, 105 S. W. 72 (1907)); the fact that one was employed as a watchman did not authorize him to shoot a trespasser (*Robards v. P. Bannon Sewer Pipe Co.*, 113 S. W. (Ky.) 429, 18 L. R. A. (N. S.) 923 (1908)); that the injury would not have occurred except for the means or facilities provided by the master is not sufficient to render him liable, the act of the servant in making use thereof must have been in the course of his employment (*Doran v. Thomsen*, 71 Atl. (N. J.) 296 (1908)); where the servant stepped aside for ever so short a time from his master's employment, the master is not liable for injuries inflicted while he is so engaged (*Savannah Elec. Co. v. Hodges*, 6 Ga. App. 470, 65 S. E. 322 (1909)); one doing general detective work is not authorized to make arrest (*Kehoe v. Marshall Field & Co.*, 141 Ill. App. 140, 86 N. E. 1054 (1909)). For additional instances, see *Thompson on Negligence*, §§ 526-7 and notes.

⁴⁰ This qualification is very material, as will be seen later on. Thus, a bailee, for hire, is responsible for damage done to the chattel, through negligence of the bailee's servant,

though not in the course of his employment (*Coupe Co. v. Maddick*, 1891, 2 Q. B. 413, 60 L. J. Q. B. 676).

⁴¹ *Walton v. N. Y. Central Sleeping Car Co.*, 139 Mass. 556, 2 N. E. 101 [car porter, throwing out his own things]; *Smith v. Spitz*, 156 Mass. 319, 31 N. E. 5 [billposter leaving bills about]; *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100 [teamster's invitation to ride, and to drive the team]; *Searle v. Parke*, 34 Atl. (N. H.) 744 [theft]; *Smith v. N. Y. Central R. Co.*, 78 Hun, 524, 29 N. Y. Supp. 540 [agent amusing himself with torpedo]; *Wyllie v. Palmer*, 63 Hun, 8, 17 N. Y. Supp. 434 [firing rockets]; *Brunner v. American Tel. Co.*, 151 Pa. St. 447, 25 Atl. 29 [dynamite as amusement]; *Shaw v. Reed*, 9 Watts & S. 72; *Aycrigg v. N. Y. & Erie R. Co.*, 30 N. J. Law, 460; *Adams v. Cost*, 62 Md. 264; *Harris v. Mabry*, 1 Ired. N. C. Law, 240; *Mayer v. Thompson, etc. Bldg. Co.*, 104 Ala. 611, 16 So. 620; *Cincinnati, etc. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122 [conductor directing passenger where to go after leaving train]; *Keating v. Michigan Cent. R. Co.*, 97 Mich. 154, 56 N. W. 346 [advice to passenger]; *Wiltse v. State Bridge Co.*, 63 Mich. 639, 30 N. W. 370 [horse frightened by private property of servant]; *Walker v. Hannibal, etc. R. Co.*, 121 Mo. 575, 26 S. W. 360 [freight carried without authority]; *Yates v. Squires*, 19 Iowa, 26; *Western Union Tel. Co. v. Mullins*, 44 Neb. 732, 62 N. W. 880; *Dawkins v. Gulf, etc. R. Co.*, 77 Tex. 232, 13 S. W. 984 [hand-car used for

make the master responsible for any act or omission, which has no relation to the servant's employment.⁴¹ The act complained of must be within the scope of authority which the servant had from the master,⁴² or which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have,⁴³ or which third persons have a right to infer from the nature and circumstances of the employment.⁴⁴ The mere fact that the injury complained of was caused by negligence of the servant in the performance of an act which, taken *per se*, was within the scope of his employment, will not impose a liability upon the master, if the act was merely incidental to the servant's attempt to perform an act entirely beyond the scope of his authority.⁴⁵

There are certain well recognized exceptions, arising from duties of the master, to the general rule that the master will only be liable to third parties for the negligence of his servants when acting in the course of their

private purpose]; *International, etc. R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517 [engineer's invitation to ride on locomotive].

⁴² Ratification of an unauthorized act will make the principal liable for an injury resulting from the negligence of the agent in doing the act (*Nims v. Mt. Hermon School*, 160 Mass. 177, 35 N. E. 776).

⁴³ It is within the scope of authority of the conductor and driver of a horse-car to receive and let off a passenger without payment of fare (*Brennan v. Fair Haven, etc. R. Co.*, 45 Conn. 284).

⁴⁴ *Chicago, etc. R. Co. v. Casey*, 9 Ill. App. 632, 639. In that case, defendant was charged with its engineer's negligence in giving permission to a boy to get upon a train while in motion. It was held not liable, *Bailey, J.*, saying: "The en-

gineer, then, in giving the boys permission to ride, acted not only without actual authority from the company, but also without any authority which third persons had a right to infer from the nature and circumstances of his employment; in other words, without any apparent authority."

⁴⁵ *Coomes v. Houghton*, 102 Mass. 211; *Olive v. Whitney Marble Co.*, 103 N. Y. 292, aff'g s. c., 36 Hun, 640. In *Burke v. Shaw*, 59 Miss. 443, the owners of a foundry had for years given the ashes to their engineer, in consideration of his removing them after working hours; and he deposited them, to the knowledge of his employers, on an unclosed lot opposite the foundry, owned by third persons. Held, such employers were not liable for injuries caused to a young child who,

employment. Among these is the liability of railway companies and others as carriers of passengers for assaults by their servants, resting on the principle that the undertaking of the carrier is not only to transport but to transport safely and without injury so far as these objects can be attained by their own care or that of their employees.⁴⁶ So too where one is present on the premises of another by invitation he is entitled to the protection of the master from assaults by his servants. The liability of the master for failure to keep safely dangerous instrumentalities intrusted to the servant or the misuse thereof may be regarded as a further exception to the general rule. These exceptions are appropriately treated elsewhere in this work.

§ 149. [Omitted.]

§ 150. Liability for servant's willful acts. — There is no such broad rule of law as that a master is not liable for the unauthorized, willful, and wrongful acts of his servants; and, though such a doctrine has often been propounded in judicial opinions,⁴⁷ it is now so thoroughly overruled as to need no further notice. The only ground upon which a master can avoid liability for unauthorized and willful acts of a servant is that they are not done in the course of the servant's employment. When they are so done, the master is responsible for them.⁴⁸ When not

running across the lot, fell into a master was held liable, as matter of quantity of the hot ashes and was law, for the reckless and disobedient burned. conduct of a servant, while in the plain line of his employment and intending to promote his master's interest (*Ochsenbein v. Shapley*, 85

⁴⁶ § 154, *post*.

⁴⁷ See *Harris v. Nicholas*, 5 Munf. 483; *Moore v. Sanborne*, 2 Mich. 519; *Johnson v. Barber*, 5 Gilm. 425, N. Y. 214). In *Spaulding v. Chicago, etc. R. Co.*, 33 Wis. 582; s. c.,

⁴⁸ See *Weed v. Panama R. Co.*, 17 N. Y. 362; *Milwaukee, etc. R. Co. v. Finney*, 10 Wis. 388; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; charge that if the act was willful *Smith v. Webster*, 23 Mich. 298. A the defendant was not liable, was

so done, yet if they directly cause a failure to perform a duty incumbent upon the master, he is responsible on that ground.⁴⁹ In other cases he is not responsible at all.⁵⁰

sustained. A railroad servant throwing water in the face of a boy trespassing upon the cars, for the purpose of removing him—held within the scope of his employment; *Clark v. N. Y., Lake Erie, etc. R. Co.*, 40 Hun, 605; citing *Higgins v. Water-vliet Turnpike, etc. Co.*, 46 N. Y. 23; *Rounds v. Delaware, etc. R. Co.*, 64 Id. 129; *Cohen v. Dry Dock, etc. R. Co.*, 69 Id. 170; *Hoffman v. N. Y. Central, etc. R. Co.*, 87 Id. 25; *City Delivery Co. v. Henry*, 139 Ala. 161, 34 So. 389 (1903); *St. Louis, etc. Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105 (1894); *McKinley v. Chicago, etc. Ry. Co.*, 44 Ia. 314, 24 Am. Rep. 743 (1876); *Baltimore, etc. Ry. Co. v. Pierce*, 89 Md. 495, 43 Atl. 940, 45 L. R. A. 527 (1899); *Aiken v. Holyoke St. Ry. Co.*, 184 Mass. 269, 68 N. E. 238 (1903); *Richberger v. Amer. Exp. Co.*, 73 Miss. 161, 18 So. 922, 55 Am. St. Rep. 522, 31 L. R. A. 390 (1896); *Chicago, etc. Ry. Co. v. Kerr*, 104 N. W. (Neb.) 49 (1905); *Rowell v. Boston, etc. Ry. Co.*, 68 N. H. 358, 44 Atl. 488 (1895); *Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038 (1906); *Jackson v. Amer. Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 30 L. R. A. 738 (1905); *Bowen v. Illinois Cent. Ry. Co.*, 136 Fed. 306, 69 C. C. A. 444, 70 L. R. A. 915 (1905); *Columbia Ry. Co. v. Woolfork*, 128 Ga. 631, 58 S. E. 152, 10 L. R. A. (N. S.) 1136 (1907); *Chase v. Knabel*, 90 Pac. (Wash.) 642 (1907); *Waalor v. Great North-ern Ry. Co.*, 117 N. W. (S. D.) 140 (1908); *Rose v. Imperial Engine Co.*, 112 N. Y. Supp. 8, 127 App. Div. 885, 196 N. Y. 515, 88 N. E. 1130 (1909); *Hogle v. H. H. Franklin Mfg. Co.*, 116 N. Y. Supp. 881, 128 App. Div. 403 (1908); *Wallace v. John A. Casey Co.*, 116 N. Y. Supp. 394, 132 App. Div. 35 (1909); *Jones v. Seaboard, etc. Ry. Co.*, 150 N. C. 473, 64 S. E. 205 (1909); *Beilke v. Carroll*, 51 Wash. 395, 98 Pac. 1119 (1909); *Southern Ry. Co. v. McNeely*, 88 N. E. (Ind.) 710 (1909); *Duquesne Distributing Co. v. Greenbaum*, 121 S. W. (Ky.) 1026 (1909); *Ploof v. Putnam*, 83 Vt. 252, 75 Atl. 277 (1910).

⁴⁹ Cases cited under § 154, *post*. *Stewart v. Brooklyn, etc. R. Co.*, 90 N. Y. 588; *Weed v. Panama R. Co.*, 17 N. Y. 362 [conductor willfully, and contrary to orders, detained a train of cars upon the road; company liable to a passenger]. A passenger may recover of a railway company for the act of a conductor in throwing him from the car, though such act was willful and malicious (*Schultz v. Third Ave. R. Co.*, 89 N. Y. 242, citing *Jackson v. Second Ave. R. Co.*, 47 Id. 274; *Rounds v. Delaware, etc. R. Co.*, 64 Id. 129; *Day v. Brooklyn R. Co.*, 76 Id. 593; *aff'g* 12 Hun, 435). Other illustrative cases are cited in the treatment of assaults on passengers and others and their ejection by conductors and other servants of the company.

⁵⁰ A master cannot be made liable for the willful injuries or trespasses of his servants, committed outside of their line of employment (*Snodgrass v. Bradley*, 2 Pa. 43; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *McKeon v. Citizens' R. Co.*, 42 Mo.

We do not undertake to define the master's liability for wrongful acts of his servant, beyond the line of negligence, as for assault and battery, false imprisonment, malicious prosecution, and other affirmative injuries. The master's liability is not confined to mere acts of negligence; but its full definition belongs to a treatise on Agency. We make a brief reference to such cases in the notes.⁵¹

§ 151. Ostensible authority for willful acts.—Where a servant has authority to commit an act of violence or other aggression, under certain contingencies, the master

79; Alabama, etc. R. Co. v. Harris, 125 S. W. (Ark.) 439 (1910).
 71 Miss. 74, 14 So. 263); and for personal motives (Murphy v. Central Park R. Co., 48 N. Y. Super. 96). A declaration setting forth an unlawful and malicious assault upon plaintiff by "defendant's servant," was held insufficient by reason of the lack of an allegation that the same was committed while the servant was acting within the scope of his employment (McCann v. Tillinghast, 140 Mass. 327, 5 N. E. 164). In North v. Smith, 10 C. B. N. S. 572, defendant's groom struck his spurs into plaintiff's horse as he was passing; defendant held not liable. A bank receiving money on special deposit, for safe keeping only, was held not responsible for an embezzlement by its cashier (Foster v. Essex Bank, 17 Mass. 479). The soundness of this decision may well be questioned. See United So. of Shakers v. Underwood, 9 Bush, 609 [conversion of special deposit by bank officers]. The fact that one is in the service of a master and that the act was done with the intention of serving him is not sufficient to render the master liable (Shelby v. Metropolitan St. Ry. Co., 141 Mo. App. 514, 125 S. W. 1189 (1910); Sweeden v. Atkinson Impt. Co., 125 S. W. (Ark.) 439 (1910).
⁵¹ Master held liable for assaults (Dickson v. Waldron, 135 Ind. 507, 35 N. E. 1, aff'g 34 Id. 506; O'Connell v. Samuel, 81 Hun, 357, 30 N. Y. Supp. 889; Canfield v. Chicago, etc. R. Co., 59 Mo. App. 354; Ward v. Young, 42 Ark. 542); for arrest (Harris v. Louisville, etc. R. Co., 35 Fed. 116; Palmeri v. Manhattan R. Co., 60 Hun, 579, *mem.*, 14 N. Y. Supp. 468 [arrest and abusive language]). Master held not liable for an assault (Cofield v. McCabe, 58 Minn. 218, 59 N. W. 1005; Meehan v. Morewood, 52 Hun, 566, 5 N. Y. Supp. 710 [foreman of store]; Campbell v. Northern Pac. R. Co., 51 Minn. 488, 53 N. W. 768 [surgeon]; Texas, etc. R. Co. v. Black, 87 Tex. 160, 27 S. W. 118 [brakeman]; Candiff v. Louisville, etc. R. Co., 42 La. Ann. 477, 7 So. 601 [conductor shooting stranger]; Thorburn v. Smith, 10 Wash. St. 479, 39 Pac. 124 [miners shooting]); nor for willfully firing building to injure his master (Collins v. Alabama, etc. R. Co., 104 Ala. 390, 16 So. 140); nor for willful murder (Fraser v. Freeman, 43 N. Y. 566; Golden v. Newbrand, 52 Iowa, 59, 2 N. W. 537).

is liable for the consequences of such an act, when committed by the servant under the belief that such a contingency had occurred, although in fact it had not.⁵² This authority may of course be given by implication,⁵³ as well as by express assent; and, where an act of violence is usually authorized under particular circumstances, the master is liable for such an act on the part of the servant, if he believes that the circumstances authorizing it exist.⁵⁴ Where a contingency occurs which justifies the

Under the Georgia Code (§ 3033), which renders railroad companies liable for damages caused by their employees, unless their agents have exercised reasonable care and diligence, such company is liable for the homicide of a person lawfully on its premises, by its agent who was known to be insane when employed (*Christian v. Columbus, etc. R. R. Co.*, 79 Ga. 460, 7 S. E. 216).

⁵² The defendants directed guards to remove disorderly passengers. Deeming an inoffensive person disorderly, a guard ejected him with excessive force. Held, that the guard had implied authority to determine who were disorderly, and defendants were liable (*Seymour v. Greenwood*, 7 Hurlst. & N. 355, 6 Id. 359. S. P., *Passenger R. Co. v. Young*, 21 Ohio St. 518). In *Bayley v. Manchester, etc. R. Co.* (L. R. 8 C. P. 148), a passenger was pulled by a porter out of a carriage, after the train had started, under the erroneous impression that the passenger was in a wrong carriage. It was his duty to prevent persons from traveling in wrong carriages; but he had no authority to remove a passenger from a carriage. Held, that a jury might find that the porter was acting within the course of his employment. Where the servant must exercise discretion in deter-

mining when the event has arisen upon whose existence his right to act depends, the master will be responsible for its exercise. "Where the master employs a watchman and authorized him to use firearms in his discretion, we cannot hold as matter of law that the act of the watchman in shooting a third party who, at the time was only near the premises, is conclusive evidence of the fact that the watchman was not acting within the scope of his employment. The master cannot escape liability for the acts of his servant when he has given the servant authority to act and discretion when to act, and the servant negligently acts at a time when such action was not necessary" (*Robards v. P. Bannon Sewer Pipe Co.*, 113 S. W. (Ky.) 429, 18 L. R. A. (N. S.) 923 (1908)).

⁵³ See *Mali v. Lord*, 39 N. Y. 381, and § 145, *ante*.

⁵⁴ *Croft v. Alison*, 4 B. & Ald. 590, where plaintiff recovered; and *McManus v. Crickett*, 1 East, 106, where plaintiff was nonsuited. *McManus v. Crickett* is discussed in *Howe v. Newmarch*, 94 Mass. 49. It really decided only that "trespass" would not lie, and that "case" was the proper remedy. General manager of hotel (*Morris Hotel Co. v. Henley*, 145 Ala. 678, 40 So. 52 (1906);

servant in using violence, yet if he uses unnecessary violence, or resorts to it in a time or a manner which make its consequences unnecessarily injurious, the master is

keeper of a park (Alton, etc. Ry. Co. v. Cox, 84 Ill. App. 202 (1899); clerk undertaking to obtain from customer article he believed stolen (McDonald v. Franchere, 102 Ia. 496, 71 N. W. 427 (1897); manager (New Ellerslie Fishing Club v. Stewart, 29 Ky. Law Rep. 414, 123 Ky. 8, 93 S. W. 598, 9 L. R. A. (N. S.) 475 (1906); pastor of church (Barabasz v. Kabat, 89 Md. 23, 37 Atl. 720 (1897); servant of warehouseman (Fairbanks v. Boston Storage Warehouse Co., 189 Mass. 419, 75 N. E. 737, 109 Am. St. Rep. 646 (1905); watchman (Letts v. Hoboken R., etc. Co., 70 N. J. Law 358, 57 Atl. 392 (1904); sewing machine agent (Griffith v. Friendly, 62 N. Y. Supp. 391, 30 Misc. Rep. 393 (1899); collector taking away furniture (Peddle v. Gally, 95 N. Y. Supp. 62, 109 App. Div. 178 (1905); servant employed to keep off trespasser (Schmidt v. Vandever, 97 N. Y. Supp. 441, 110 App. Div. 758 (1906); servant of restaurant keeper (Goodwin v. Greenwood, 16 Okl. 489, 85 Pac. 115 (1906); Barrett v. Minneapolis, etc. Ry. Co., 106 Minn. 51, 117 N. W. 1047, 18 L. R. A. (N. S.) 416 (1908); Standard Oil Co. v. Anderson, 152 Fed. 166, 81 C. C. A. 399, 212 U. S. 215, 53 L. Ed. —, 29 S. Ct. 252 (1909); Ellefson v. Singer, 116 N. Y. Supp. 453, 132 App. Div. 89 (1909); Board of Trade, etc. v. Cralle, 63 So. (Va.) 995 (1909); Fetting v. Winch, 104 Pac. (Ore.) 722 (1909); Shamp v. Lambert, 121 S. W. (Mo. App.) 770 (1909); Cressy v. Rep. Creosoting Co., 108 Minn. 340, 122 N. W. 484 (1909); Cain v. Hugh Mann Contracting Co., 202 Mass. 237, 88 N. E. 842 (1909); Harding v. St. Louis Nat. Stock Yards, 242 Ill. 444, 90 N. E. 205 (1909); Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128 (1909); Smith v. South, etc. Co., 151 N. C. 479, 66 S. E. 435; Weinecker, etc. Co. v. Ott, 50 So. (Ala.) 901 (1909); Jones v. Weihand, 119 N. Y. Supp. 441, 134 App. Div. 648 (1909); Medlin Milling Co. v. Boutwell, 122 S. W. (Tex. App.) 442 (1909); Ploof v. Putnam, 83 Vt. 252, 75 Atl. 277 (1910). *Cases in which master was held not liable:* Palos Coal & Coke Co. v. Benson, 145 Ala. 664, 39 So. 727 (1905); Peter Anderson & Co. v. Diaz, 77 Ark. 606, 92 S. W. 861, 113 Am. St. Rep. 180, 4 L. R. A. (N. S.) 649 (1906); Belt Ry. Co. v. Banicki, 102 Ill. App. 642 (1902); McDermott v. American Brewing Co., 105 La. 124, 29 So. 498 (1901); Brown v. Boston Ice Co., 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469 (1901); Johanson v. Pioneer Fuel Co., 77 Minn. 405, 75 N. W. 719 (1898); Collette v. Rebori, 107 Mo. App. 711, 82 S. W. 552 (1904); Holler v. P. Sanford Ross, 68 N. J. Law 324, 50 Atl. 342, 96 Am. St. Rep. 546, 59 L. R. A. 943 (1902); Kiernan v. N. J. Ice Co., 74 N. J. Law, 175, 63 Atl. 998 (1906); Feneran v. Singer Mfg. Co., 47 N. Y. Supp. 384, 20 App. Div. 574 (1897); Grimes v. Young, 64 N. Y. Supp. 859, 51 App. Div. 239 (1900); McGrath v. Michaels, 81 N. Y. Supp. 109, 80 App. Div. 458 (1903); Lytle v. Crescent News Hotel Co., 27 Tex. App. 530, 66 S. W. 240 (1901); Danforth v. Fisher, 75 N. H. 111, 71 Atl. 535 (1908); Doran v. Thomsen, 71

liable,⁵⁵ notwithstanding any precaution that he may have taken in his instructions to avoid the occurrence of such excessive or ill-timed use of the power intrusted to the servant.⁵⁶ Thus a railroad company is generally liable for an injury suffered by a passenger who, for refusing to pay fare, is put off by its servant, while the cars are in motion,⁵⁷ or with unnecessary violence;⁵⁸ or

Atl. (N. J.) 296 (1908); *Farrington v. Cheponis et al.*, 82 Conn. 258, 73 Atl. 139 (1904); *Sweeden v. Atkinson Improvement Co.*, 125 S. W. (Ark.) 439 (1910); *Novelty Theatre Co. v. Whitcomb*, 47 Colo. 110, 106 Pac. 1012 (1910); *Corrigan v. Hunter*, 127 S. W. (Ky.) 131 (1909); *Shelby v. Metropolitan Street Ry. Co.*, 141 Mo. App. 514, 125 S. W. 1189 (1910); *Howe v. Leighton*, 75 Atl. (N. H.) 102 (1911); *Lessoiff v. Gordon*, 124 S. W. (Tex. App.) 182 (1909); *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016 (1910).

⁵⁵ Master held liable in *Rogahn v. Moore Mfg. Co.*, 79 Wis. 573, 48 N. W. 669 [expelling with violence]; *Jones v. Glass*, 13 Ired. N. C. Law 305 [excessive punishment]. Servant driving sleigh striking violently boy who jumped on runner (*Dealy v. Coble*, 98 N. Y. Supp. 452, 112 App. Div. 296 (1906); driver of dray knocked boy off (*Hyman v. Tilton*, 208 Pa. 641, 51 Atl. 1124 (1904);

bartender (*Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. Rep. 47 (1900); *Oakland City, etc. Society v. Bingham*, 4 Ind. App. 545, 31 N. E. 383 (1892); *Lombard Water Wheel Governor Co. v. Great Northern Paper Co.*, 101 Me. 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180 (1906); *Texas & N. O. Ry. Co. v. Parsons*, 109 S. W. (Tex. App.) 240, 113 S. W. (Supreme) 914 (1908); *Cunningham v. Castle*, 111 N. Y. Supp. 1057, 127 App. Div. 580 (1908); *Gresh v. Wanamaker*, 221 Pa. 28, 69 Atl. 1123 (1908).

⁵⁶ *Higgins v. Watervliet Turnp. Co.*, 46 N. Y. 23; *Louisville, etc. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572.

⁵⁷ *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343; *Higgins v. Watervliet Turnp. Co.*, 46 Id. 23; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Healey v. City Pass. R. Co.*, 28 Ohio St. 23. See cases cited under last section. In *Harlinger v. N. Y. Central R. Co.*, 15 Week. Dig. 392, aff'd,

⁵⁸ *Perkins v. Missouri, etc. R. Co.*, 55 Mo. 201; *Hufford v. Grand Rapids, etc. R. Co.*, 53 Mich. 118, 31 N. W. 544; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Kline v. Central Pacific R. Co.*, 37 Cal. 400. So, where the servant uses excessive force and abusive language to compel the double payment of fare, the carrier is liable (*Goddard v. Grand Trunk R. Co.*, 57 Me. 202). *Planz v. Boston, etc. Ry. Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 935 (1892); *Chicago, etc. Trac. Co. v. Mahoney*, 230 Ill. 562, 82 N. E. 868 (1907); *McGarry v. Holyoke St. Ry. Co.*, 182 Mass. 123, 65 N. E. 45 (1902); *Norfolk, etc. Ry. Co. v. Brame*, 109 Va. 422, 63 S. E. 1018 (1909); *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 108 Pac. 604 (1910); *Ry. Co. v. Diefenbach*, 167 Fed. 39 (1909).

if the passenger's property is seized for fare.⁵⁹ It is liable for excessive and wanton violence used in ejecting a trespasser,⁶⁰ and for the wrongful ejection of one whom

without opinion, 92 N. Y. 661, a car porter removed a trespasser from his car while the train was in motion, causing his death. Held, the company was liable, though the porter acted with negligence, want of judgment and violence of temper. *Contra*, *Williams v. Pullman Car Co.*, 40 La. Ann. 87, 3 So. 631; not to be followed. In ejecting a passenger the train must be stopped, *Gallena v. Hot Spring R. Co.*, 13 Fed. 116; *State v. Kinney*, 34 Minn. 311, 25 N. W. 705; at a regular station, *Hall v. Memphis, etc. R. Co.*, 15 Fed. 57. See § 493, *post*. *Hirte v. Eastern, etc. Ry. Co.*, 127 Wis. 230, 106 N. W. 1068 (1906); *Indianapolis, etc. Ry. Co. v. Hockett*, 161 Ind. 196, 67 N. E. 106 (1903); *Braly v. Fresno, etc. Ry. Co.*, 9 Cal. App. 417, 99 Pac. 400 (1908); *Ft. Worth, etc. Ry. Co. v. Conner*, 131 S. W.

(Tex. App.) 1135 (1910); *Springfield v. Louisville, etc. Ry. Co.*, 32 Ky. Law Rep. 578, 105 S. W. 1190 (1907). "If a passenger is drunk, or uses profane and insulting language, or violates the rules of the company willfully or flagrantly, he may be ejected from the car, but not while it is in motion," unless necessary for the protection of life or against serious bodily injury of other passengers or employees (*Union Pac. Ry. Co. v. Mitchell*, 56 Kans. 324, 43 Pac. 244 (1896)); but the mere fact that the train is in motion is not generally held conclusive of negligence; it is a question for the jury, under the facts of each case, whether he was exposed to unnecessary danger by the want of ordinary care (*Indianapolis, etc. Ry. Co. v. Hockett, supra*).

⁵⁹ *Ramsden v. Boston & Alb. R. Co.*, 104 Mass. 117.

⁶⁰ It is part of the duty of a street-car driver to keep trespassers off his car, and, therefore, where he compels a boy to jump off while the car was in rapid motion, such act, though wanton and reckless, is within the scope of his employment (*Baber v. Broadway, etc. R. Co.*, 9 Misc. 20, *aff'd*, 149 N. Y. 584, *mem.*, 43 N. E. 985; *Healey v. City Passenger R. Co.*, 28 Ohio St. 23; *Haehl v. Wabash R. Co.*, 119 Mo. 325, 24 S. W. 737. *s. p.*, *Shea v. Sixth Av. R. Co.*, 62 N. Y. 180 [forcing lady off]. So as to conductors (*North Chicago R. Co. v. Gastka*, 128 Ill. 613, 21 N. E. 522; *Sothern Pac. Co. v. Kennedy*,

9 Tex. Civ. App. 232, 29 S. W. 394 [conductor shooting trespasser]); so as to an engineer (*Chicago, etc. R. Co. v. West*, 125 Ill. 320, 17 N. E. 788 [forcing child off]). A brakeman has implied authority to remove from his train, in a lawful manner, a trespasser found on a car, and the company is liable for his errors and excesses in so doing (*Smith v. Louisville, etc. R. Co.*, 95 Ky. 11, 23 S. W. 652; *Hoffman v. N. Y. Central R. Co.*, 87 N. Y. 25 [brakeman, kicking boy from train running ten miles an hour]; *Lang v. N. Y., Lake Erie, etc. R. Co.*, 51 Hun, 603; *s. c.*, again, 80 Hun, 275, 30 N. Y. Supp., 137 [brakeman throwing coal at boy]; *Mobile, etc. R. Co. v. Seaes*,

its servant erroneously believed to be a trespasser.⁶¹

§ 152. [Omitted.]

§ 153. Willful acts; when consequences of negligence.

— A servant's negligence in his master's business may involve him in difficulties, out of which he cannot escape without purposely doing an injury to a third person. In such a case, if a prudent regard to his master's interest would dictate such a course, he has an implied authority from his master to commit the injury; and the master is, of course, answerable for the consequences.⁶²

§ 154. Liability for negative result of willful acts. —

Where the servant, by his wrongful act, deprives the plaintiff of the benefit of some act which it was the duty of the master to perform, and the performance of which

100 Ala. 368, 13 So. 917 [wanton injury]). *Contra*, as to brakemen, Illinois Cent. R. Co. v. Latham, 72 Miss. 32, 16 So. 757; Georgia R. Co. v. Wood, 94 Ga. 124, 21 S. E. 288; Farber v. Missouri Pac. R. Co., 32 Mo. App. 378. In Texas and Arkansas, some evidence of the brakeman's authority is required (Texas, etc. R. Co. v. Moody [Tex. Civ. App.], 23 S. W. 41); but when given, the company is responsible (Texas, etc. R. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; St. Louis, etc. R. Co. v. Hendricks, 48 Ark. 177, 2 S. W. 783; Bess v. Chesapeake, etc. R. Co., 35 W. Va. 492, 14 S. E. 234 [business of servant "unknown"]). In Molloy v. N. Y. Central R. Co., 10 Daly, 453, the rule was erroneously declared not to apply to the case of an employee who kicks or pushes a person merely running alongside the train. Morgan v. Oregon, etc. Ry. Co., 27 Utah 92, 74 Pac. 523 (1903); Toledo, etc. Ry. Co. v. Gordan, 143

Fed. 95, 74 C. C. A. 289 (1906); Cook v. Southern Ry. Co., 128 N. C. 333, 38 S. E. 925 (1901); Pierce v. North Carolina Ry. Co., 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316 (1899); Baltimore, etc. Ry. Co. v. Norris, 17 Ind. App. 189, 46 N. E. 554, 60 Am. St. Rep. 166 (1897); St. Louis, etc. Ry. Co. v. Pell, 89 Ark. 87, 115 S. W. 957 (1908); Golden v. Northern Pac. Ry. Co., 39 Mont. 435, 104 Pac. 549 (1909).

⁶¹ Lake Shore, etc. R. Co. v. Rosenzweig, 113 Pa. St. 519, 6 Atl. 545.

⁶² Defendant's team was driven so negligently by his servant as to put him in danger, from which he could only escape by intentionally driving against plaintiff's wagon. Held, that defendant was liable (Wolfe v. Mersereau, 4 Duer, 473; see, also, Croft v. Alison, 4 B. & Ald. 590). So a locomotive engineer has implied authority to run over cattle, if necessary to save the train. See § 429, *post*.

is, in whole or in part, delegated to that servant, the master is responsible for the servant's act, no matter how willful, malicious and unauthorized it may be.⁶³ Nor would it alter the case to prove that the servant not only knew his act to be unauthorized, but was impelled to the act by a desire to injure his master.⁶⁴ This doctrine is peculiarly applicable to common carriers, who are bound to protect their passengers from insult and injury, so far as lies reasonably within their power, and absolutely so, against their own servants.⁶⁵ But it ap-

⁶³ *Stewart v. Brooklyn, etc. R. Co.*, 90 N. Y. 588; *Schultz v. Third Ave. R. Co.*, 89 Id. 242. A railroad passenger was expelled by the conductor from the car. Held, that the company was liable (*Milwaukee, etc. R. Co. v. Finney*, 10 Wis. 388).

⁶⁴ *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48.

⁶⁵ *Stewart v. Brooklyn, etc. R. Co.*, 90 N. Y. 588, overruling *Isaacs v. Third Ave. R. Co.*, 47 Id. 122. In the former case, a carrier was held liable to a passenger who was, without any cause, cruelly beaten by the driver of the car. *s. p.*, *Fisher v. Metropolitan R. Co.*, 34 Hun, 433. In *Schultz v. Third Ave. R. Co.*, 89 N. Y. 242, the carrier was held liable for willful act of the conductor in throwing plaintiff off the platform into the street without asking for his fare. A railroad company, being bound to protect its passengers from the violence and insult of its servants, is liable for an assault by the conductor, though made willfully and maliciously, and in no manner connected with the conductor's duties (*Dillingham v. Anthony*, 73 Tex. 47, 11 S. W. 139). To same effect, *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219 [railway gateman]; *Mulligan v. Rockaway Beach R.*

Co., 14 N. Y. Supp. 456, 60 Hun, 579, *mem.* [arrest of passenger for offering counterfeit money]). To the contrary is a palpably erroneous decision in *Louisville, etc. R. Co. v. Douglass*, 69 Miss. 723, 11 So. 933 [baggage-master forcing passenger off train.] In *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 23 S. E. 327, a passenger, calling to receive his baggage, was shot by the depot-agent on account of the former's abusive language to him. Carrier held liable. But a carrier is not liable for an injury to a passenger by its servant under circumstances which free the servant from all criminal or civil responsibility (*New Orleans, etc. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109 [shooting in self-defense]). Carrier not liable for assault by servant, after contract for carriage fully performed (*Central R. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709; *Dwinelle v. N. Y. Central, etc. R. Co.*, 45 Hun, 139). *Birmingham, etc. Ry. Co. v. Bair*, 130 Ala. 334, 30 So. 456, 54 L. R. A. 752 (1901) [assault by conductor]; *Haver v. Central, etc. Ry. Co.*, 62 N. J. Law, 282, 41 Atl. 916, 72 Am. St. Rep. 647, 43 L. R. A. 84 (1898) [assault by baggage-master]; *Knoxville Trac. Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 579 (1899)

plies also to every case in which the wrongful act of the servant results in a breach of any duty of the master.⁶⁶ These principles have been often overlooked; as where the master of a vessel wantonly ran into another, without quitting his direct route,⁶⁷ and where an engineer purposely ran over or frightened a person or an animal.⁶⁸ But these decisions have been since disapproved.⁶⁹ They

[insults by motorman]; Baltimore, etc. Ry. Co. v. Barger, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220 (1894) [assault by conductor]; Alabama, etc. Ry. Co. v. Sampley, 53 So. (Ala.) 142 (1910) [assault by conductor]; St. Louis, etc. Ry. Co. v. Harrison, 76 Ark. 430, 89 S. W. 53 (1905) [assault by conductor]; Georgia Elec. Ry. Co. v. Rich, 71 S. E. (Ga.) 759 (1911) [assault by conductor]; Heggen v. Fort Dodge, etc. Ry. Co., 130 N. W. 148 (1911) [assault by conductor]; Palmer v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632, 16 L. R. A. 136 (1892) [insults by ticket agent]; Miller v. Ry. Co., 124 App. Div. 537, 108 N. Y. Supp. 960; McMahon v. Chicago, etc. Ry. Co., 239 Ill. 334, 88 N. E. 223 (1909); Jackson v. Old Colony Ry. Co., 206 Mass. 477, 92 N. E. 725, 30 L. R. A. 1046 (1910); Dawson v. Metropolitan St. Ry. Co., 138 S. W. (Mo. App.) 665 (1911); St. Louis Ry. Co. v. Sanderson, 54 So. 885 (1911); Rand v. Butte, etc. Ry. Co., 40 Mont. 398, 107 Pac. 87 (1910); Fielder v. St. Louis, etc. Ry. Co., 51 Tex. App. 244, 112 S. W. 699 (1908); Johnson v. Washington Water Power Co., 114 Pac. (Wash.) 453 (1911); The Minnetonka, 146 Fed. 509, 77 C. C. A. 217; Rohrbach v. Car Co., 166 Fed. 797. § 145, note; § 155, note 513, *post*.

⁶⁶ The gate-keeper of defendant's fair, authorized to eject those who

were not rightfully on the grounds, wrongfully ejected plaintiff and inflicted malicious injury on him. Defendant liable (Oakland Agric. Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383). A company, keeping a "union depot," for the accommodation of passengers coming on several railways, is liable for the violence of a brutal servant, to the same extent as a carrier (Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N. W. 54).

⁶⁷ Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479.

⁶⁸ Cooke v. Illinois Cent. R. Co., 30 Ia. 202; Stephenson v. Southern Pac. R. Co., 93 Cal. 558, 29 Pac. 234.

⁶⁹ Wallace v. Merrimack, etc. Co., 134 Mass. 95, 45 Am. Rep. 301; Duggins v. Watson, 15 Ark. 118. The master is civilly liable for the act of his servant, whether the act is one of omission or commission, whether negligent, fraudulent or deceitful, if the act is done in the course of the servant's employment (Hanson v. European, etc. R. Co., 62 Me. 84; Goddard v. Grand Trunk R. Co., 57 Id. 202; Bryant v. Rich, 106 Mass. 180; Ramsden v. Boston, etc. R. Co., 104 Id. 117; Craker v. Chicago, etc. R. Co., 36 Wis. 657; Chicago, etc. R. Co. v. Flexman, 103 Ill. 546; Chicago, etc. R. Co. v. Dickson, 63 Id. 151; Sherley v. Billings, 8 Bush, 147; Nashville, etc. R. Co. v. Starnes, 9 Heisk. 52; Wetmore v. Little Miami R. Co., 19 Ohio St. 110; Mc-

overlook the duty which the owner of a dangerous instrument owes to the public, not to set it in motion without keeping it under proper guidance.

§ 154a. Dangerous agencies and instrumentalities entrusted to a servant.—The doctrine of the English courts, announced in *Rylands v. Fletcher*,⁷⁰ to the effect that one who brings on his premises or accumulates thereon, a dangerous agency, liable to escape and injure others, is absolutely liable, has not been accepted in this country. The American doctrine is that in such case the owner's responsibility is for the exercise of due care in keeping the thing safely. Hence the master's liability for dangerous agencies entrusted to the servant is for the exercise of such care on his part in keeping the thing safely as is commensurate with the danger to others from a failure to do so,⁷¹ or for his negligent use in the

Kinley v. Chicago, etc. R. Co., 44 Ia. 314; *Philadelphia R. Co. v. Derby*, 14 How. U. S. 468; see 40 Am. Rep. 227, note and § 150, *ante*, and § 513, *post*). Railroad companies have been repeatedly held responsible for the act of an engineer, in maliciously spurting steam (*Cobb v. Columbia, etc. R. Co.*, 37 S. C. 194, 15 S. E. 878; *Chicago, etc. R. Co. v. Dickson*, 63 Ill. 151; *Georgia R. Co. v. Newsome*, 60 Ga. 492; *Philadelphia, etc. R. Co. v. Brannen* [Penn.], 33 Alb. L. J. 216); or blowing a whistle (*Texas, etc. R. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479) to frighten animals, etc. See § 426, *post*. The general principle of the *Vanderbilt* case (*supra*, note 5) has, however, been mentioned with approval in the same court (*Rounds v. Delaware, etc. R. Co.*, 64 N. Y. 129, 135; *Mott v. Consumers' Ice Co.*, 73 Id. 543, 548).

⁷⁰ L. R. A. 3 H. L. 330, aff'g L. R. 1 Ex. 265, reversing S. C. 3 Hurlst. & C. 774; for full report of the case see 1 Thompson on Negligence (1st ed.) p. 2; and for full discussion, §§ 695 *et seq.* (2d ed.) of same work; see §§ 701 of this work.

⁷¹ *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736 (1896); *Marshall v. Wellwood*, 38 N. J. Law, 339 (1876), forcibly criticising *Rylands v. Fletcher, supra*; *Hyman v. Pittsburgh, etc. Ry. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507 (1887); *Pittsburgh, etc. Ry. Co. v. Shields*, 47 Ohio St. 387, 24 N. E. 658, 21 Am. St. Rep. 840, 8 L. R. A. 464 (1890). In the *Shields* case, with excellent discrimination, it is said "a servant may depart from his employment without making his master liable for his negligence when outside the employment of the master; and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he cannot depart from the *duty*

course of his employment. A misuse solely for the gratification of the servant's personal feeling, whether of malice or of mischief, is not a failure to keep safely and does not impose liability on the part of the master. The master's liability is for the management of his own business and not for the independent conduct of the servant. For the misuse of such agencies or instrumentalities by the servant in the course of his employment the master is liable, notwithstanding such misuse is accompanied by a malicious or mischievous purpose of the servant. Thus it has been held that for injury from the sportive insertion of the hot water hose by the engineer and fireman in the pocket of one they had permitted to ride in the cab, the company is not liable;⁷² and that

entrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business without making the master liable for the consequences; for the first step in that direction is a breach of the duty entrusted to him by the master and his negligence in that regard becomes at once the negligence of the master; otherwise the duty required of the master in respect to the custody of such instruments employed in his business may be shifted from the master to the servant, which cannot be done so as to exonerate the master from the consequences of the neglect of the duty." The *Shields* and *Hyman* cases are sharply criticised in the case of *Obertoni v. Boston & Maine Ry. Co.*, 186 Mass. 481, 71 N. E. 980, 67 L. R. A. (1904); but we are unable to see any difference in principle in the cases. In the *Shields* case the master was held liable upon the ground that the servant who was properly chargeable with the care of the torpedo had, by neglect of duty, permitted it to re-

main in an exposed place where it was found by a child, injured by its explosion. In the *Obertoni* case the railway company was held not liable where the torpedo was found upon the track, also by a child, but the evidence showed that it had been carelessly left there by a railway employee not chargeable with its custody and no evidence was adduced to show that it had passed out of the custody of the servant properly entrusted with its keeping by negligence, the court holding that the mere fact of its being found on the track was not such evidence on this point as, standing alone, should be permitted to go to the jury. See also *Galveston, etc. Ry. Co. v. Currie*, 100 Tex. 136, 96 S. E. 1073, 10 L. R. A. (N. S.) 367 (1906) and authorities there cited. For other torpedo cases see *Merschel v. Louisville, etc. Ry. Co.*, 27 Ky. Law R. 465, 85 S. W. 710 (1905); *Euting v. Chicago, etc. Ry. Co.*, 116 Wis. 13, 92 N. W. 358, 98 Am. L. R. 936 (1903).

⁷² *International, etc. R. R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517 (1895).

where a railroad company had entrusted the care of a hand-car to a foreman who, in using it solely for his private purposes, injured another, the company is not liable.⁷³ And so in the case of the servant charged with the custody of the compressed air apparatus in the roundhouse who used it upon another in sport.⁷⁴ Such cases are distinguished from those in which the employees on a locomotive, in malice or sport, frighten persons or animals by blowing the whistle or discharging steam, on the ground that the latter are acts in the course of their employment, the private purpose of the servant merely accompanying the act.⁷⁵

§ 155. Disobedience of master's orders. — Unintentional disobedience of a master's orders should always be deemed mere negligence, for the consequences of which, if the master would otherwise be liable, his orders should not protect him from liability.⁷⁶ Even the willful disobedience of a servant does not necessarily exonerate his master.⁷⁷ Where the master is bound by law or con-

⁷³ *Branch v. International, etc. R. Co.*, 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 884 (1898). *Contra*, *Barmore v. Vicksburg, etc. Ry.*, 38 So. (Miss.) 210 (1905).

⁷⁴ *International, etc. R. R. Co. v. Currie, supra*.

⁷⁵ *Regan v. Reed*, 96 Ill. App. 460; *Alsever v. Minneapolis, etc. Ry. Co.*, 115 Ia. 338, 88 N. W. 841, 56 L. R. A. 718 (1902); *Skipper v. Clifton Mfg. Co.*, 58 S. C. 143, 36 S. E. 509 (1900); *Texas, etc., Ry. Co. v. Scoville*, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179 (1894).

⁷⁶ *Armstrong v. Cooley*, 5 Gilm. 509 [prairie fire]. Defendant directed servant to cut trees along the line of his land. The servant ignorantly cut timber upon another man's land. Held, defendant was liable (*Luttrell v. Hazzen*, 3 Sneed, 20; see, also, *Carman v. New York*, 14 Abb. Pr. 301).

⁷⁷ See many cases cited under § 146, *ante*. But where defendant's employees, in direct disobedience of his orders, purposely start a fire in clearing defendant's field, which spreads to plaintiff's field, defendant is not liable (*Andrews v. Green*, 62 N. H. 436). *Sed quære?* To the

tract to render a particular service to a third person, he is liable for the non-performance of such service, although arising solely from the willful refusal of a servant to do his duty, whatever may be the motive. Thus, a carrier is liable for a delay in the transportation of persons⁷⁸ or property,⁷⁹ caused by the willful act of his servants, directly contrary to his orders, and even though committed for the purpose of injuring him.⁸⁰ And where a servant is employed to do a certain act, and is specially forbidden to adopt a particular method of doing it, yet willfully adopts that method, the master is, nevertheless, liable for injuries thereby caused to third persons, if the servant did the forbidden thing as a real means for the performance of his master's work.⁸¹ So, if the master is bound to guard an animal from doing mischief, and for this purpose employs a servant, who, by an act of willful disobedience, abandons his post, the master is liable for the consequences of the want of a guard.⁸²

§ 156. [Omitted.]

precise contrary, see *Keith v. Keir*, 8. *Ellegard v. Acklund*, 43 Minn. 352, 45 N. W. 715 (1890); *Lake Shore, etc. R. Co.*, 102 N. Y. *Voegeli v. Pickle Marble, etc. Co.*, 563, 7 N. E. 828).
49 Mo. App. 643; *Simons v. Manier*, 29 Bab. 419.

⁷⁸ *Weed v. Panama R. Co.*, 17 N. Y. 362. The conductor of a passenger train willfully kept it standing all night, from motives of his own. *Strong, J.*, said: "The obligation to be performed was that of the master, and delay in performance, from intentional violation of duty by an agent, is the negligence of the master." S. P., *Philadelphia, etc. R. Co. v. Derby*, 14 How. U. S. 468.

⁷⁹ *Blackstock v. N. Y. & Erie R. Co.*, 20 N. Y. 48; *Galena, etc. R. Co. v. Rae*, 18 Ill. 462. But where the carrier's servants left his service, and violently prevented new ser-

vants from acting; held, that the carrier was not liable (*Geismer v. Lake Shore, etc. R. Co.*, 102 N. Y. *Voegeli v. Pickle Marble, etc. Co.*, 563, 7 N. E. 828).

⁸⁰ *Blackstock v. N. Y. & Erie R. Co.*, *supra*. All the engineers on the road having struck, the company was unable to deliver plaintiff's potatoes in time. Defendant offered to prove that the engineers were entirely in the wrong; it was obvious they meant to injure the company, so as to compel submission to their demands. Held, all this made no difference.

⁸¹ A railroad company may be responsible for the acts of its servants, though in direct violation of its rules (*Toledo, etc. R. Co. v. Harmon*, 47 Ill. 298).

⁸² *Whatman v. Pearson*, L. R. 3 C. P. 422.

§ 157. **Liability for sub-agents or strangers.**—The master is, of course, liable for the negligence of one whom his servant employs, by his authority, to aid such servant in the master's business.⁸³ Such authority need not be express, but may be implied from the nature of the business, or the course of trade. Thus, such an authority would almost necessarily be implied in favor of a servant entrusted with the whole care of a farm, or the construction of a building, or the transportation of a large quantity of goods, or any other task which could not be performed within a reasonable time by one man.⁸⁴ But a question of some difficulty may arise, where a servant, without having any real or ostensible authority to do so, employs an assistant, by whose negligence, in the performance of work assigned to the former servant, a third person is injured. The master would not be bound by a contract made in his name by such a sub-agent, even though it were exactly such as he had authorized his own servant to make; and from this it might not unreasonably be inferred that he could not be made liable for the torts of one whose contracts would not bind him.⁸⁵ On the other hand, manifest inconvenience is certain to ensue to the public at large from thus shifting the responsibility from masters, who, as a class, are able to meet it, and who receive the benefit of the service, upon servants who, as a class, are entirely unable to compensate for the injuries thus caused. Public policy, therefore, requires that masters should be held liable for the consequences in such cases; and so the courts have held, although without laying down any general rule upon the subject.⁸⁶ But the rule does not extend so

⁸³ *Wanstall v. Pooley*, 6 Clark & Fin. 910, note. not to be liable for the negligence of one employed by its servant, without authority, to assist him in moving

⁸⁴ *Bucki v. Cone*, 25 Fla. 1, 6 So. 160 [logging]; *Gleason v. Amsdel*, 9 a crate of crockery.

Daly, 393 [master saw assistant at work]. ⁸⁵ *Althorf v. Wolfe*, 22 N. Y. 355; where defendant directed his servant

⁸⁶ In *Jewell v. Grand Trunk R. Co.* to clear the snow off the roof. The (55 N. H. 84), defendant was held servant employed another man to

far as to hold a master liable where a third person is injured through the negligence of a stranger who intrudes into and acts in the master's business, without the assent of the servant in charge, although the conduct of the latter gave opportunity for the intrusion.⁸⁷ As seen in the preceding part of this section, the master is liable for the negligence of one whom his servant calls upon to assist him in his work, having authority to do so, express or implied, and the negligent act itself is one in the course of the employment so assumed.⁸⁸ It has been held that the defendant is liable for the negligence of a bystander who was assisting the defendant's driver at the driver's request, a pedestrian being injured thereby, the circumstances implying authority;⁸⁹ and that the master is liable for injury to a third person by the negligence of one employed by the janitor, with implied authority, though without the master's knowledge.⁹⁰ Where the person rendering assistance, either at the request or with the acquiescence of

help him; through negligence of the latter, a mass of snow thrown into the street killed plaintiff's intestate. Held, defendant was liable. So as to stranger left in charge of locomotive by engineer (*Lakin v. Oregon Pac. R. Co.*, 15 Oreg. 220, 15 Pac. 641). In *Carson v. Leathers*, 57 Miss. 650, the owners of a steamboat were held liable to a passenger who disembarked at a wrong landing pursuant to the directions of strangers, deputed by the clerk.

⁸⁷In *Edwards v. Jones*, 67 How. Pr. 177, defendant's servant left a horse which he had been driving, and was absent ten or fifteen minutes. During this time, a strange man took hold of the horse, and by his negligence plaintiff's boat was damaged. Defendant was held not liable.

⁸⁸*Gaines v. Bard*, 52 Ark. 615, 22

S. W. 570, 38 Am. St. Rep. 266; *Appel v. Eaton, etc. Co.*, 97 Mo. App. 428, 71 S. W. 741 (1904); *Jackson v. Amer. Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738 (1905); but see *Long v. Richmond*, 175 N. Y. 495, 67 N. E. 1084 (1903); *Thorp v. Minor*, 109 N. C. 152, 13 S. E. 702 (1892); *Board of Trade Cor. v. Cralle*, 63 S. E. (Va.) 995 (1909). For cases in which it has been held that the *authority was lacking*, see *Thyssen v. Davenport Ice & Storage Co.*, 112 N. W. (Ia.) 177 (1907); *Cooper v. Lowery*, 4 Ga. App. 120, 60 S. E. 1015 (1909); *So. Ry. v. Pope's Admr.*, 119 S. W. (Ky.) 237 (1909).

⁸⁹*Hollidge v. Duncan*, 199 Mass. 121, 85 N. E. 186 (1910).

⁹⁰*Ellefson v. Singer Mfg. Co.*, 116 N. Y. Supp. 453, 132 App. Div. 89 (1909).

the servant in charge, is himself, or as servant of another, interested in the work being done, he is not to be regarded as a fellow servant of those doing the work, and is entitled to recover for injuries inflicted by their negligence. Thus it has been held where the injured party was acting at the time in the furtherance of his own interest in having his freight delivered by a railway company and was injured through the carelessness of the company's servants, he was entitled to recover damages of the company. In such case it has been said that the injured person is not a volunteer, but engaged at the request or with the permission of the railway company's agents in a transaction of interest as well to himself, or other master, as the case may be, as to the railroad company, and this entitles him to the same protection against the negligence of the company's servants as if he were at the time attending to his private business. Though performing a service beneficial to both, he is doing so in his own behalf and not as a servant of the company. Its request or acquiescence gives him the right to perform the service; the fact that he acts in his own behalf, however beneficial his labor may be to the company, gives him the right to be protected against the negligence of the company's servants. The act done by him should be a prudent and reasonable one, and "not a wrongful intermeddling with business in which he had no concern."⁹¹ So when a passenger on a street-car voluntarily assisted the driver in backing the car upon a switch so that another car coming in the opposite direction could pass, and was injured through the negligence of the driver of the latter car, he was held entitled to recover against the street-car company.⁹² The master has a right to select his own servants. Viewed in its relation to others this right becomes a duty to employ

⁹¹ *Eason v. South, etc. R. Co.*, 65 Eng. Ry. Cases, 501; *Mayton v. Tex.* 577, 57 Am. St. Rep. 606 *Texas, etc. R. Co.*, 48 Miss. 112; *Flower v. Pennsylvania, etc. Ry. Co.*, (1886).

⁹² *McIntyre v. Bolton*, 21 Amer. & 69 Pa. St. 210, 8 Am. St. Rep. 251.

competent servants. Clearly, therefore, another and subordinate servant, having no power to employ and discharge, ordinarily cannot impose this relation on him. We think in such case the law is that where a special emergency arises in the master's business, requiring additional assistance, without which the service would suffer material detriment, as by the exposure of the lives or property of others in the master's charge to injury, the law implies authority from the master to those engaged in his service to employ such additional assistance as the emergency may require.⁹³

§ 158. **Implied liability of owner of vehicle.** — When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant,⁹⁴ leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person, for whose negligence the owner would not be answerable. This view is supported by decisions, in which it was held

⁹³ *Mayton v. Texas, etc. Ry. Co., v. Bailey* [1891], 2 Q. B. 403, 60 *supra*; *Holmes v. North Eastern Ry. L. J. Q. B. 779*; see *Atchison, etc. Co., L. R. 4 Exch. 254*; *Wright v. R. Co. v. Cochran*, 43 Kans. 225, 23 London Ry., 1 Q. B. Div. 252. Pac. 151 [shareholder not a part

⁹⁴ Proof of defendant's ownership of a wagon is *prima facie* evidence, to charge him with responsibility for its management (*Norris v. Kohler*, 41 N. Y. 42; see *Boniface v. Relyea*, 6 Robt. 397; *Svenson v. Atlantic Mail S. S. Co.*, 57 N. Y. 108, *aff'd* 33 N. Y. Super. Ct. 277; *McCoun v. N. Y. Central R. Co.*, 66 Barb. 338 [men at work on locomotive]; *Smith* (1899). *Doherty v. Lord*, 8 Misc. (N. Y.) 227, 28 N. Y. Supp. 720, 59 N. Y. St. Rep. 445, *aff'd*, 55 N. Y. St. Rep. 160, 25 N. Y. Supp. 752; *Perstein v. American Exp. Co.*, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959 (1901); *Thurn v. Taylor Brewing & Malt. Co.*, 56 N. Y. Supp. 85, 37 App. Div. 391

sufficient evidence of the defendant's negligence to show that the plaintiff was injured by something falling out of the window of the defendant's house,⁹⁵ or from hoisting apparatus belonging to the defendant.⁹⁶ Acquiescence in the constant use of a vehicle may make the owner responsible for the negligence of those using it in connection with his business.⁹⁷ And where an injury is caused by defects in a vehicle or its loading, which the owner was bound to remedy, it is immaterial whether the persons in charge were his servants or not.⁹⁸

§ 159. Ownership of other property; how far implies liability. — It would seem to be reasonable that the same doctrine should apply to every species of property which, in the ordinary course of affairs, is managed by its owner or his servants, and that the mere fact of its mismanagement should raise a presumption that the owner was responsible therefor.⁹⁹ Of course the circumstances

⁹⁵ *Byrne v. Boadle*, 2 Hurlst. & C. 722.

⁹⁶ *Scott v. London Dock Co.*, 3 Hurlst. & C. 596. See § 59, *ante*.

⁹⁷ *Reilly v. Hannibal, etc. R. Co.*, 94 Mo. 600, 7 S. W. 407 [locomotive]; *Lovington v. Bauchens*, 34 Ill. App. 544 [team].

⁹⁸ *Haugh v. Chicago, etc. R. Co.*, 73 Iowa, 66, 35 N. W. 116.

⁹⁹ *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380. As the owner of a building adjoining a highway is bound to take reasonable care that it is kept in proper condition, the mere falling of the building raises a presumption of negligence, and the burden is on the owner of showing ordinary care (*Mullen v. St. John*, 57 N. Y. 567. Compare *English v. Brennan*, 60 N. Y. 609). s. p., *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78 [uncovered coal-hole in sidewalk in charge of agent of owner of abutting building]. The falling

of a piece of wood from a building during the repairs is *prima facie* evidence of negligence in the owner (*Clare v. National City Bank*, 1 Sweeney, 539). So is the fall of anything from a window (*Byrne v. Boadle*, 2 Hurlst. & C. 722). In *Lebanon Light Co. v. Leap*, 139 Ind. 443, 39 N. E. 57, a gas company contracted for the construction of a gas plant. The contractor sublet the contract for boring the gas wells. The sub-contractor, after boring one well, laid pipe, which was furnished by the contractor, to get gas from the well to use in boring others. Part of the pipe so laid was taken up by the contractor, and the rest used in conducting gas to a town for the use of the company. Held, that, though the plant had not been turned over to the company, it and both contractors were liable for injuries caused by the negligent manner in which the pipe was laid. s. p.,

may be such as to raise a presumption that the property was not, at the time of the accident, under the defendant's actual control; and in such case the usual presumption of the defendant's negligence, arising out of his supposed custody of the thing, is rebutted, and further evidence must be adduced.¹⁰⁰ And it has been well suggested that, where it is the usual course of business to employ a contractor to do certain work on property, no presumption should arise, from the mere fact that such work was going on, that it was done by servants of the owner.¹⁰¹

§ 160. Who is to be deemed a master.—He is to be deemed the master, who has the supreme choice,¹⁰² con-

Wichita, etc. R. Co. v. Gibbs, 47 *post*. The owners of a vessel, by Kans. 274, 27 Pac. 991 [railroad in employing a tug to draw it, do not hands of construction company]; necessarily become responsible for Chattanooga, etc. R. Co. v. White- negligence of the tug, "as they head, 90 Ga. 47, 15 S. E. 44 [same]; neither appoint the master of the Johnson v. Spear, 76 Mich. 139, 42 tug nor employ the crew, nor can N. W. 1092 [owner's hoisting ap- they displace either one or the paratus used by contractor]. other" (The Clarita, 23 Wall. 1).

¹⁰⁰ Plaintiff was injured by being knocked down by a van belonging to defendants, and which they lent to A., who attached his own horses to the van, and provided a driver. Held, as the horse was the property, and the driver, strictly speaking, the servant, not of defendants, but of A., defendants were not liable (Shiells v. Edinburgh, etc. R. Co., Hay, 254, 18 Dunlop, 1199).

¹⁰¹ Welfare v. Brighton, etc. R. Co., L. R. 4 Q. B. 693.

¹⁰² General Steam Nav. Co. v. British, etc. Nav. Co., L. R. 3 Exch. 330; Dalvell v. Tyrer, El. B. & El. 899. He is the master who employs and has the power to discharge. "This is the only test by which to determine which is the master, and, as such, liable to the person injured" (Michael v. Stanton, 3 Hun, 462). See other illustrations, § 162,

There, the master of a tug having a burning ferry-boat in tow, allowed the latter to drift against libellant's vessel and set it on fire. A. sold to B. a box in the loft of A.'s store; B. sent his porter to take it away; and the porter, while, with the permission of A., getting the box down, suffered it to fall on plaintiff. Held, in letting down the box, the porter was the servant of B., not of A., and A. was not liable (Stevens v. Armstrong, 6 N. Y. 435). Legal competency to discharge a servant, being an essential attribute of the master, it has been doubted whether the relation can exist between husband and wife in such sense as to sustain an action by a stranger against one for negligently retaining the other (Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148); where it was sought to hold a woman, proprietor of a tavern, liable

trol¹⁰³ and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all its details.¹⁰⁴ The payment of an em-

for negligence in having in her employment her ferocious husband, who had removed the eye of a guest. But a husband has always been held liable for his wife's acts, when employed by him. And the wife could have dismissed the husband from her employment, although not from the house. And see, as to power to discharge *sub modo*, *Zeigler v. Danbury*, etc. R. Co., 52 Conn. 483.

¹⁰³ *McGuire v. Grant*, 25 N. J. Law, 356. The liability of a master for the acts of his servants is precisely commensurate with the extent of his right to control them (*Callahan v. Burlington*, etc. R. Co., 23 Iowa, 562; see *Clapp v. Kemp*, 122 Mass. 481, and § 164, *post*). A lessee of the penitentiary placed a convict in charge of his orchard, with authority to protect it. Plaintiff, a boy, entered therein with a gun, to shoot birds. The convict ordered him out and struck the boy. It was contended that the relation of master and servant could not exist between the lessee of the penitentiary and a convict. But the lessee was held liable (*Ward v. Young*, 42 Ark. 542). In *Bradley v. N. Y. Central R. Co.*, 3 T. & C. 287, *aff'd*, 62 N. Y. 99, a track master engaged plaintiff, a farmer, to aid with his team in scraping snow from defendant's track, in which operation he was injured through the track master's negligence. Defendant contended plaintiff was its servant, and without remedy for the negligence of a co-employee, but this view was rejected. "The presumption is that a minor child living with his father, and using his team and conveyance in and about the business of such

father, is acting in his behalf and upon his direction" (*Schaefer v. Osterbrink*, 67 Wis. 495, 30 N. W. 922). The captain of a tug, having a canal boat in tow, was held not to be master of the boat, so as to make the owner of the tug chargeable with negligence of the boat crew in not putting out lights, whereby a collision occurred and a third vessel was sunk (*Arctic Ins. Co. v. Austin*, 69 N. Y. 470). Plaintiff, having discovered a leakage of gas, due to defendant's negligence, called in a plumber to ascertain the location of the leak, and the latter entered with a lighted candle, causing an explosion. Held, that the plumber was not the plaintiff's servant, so as to make plaintiff answerable for his negligence, and that both defendant and the plumber were responsible (*Schermerhorn v. Metropolitan Gas Co.*, 5 Daly, 144).

¹⁰⁴ See §§ 162, 163, *post*; *Williamson v. Wadsworth*, 49 Barb. 294. In *Coggin v. Central R. Co.*, 62 Ga. 685, plaintiff, an employee of a telegraph company, was injured by the carelessness of an engineer in taking up the "slack" of his train, engaged in distributing telegraph poles along the line; all the operatives except the engineer and conductor being servants of the telegraph company, and one of the latter being in command of the train. Held, the engineer was the servant of the railroad company, and plaintiff could recover; there being no evidence that any telegraph agent interfered or had a right to interfere with the application of steam or with manipulating the engine. § 143, *ante*.

ployee by the day,¹⁰⁵ or the control and supervision of the work by the employer,¹⁰⁶ though important considerations, are not in themselves decisive of the fact that the two are master and servant. It has been well said by a Connecticut judge: "To get at the truth, we must look further, and see if the person said to be a servant is acting at the time for and in the place of his master, in accordance with and representing his master's will, and not his own."¹⁰⁷ Where this is not the case, the employer is not a master, nor the person employed his servant.¹⁰⁸ Where the relation of master and servant exists in fact, the master cannot avoid liability by any arrangement between them for concealing the fact from others¹⁰⁹ nor by an express agreement to the contrary between themselves, even in good faith.¹¹⁰

¹⁰⁵ Plaintiff contracted with defendant to build a stone dam, for which he was to receive a certain price per day for himself and each of his men; defendant furnishing the powder for blasting and superintending the building of the dam, but having no control over the blasting. Held, the relation of master and servant did not exist, and defendant was not liable to indemnify plaintiff for damages recovered from him by a third party, injured by the negligence of men employed upon the blasting (*Corbin v. American Mills*, 27 Conn. 274). The Louisiana Code (art. 163) defines servants as those who let, hire or engage their services "to another in this State, to be employed therein at any work, commerce or occupation for the benefit of him who has contracted with them, for a certain price or retribution, or upon certain conditions." Under this section it has been held that where a person was employed to peddle goods at a fixed wage per week, with certain additional commissions, the payment of wages established the rela-

tion of master and servant, so as to make the hirer responsible for his servant's negligence in the course of his employment (*Shea v. Reems*, 36 La. Ann. 966).

¹⁰⁶ *Corbin v. American Mills Co.*, 27 Conn. 274; *Gerlach v. Edelmeyer*, 47 N. Y. Superior, 292, aff'd, 88 N. Y. 645; *Wray v. Evans*, 80 Pa. St. 102 [work to be to satisfaction of defendant's engineer].

¹⁰⁷ *Corbin v. American Mills*, 27 Conn. 274.

¹⁰⁸ A railroad company is not responsible for United States postal clerks on its trains (*Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782). One riding in a friend's wagon, for a specific trip, does not thereby become liable for negligence of the friend's driver (*Muse v. Stern*, 82 Va. 33).

¹⁰⁹ *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. Ct. 175 [canvasser].

¹¹⁰ *Tiffin v. McCormack*, 34 Ohio St. 638; see *Southern Exp. Co. v. Brown*, 67 Miss. 260, 7 So. 318, 8 Id. 425.

§ 160a. There cannot be two masters as to the same act. — One cannot be the servant both of a general and a temporary master in doing the same act. Though he may at the same time be the servant of his general master in doing some acts and of a temporary master in doing some other acts.¹¹¹ It has been well said in a Massachusetts case, “The circumstances are often such that, while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication that as to the particulars of the management of the horses he is the servant of his general employer.”¹¹² The holding out by the defendant of one to the public as his servant though without the right to control his action with respect to the act or failure to act out of which the injury arose, may impose upon one liability for the negligence of such person by the operation of the doctrine of estoppel.¹¹³ Like ownership of a vehicle, these are evi-

¹¹¹ *Brow v. Boston, etc. R. Co.*, 157 Mass. 399, 32 N. E. 362; *Union R. Co. v. Kallaher*, 114 Ill. 325, 2 N. E. 77; *Cleveland, etc. R. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 12 S. W. 972; *Morris v. Trudo*, 83 Vt. 44, 74 Atl. 387 (1909); *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645 (1879); *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58 (1894); *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54 (1883); *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890; *Walker v. El Paso Elec. Ry. Co.*, 118 S. W. (Tex. App.) 554, aff'd, 126 S. W. (Sup.) 262 (1910).
¹¹² *Delorey v. Blogett*, 185 Mass. 126, 69 N. E. 1078, 102 Am. St. Rep. 328, 64 L. R. A. 111 (1904).

¹¹³ *Growcock v. Hall*, 84 Ind. 202 (1882). In the case cited it was held that the relation of master and servant may be implied from cir-

cumstances and that a result other than the true state of facts may be reached by the application of the doctrine of estoppel, “where one represents to another that a designated person is his servant or agent and induces the person to whom such representations are made to confide therein and he acts upon the belief that such relationship does in fact exist.” In the case of *Denver, etc. Ry. Co. v. Gustafson*, 21 Colo. 399, 41 Pac. 505 (1894), it is stated, as a proposition of substantive law, that if the defendant “holds out to the public one as engaged in his service” he is liable for his negligence where the act or failure constituting the negligence comes within the apparent scope of his employment, even if the person for whom the service is rendered has not employed or paid the servant. This is at least misleading. The facts showing such holding out are purely evidential

dentiary facts sufficient to sustain a verdict against such a defendant; sufficient indeed to authorize the direction of a verdict in the absence of other evidence. They may also be sufficient, in connection with other appropriate evidence, to fix liability on one for having directed the particular thing under the well-known rule of the doctrine of agency, but they do not of themselves impose liability under the doctrine of *respondeat superior*. Here the inquiry is always as to the true or real master. With reference to the manner of doing the same act, it is as true in law as in scripture, one cannot serve two masters.

§ 161. **Nominal master when not liable.**—Servants who are employed and paid by one person may nevertheless be, *ad hoc*, the servants of another in a particular transaction, and that, too, even where their general employer is interested in the work.¹¹⁴ Obviously they may

and properly for the determination of the jury. In the case of *Jones v. Scullard*, 2 Q. B. 595 (1898), the livery stable keeper supplied the coachman, but the defendant used his own groom, horse and harness, and also provided the livery worn by the coachman. Lord Russell, C. J., said: "The principle then to be extracted from the cases is that, if the hirer simply applied to the livery stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for negligence on the part of the driver. But it seems to me to be altogether a different case where the groom, the horse, the harness and the livery are the property of the person hiring the services of the driver," and he concludes that such facts are at least evidence to warrant a jury in concluding that the driver is the servant of the hirer and not of the livery stable keeper. See also *Thomas v. Springer*, 119 N. Y. Supp. 460-463, 134 App. Div. 640 (1909).

¹¹⁴ *Oil Creek, etc. R. Co. v. Keighron*, 74 Pa. St. 316; where the superintendent of a petroleum company, intrusted by the defendant, a railroad company, with the management of cars, was held to be defendant's servant, *pro hac vice*, so as to render it liable to a third person injured by the superintendent's negligence. In *Huff v. Ford*, 126 Mass. 24, a driver employed by a contractor who hired out the driver, horse and wagon to a city by the day, to aid in paving streets, was held to continue as the contractor's servant, so as to render his master liable for damage caused by the driver's negligent management of the horse. In *Denver, etc. R. Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505, a railroad company which knowingly availed

desert the service of their lawful master, and work for another; or he may lend their services to another person, abandoning to the latter all control over them;¹¹⁵ or they may, without consulting their master, but in good faith, assist a person independently employed to do something which will benefit their master, but with which neither he nor they have any right to interfere, and in which they act entirely under the control of such other person.¹¹⁶ In these cases the nominal master is not responsible to strangers for their acts or omissions,¹¹⁷ while the person really controlling them is.¹¹⁸

§ 162. Liability for servant hired out. — A master who hires out one of his servants to work for another person is liable to *the hirer* for such servant's negligence in the work, and this even though the particular servant was selected by the hirer himself;¹¹⁹ and unless the master abandons the entire control of his servants to the hirer,

itself for a number of years of the services at a street crossing of the flagman employed and paid by another company, was held liable as an employer. *Taylor v. Western Pac. Ry. Co.*, 45 Cal. 323, 334.

¹¹⁵ *Donovan v. Laing*, 4 Reports, 317 [1893], 1 Q. B. 629; *Murray v. Currie*, L. R. 6 C. P. 24; see *McGatrick v. Wason*, 4 Ohio St. 566, § 162, *post*.

¹¹⁶ *Murphey v. Caralli*, 3 Hurlst. & C. 462; see *Elder v. Bemis*, 2 Metc. 599.

¹¹⁷ *Murray v. Currie*, L. R. 6 C. P. 24; *Murphey v. Caralli*, 3 Hurlst. & C. 462; *Manning v. Adams*, 32 W. R. 430. In the last case, plaintiff, in the employ of a stevedore as foreman, was injured while unloading a ship with the assistance of the crew, through the negligence of one of these. In an action against the ship-owners, held plaintiff could not recover.

¹¹⁸ *Kimball v. Cushman*, 103 Mass. 194.

¹¹⁹ Defendant's servant hired himself, on his own account, to plaintiff to do thatching. The servant having left his work, defendant told plaintiff that if the servant did the work, he, defendant, must be paid for it. Afterward the servant resumed work; defendant sent another to assist him and received pay for both. An injury having occurred, the thatching being defective, it was held defendant was responsible (*Holmes v. Onion*, 2 C. B. N. S. 790). Cockburn, C. J., said: "Although true it is that where a man employing a tradesman selects a particular servant or workman to do the job, the master may be relieved from responsibility for the consequences of the man's incompetency, it is, I think, going too far to say that he is relieved from all responsibility if the servant is guilty of negligence."

he remains liable to strangers for their negligence.¹²⁰ The hirer cannot properly be said to have control of the servants, unless he has the right to discharge them and employ others in their places in case of their misconduct or incapacity; that being the only practicable means by which free servants can be controlled. If, therefore, the hirer has no such power, he is not responsible to any one for the faults of the servants.¹²¹ If the hirer is vested for the time with *exclusive* control with the right to discharge the servants and to employ others, he alone is responsible for their defaults.¹²² Where a person hires the personal property of another, who supplies, under the contract, a servant charged with the general management and control of the property, although the hirer acquires, to a limited degree, a dominion over the servant,

Defendant hired of plaintiff a team and driver, through whose negligence the horses were drowned. Held, although the horses and driver were under the control and management of defendant, who was responsible for whatever was done in pursuance of his orders, plaintiff must bear the results of the driver's incompetency, as he was bound to furnish a suitable servant (*Ames v. Jordan*, 71 Me. 540).

¹²⁰ *Coyle v. Pierrepont*, 37 Hun, 379; overruling s. c., 33 Id. 311. Defendants hired to H. for a day a steamer and crew. The crew were hired, paid and entirely controlled by defendants, who also had power to substitute others in their place. By the negligence of the crew an injury was occasioned to the plaintiff. Held, defendants were liable; the crew were their servants, and not those of H. (*Dalyell v. Tyrer*, El. B. & El. 899; see also *Fenton v. Dublin Steam Packet Co.*, 8 Adol. & El. 835). The livery-stable keeper or other owner who hires out a driver and team ordinarily continues liable

as master for the negligence of the driver both to the hirer and the public generally (*Fenner v. Crips*, 109 Ia. 455, 80 N. W. 526 (1899); *Huff v. Ford*, 126 Mass. 24, 30 Atl. 645 (1878); *Moore v. Stanton*, 80 N. Y. App. Div. 295, 80 N. Y. Supp. 244, aff'd in 177 N. Y. 581, 69 N. E. 1127 (1904); *Hershberger v. Lynch*, 2 Pa. Cases 91, 11 Atl. 642 (1888); *Cargill v. Duffy*, 123 Fed. 721 (1903); *Waldock v. Winfield*, 2 K. B. 596, 70 L. J. K. B. 925, 85 L. T. Rep. N. S. 202 (1901).

¹²¹ *Burke v. De Castro, etc. Co.*, 11 Hun, 354. *Compare Gerlack v. Edelmeyer*, 88 N. Y. 645.

¹²² *Murray v. Currie*, L. R. 6 C. P. 24; *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. Div. 295; *Quin v. Complete Elect. Co.*, 46 Fed. 506; *Sweeney v. Murphy*, 32 La. Ann. 628. In such case, the former master may pay the servants' wages, being repaid by the real master, without becoming liable as master (*Cotter v. Lindgren*, 106 Cal. 602, 39 Pac. 950; *Ditberner v. Rogers*, 66 How. Pr. 35, 13 Abb. N. C. 436).

with a right to superintend and direct his conduct, the owner continues responsible for the servant's negligence, though it occurs in the performance of work in which the hirer alone is interested.¹²³

¹²³ Per Cooper, J., in *New Orleans*, 642 (1888); locomotive and crew of etc. *R. Co. v. Norwood*, 62 Miss. 565. Street-roller and engine, with engineer to operate same, hired by city, owner is liable for engineer's negligence (*Stewart v. Cal. Impr. Co.*, 131 Cal. 125, 63 Pac. 177, 52 L. R. A. 205 (1900)); company selling fire-works and furnishing men to superintend their discharge, liable for their negligence (*Consolidated Fire-works Co. v. Koehl*, 206 Ill. 283, 68 N. E. 1077, aff'g 103 Ill. App. 152 (1903)); owner hiring a conveyance and driver to manager of a picnic excursion continues liable for driver's negligence (*Fenner v. Crips*, 109 Iowa, 455, 80 N. W. 526 (1899)); seller of an engine stipulating to set it in operation to the satisfaction of the purchaser and to send a man for the purpose, continues liable for the negligence of the engineer until the engine is accepted (*Wright Steam-Engine Works v. Lawrence Cement Co.*, 167 N. Y. 440, 60 N. E. 739 (1901)); where one hires and pays for another for whose service he charges a third person at an advance rate, the person so hired is his servant, so that he is liable for injury to another from his negligence (*Dorsey v. Redford*, 67 Atl. (R. I.) 367 (1907)); one riding in a carriage hired by an undertaking company and injured by the negligence of the driver; held, entitled to recover *solely* against the person hiring out the carriage and driver to the undertaking company (*Frerker v. Nicholson*, 41 Colo. 12, 92 Pac. 224, 13 L. R. A. (N. S.) 1122 (1907)); *Hershberger v. Lynch*, 11 Atl. (Pa.) 642 (1888); railway company permanently engaged in switching on the track and premises, and under the directions of another; held, the railway company is not liable (*Sexton v. N. Y. Cent., etc. Ry. Co.*, 189 N. Y. 518, 81 N. E. 1175 (1907)); express company hiring auto and chauffeur to deliver packages under the direction of one of its own employees, held not liable for injury caused by the negligence of chauffeur while going to lunch (*Bohan v. Metropolitan Express Co.*, 107 N. Y. Supp. 530, 122 App. Div. 490 (1907)); if the master lend his servant to another for a particular employment, the servant, for anything done therefore is the servant of the one to whom he was lent, although he remains the general servant of the person who lent him (*Bassi v. Orth*, 109 N. Y. Supp. 88, 58 Misc. 372 (1908)); where, though the chauffeur was in the employment and payment of another, he was entrusted with the running of defendant's car, the defendant is liable (*Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572 (1909)); railway company operating its train over leased track, held not liable for neglect of duty on part of crossing watchman under the sole control of the lessor company (*Willis v. Railway Co.*, 133 Mo. App. 625, 113 S. W. 713 (1908)); owner is not liable for daughter's negligent use of auto while driving for her own pleasure and that of her friends (*Doran v. Thomsen*, 71 Atl. (N. J.) 296 (1908)); *Mayor v. Benedict*, 108 N. Y. Supp. 228, 123 App. Div. 579 (1908); winchman in gen-

§ 163. Liability of trustees and receivers for employee's acts. — Trustees are personally liable to third persons for the negligence of persons employed in the discharge of the trust, unless they are themselves acting as mere agents, with a responsible principal behind them. Thus, while the directors of a railroad company are not in general personally liable for the negligence of its servants, trustees of bondholders, who take possession of a railroad under the provisions of a mortgage, and run it for the benefit of the bondholders, cannot require persons injured by the negligence of servants on the road to sue the bondholders, but must personally answer for the damage.¹²⁴ The receiver of a railroad is liable, to the extent of his trust funds (but no further), for the negligence of his servants.¹²⁵ Where appointed in involuntary proceedings, he is not the agent or servant of the corporation, so

eral employment of shipper, so remains to fix responsibility for injury of longshoreman employed by stevedore to load the vessel, the master of the vessel having no control over the winchman (*Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252 (1909)); master is laible for neglect of one employed by his servant, under express or implied authority while acting in the scope of the employment (*Board of Trade Building Co. v. Cralle*, 63 S. E. (Va.) 995 (1909)); where the railway company is bound to place cars on the spur-track of a compress company; held that it is liable for injury to superintendent of compress company for injury from cars being negligently moved on to the spur-track by employees of the compress company, the method being customary (*Gulf, etc. Ry. Co. v. Gaskill*, 120 S. W. (Tex. App.) 557 (1909)); where an automobile with chauffeur is hired out for two days the owner remains

liable for collision due to chauffeur's negligence (*Shepard v. Jacobs*, 204 Mass. 110, 90 N. E. 392 (1910)); one to whom the servant of another is temporarily lent has for the time being the responsibility of master in so far only as he may exercise the authority (*Morris v. Trudo*, 83 Vt. 44, 74 Atl. 387 (1909)). See also *W. U. Tel. Co. v. Rust*, 120 S. W. (Tex. App.) 249 (1909).

¹²⁴ *Ballou v. Farnum*, 9 Allen, 47.
¹²⁵ *Meara v. Holbrook*, 20 Ohio St. 137. But he is liable only to that extent; and a judgment against him personally, for such a cause, will be reversed or amended (*Camp v. Barney*, 4 Hun, 373; see *Dalton v. Receivers of Atlantic, etc. R. Co.*, 4 Hughes, 180). There are now innumerable reported cases, in which receivers have been thus held liable. Such claims are classed as operating expenses (*Bartlett v. Cicero Light, etc. Co.*, 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715 (1898); *St. Louis, etc. Trust*

as to render it liable for the negligence of himself or his employees, whereby a passenger is injured.¹²⁶ But a corporation, having public duties (*e. g.*, a railroad company), cannot get rid of its liabilities by a voluntary surrender to trustees under a mortgage.¹²⁷

§ 164. Who is a "contractor." — Although, in a general sense, every person who enters into a contract may be called a "contractor," yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect of all its details.¹²⁸

Co. v. Texas, etc. Ry. Co., 126 S. W. (Tex. App.) 296 (1910); Bound v. South Carolina Ry. Co., 174 Fed. 729 (1904).

¹²⁶ Metz v. Buffalo, etc. R. Co., 58 N. Y. 61, 17 Am. Rep. 201. See § 120a, *ante*.

¹²⁷ Naglee v. Alexandria, etc. R. Co., 83 Va. 707, 3 S. E. 369.

¹²⁸ Morgan v. Smith, 159 Mass. 570, 35 N. E. 101. In Ferguson v. Hubbell, 97 N. Y. 507, defendant leased to H. certain land to work upon shares; defendant was to pay H. ten dollars per acre for clearing the lot. Held, in clearing the land by fire, H. was an independent contractor, and not a servant. But where M. agreed to clear defendant's land at a fixed price, and defendant advised him to fire log heaps, held, M. was a mere workman, and defendant was liable for plaintiff's fence which was burned (Johnston v. Hastie, 30 Upper Can. [Q. B.] 232). In Pierrepont v. Loveless, 72 N. Y. 211, defendants contracted with third persons to drive logs into a river. Held, that the log drivers were contractors, Rapallo, J., says: "The absence of

control was more complete than in any of the cases on the subject." So in Fuller v. Citizens' Nat. Bank, 15 Fed. 875, where a land owner let the whole work of excavating a vault to A. reserving no control over the manner of performance, though he was to furnish materials; held, A. was a contractor. So in Bennett v. Truebody, 66 Cal. 509, where the owner of a building was absolved from responsibility to one who fell through a trap-door, left open by servants of a plumber. But a master cannot convert a servant into a contractor by agreeing to exercise no control over him in the manner of doing his work (Tiffin v. McCormack, 34 Ohio St. 638). The following persons were held to be contractors, not servants: A person employed by a railroad company to clear rubbish from its right of way at so much per mile, who hires, pays and controls his own help (St. Louis, etc. R. Co. v. Yonley, 53 Ark. 503, 14 S. W. 800, 13 Id. 333); a railroad company, building telegraph lines (Hackett v. Western Union Tel. Co., 80 Wis. 187, 49 N. W. 822);

The true test of a "contractor" would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished.¹²⁹ If he never serves more than one person, there is usually a presumption that he has no independent occupation; but this presumption is not conclusive. A single large railroad company, for example, might find work enough for a contractor to occupy his whole lifetime, yet leave him to work in perfect independence, accepting the results of his labor, without ever interfering with his choice of the mode and instruments of working. On the other hand, one may have many employers within a short space of time, yet be a mere servant to each of them in turn. The mere fact of direction as to things to be done, without control over the method or means of doing them, does not make a contractor a servant.¹³⁰ In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own sub-contracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of the work. Where these con-

an ore digger, paid per car load (Harris v. McNamara, 97 Ala. 181, 12 So. 103); see Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58 [question for jury to say whether one in charge of a log drive, he supplying men and supplies, was an independent contractor or not].

¹²⁹ This clause was originally inserted without the support of any express authority. It has now, however, been quoted and adopted in Hexamer v. Webb, 101 N. Y. 377, 385, 4 N. E. 755, and in Cunningham v. International R. Co., 51 Tex. 503; see Robinson v. Webb, 11 Bush, 464; and Andrews v. Boe-

decker, 17 Ill. App. 213, where this test is declared to be the true one. Whitney, etc. Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242 (1898); Eldred v. Mackie, 178 Mass. 1, 59 N. E. 673 (1901); Moffet v. Koch, 106 La. 371, 31 So. 40 (1902); Berger v. Mandel, 54 N. Y. Supp. 987, 25 Misc. Rep. 766 (1898); Sullivan v. New Bedford, etc. Co., 190 Mass. 288, 76 N. E. 1048 (1906). Preceding part of this section quoted with approval in Caldwell v. Atlanta, etc. Ry. Co., 49 So. (Ala.) 674 (1909).

¹³⁰ Morgan v. Smith, *supra*, note 141, and § 166, *post*.

ditions concur there is, of course, no difficulty in determining his character as such. It is only where one or more of them is lacking that a question arises. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it.¹³¹ As will be seen in subsequent sections this does not exclude the idea of the employer or contractor reserving the right to direct changes or

¹³¹ *Boomer v. Wilbur*, 176 Mass. (1910), *aff'd*, 198 N. Y. 586, 92 N. 482, 57 N. E. 1004, 53 L. R. A. 172 E. 1105; *Kendall v. Johnson*, 51 (1900); *Wright v. Big Rapids, etc.* Wash. 477, 99 Pac. 310 (1909); *Co.*, 124 Mich. 91, 82 N. W. 829, 50 *Seitzinger v. Burnham*, 223 Pa. 537, L. R. A. 495 (1900); *Corrigan v.* 72 Atl. 898 (1909); *Stephenville, Elsinger*, 81 Minn. 42, 83 N. W. 492 etc. Ry. Co. v. Couch, 121 S. W. (1900); *Cullom v. McKelvey*, 26 (Tex. App.) 189 (1909); *Alabama, App. Div. 46*, 49 N. Y. Supp. 669 etc. Ry. Co. v. Tally-Bates Constr. (1898); *Munroe v. Ley*, 156 Fed. Co., 50 So. (Ala.) 341 (1909); 468, 84 C. C. A. 278 (1907); *Hough- Sufferling v. Heyl*, 139 Wis. 510, ton v. Loma Prieta Lbr. Co., 93 Pac. 121 N. W. 251 (1909); *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6 (1909); *DePalma v. Weinman*, 103 Pac. (N. M.) 782 (1909); *Bellamy v. Ames*, 140 Ky. 98, 130 S. W. 980 (1910); *Jewell v. Kansas City Bolt, etc. Co.*, 132 S. W. (Mo.) 703 (1910); *United Gas, etc. Co. v. Larsen*, 182 Fed. 620 (1909); *Laffery v. United States Gypsum Co.*, 83 Kans. 349, 111 Pac. 498 (1910); *Bellamy v. Ames*, 140 Ky. 98, 130 S. W. 980 (1910); *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143 (1910); *Cochran v. Rice*, 128 N. W. (S. D.) 583 (1910); *Campbell v. Jones*, 110 Pac. (Wash.) 1083 (1910); *Peters v. St. Louis, etc. Ry. Co.*, 131 S. W. (Mo. App.) 917 (1910); *Runians v. Keller, etc. Co.*, 141 Ky. 827, 133 S. W. 960 (1911); *Wistover v. Hoover*, 129 N. W. (Neb.) 285 (1911); *Moore v. Kopplin*, 135 S. W. (Tex. App.) 1033 (1911). See *Canney v. Rochester, etc. Ass'n*, 76 N. H. 60, 79

101 Tex. 535, 109 S. W. 1089 (1908); *Lampton v. Cedartown Co.*, 6 Ga. App. 147, 64 S. E. 495 (1909); *Ballard v. Lee's Admr.*, 115 S. W. (Ky.) 732 (1909); *Carey v. Baxter*, 201 Mass. 522, 87 N. E. 901 (1909); *Dorn v. Snare*, 62 Misc. 269, 114 N. Y. Supp. 820 (1909); *Midgette v. Browning Mfg. Co.*, 150 N. C. 333, 64 S. E. 150 (1909); *Missouri Valley Bridge Co. v. Ballard*, 116 S. W. (Tex. App.) 93 (1909); *Vickers v. Kanawha, etc. Ry. Co.*, 63 S. E. (W. Va.) 367, 20 L. R. A. (N. S.) 793 (1908); *Mason v. Highland*, 116 S. W. (Ky.) 320 (1909); *Vogeman v. American Dock, etc. Co.*, 131 App. Div. 216, 115 N. Y. Supp. 741

deviations and to exercise personally or by a superintendent such supervisory control over the work as may have relation to the general result, as to secure the proper performance of the contract,^{131a} nor is the character of the contractor as such affected by his suffering or permitting any amount of interference with the actual control, which he himself has a legal right to exercise, over the mode and manner of doing the work, though such interference may, of course, subject him to liability to any one thus injured by his negligence.^{131b}

§ 165. When contractor and when servant. — One who has an independent business, and generally serves only in the capacity of a contractor, may abandon that char-

Atl. 517 (1911), (fair association 1090 (1901); Smith v. Humphrey-contraction for ascensions, held liable for injury by fall of balloon). (1907); Baker v. Atlanta, etc. Ry.

^{131a} Frassi v. McDonald, 122 Cal. Co., 49 So. (Ala.) 751 (1909); 400, 55 Pac. 139, 55 Pac. 772 Luce v. Holloway, 103 Pac. (Cal.) (1898); Green v. Soule, 145 Cal. 886 (1909); Taylor v. Winsor, 30 96, 78 Pac. 337 (1904); Bijorsen v. R. I. 44, 73 Atl. 388 (1909); Saccone, 88 Ill. App. 6 (1900); Stephenville, etc. Ry. Co. v. Couch, Kelleher v. Schmit, etc. Co., 122 Ia. 121 S. W. (Tex. App.) 189 (1909); 635, 98 N. W. 482 (1904); Vosbeck Voeker v. Yeager, 151 Ill. App. 144 v. Kellogg, 78 Minn. 176, 80 N. W. (1910); Denny v. City of Burlington, 70 S. E. (N. C.) 1085 (1911). 957 (1899); Scharff v. Southern See Beal v. Champion Fibre Co., 60 Ill. Constr. Co., 115 Mo. App. 157, 92 S. W. 126 (1905); Omaha Bridge, S. E. (N. C.) 834 (1911).

etc. Co. v. Hargadine, 5 Neb. 418, ^{131b} Louisville, etc. Ry. Co. v. Tow, 98 N. W. 1071 (1904); Weber v. 23 Ky. L. Rep. 408, 63 S. W. 27, Buffalo Ry. Co., 20 App. Div. 202, 66 L. R. A. 941 (1901); Kentucky 47 N. Y. Supp. 7 (1897); Burke v. Stove Co. v. Bryan's Admr., 27 Ky. Ireland, 26 App. Div. 487, 50 N. Y. L. Rep. 136, 84 S. W. 537 (1905); Supp. 369 (1898); Hawke v. Brown, Maher v. Steuer, 170 Mass. 454, 49 28 App. Div. 37, 50 N. Y. Supp. N. E. 741 (1898); Nelson v. Young, 1032 (1898); Jaskoey v. Consol. Gas 91 App. Div. 457, 87 N. Y. Supp. Co., 33 Misc. 790, 67 N. Y. Supp. 69, aff'd, 180 N. Y. 523, 72 N. E. 976 (1901); Cohen v. Western Elec. 1146 (1904); Burke v. Ireland, 26 Co., 50 Misc. 660, 99 N. Y. Supp. App. Div. 487, 50 N. Y. Supp. 369 525 (1906); Thomas v. Altoona, etc. (1898); Jehle v. Ellicott Square Ry. Co., 191 Pa. St. 361, 43 Atl. Co., 31 App. Div. 336, 52 N. Y. 215 (1899); Miller v. Merritt, 211 Supp. 366 (1898); Toledo Stove Pa. 127, 60 Atl. 508 (1905); Simon- Co. v. Reep, 18 Ohio Cir. Ct. 58 ton v. Perry, 62 S. W. (Tex. App.) (1898); McDonald v. O'Reilly, 45

acter for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed. If he submits himself to the direction of his employer as to the details of the work, fulfilling his wishes, not merely as to the results, but also as to the means by which that result is to be attained, the contractor becomes a servant in respect to that work.¹³² And he may even be a contractor as to part of his service, and a servant as to part. Whether he works as contractor or as servant is a question of mingled law and fact, which it is scarcely possible to decide by any fixed rule which will accurately govern those cases where the one occupation borders closely upon the other. In most instances, the distinction is easily observed. Thus, one who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely according to his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant.¹³³

Ore. 589, 78 Pac. 753 (1904); *Mc-servant*); *Drennen v. Smith*, 115
Neil v. Crucible Steel Co., 207 Pa. Ala. 316, 22 So. 442 (1897), (min-
 493, 56 Atl. 1067 (1904); *Southern ing coal at a fixed price per ton*);
Cotton Oil Co. v. Wallace, 23 Tex. Swart v. Justh, 24 App. D. C. 596
 App. 12, 54 S. W. 638 (1899); (1905), (where an independent con-
Anderson v. Tug River, etc. Co., 59 tractor had finished the building,
 W. Va. 301, 53 S. E. 713 (1906); held that in throwing waste material
Dublin v. Taylor, etc. Ry. Co., 49 from the roof he was acting as a
 S. W. 667, 92 Tex. 535, 50 S. W. servant of the owner).
 120 (1899); *Cumberland Coal Co.* ¹³³ *Pack v. New York*, 8 N. Y. 222;
v. Lee, 119 S. W. (Ky.) 746 (1909). *Kelly v. New York*, 11 Id. 432;
¹³² *Savannah, etc. R. Co. v. Phillips*, rev'g 4 E. D. Smith, 291; *Forsyth*
 90 Ga. 829, 17 S. E. 82 [contractor v. Hooper, 11 Allen, 419; *Allen v.*
 accepting control in details]. See *Hayward*, 7 Q. B. 960; *Painter v.*
Brckett v. Lubke, 4 Allen, 138; *Pittsburgh*, 46 Pa. St. 213; *Allen*
Moir v. Hopkins, 16 Ill. 313; *Nyback v. Willard*, 57 Id. 374; *McCarthy v.*
v. Champagne Lbr. Co., 109 Fed. Portland, 71 Me. 318 (where the text
 732, 48 C. C. A. 632 (1901), (one is quoted with approval); *Hale v.*
 contracting to work up certain ma- *Johnson*, 80 Ill. 185 (where the text
 terial belonging to defendant com- is cited and its doctrine applied).
 pany with its own machinery held a

The fact that such an employee is paid by the day,¹³⁴ or that, in all the work, he consults and defers to the wishes of his employer, makes no difference; although an express contract to pay by the job is always strong evidence that the relation of master and servant does not exist.¹³⁵ On the other hand, one who is at all times subject to the will of his employer, and who cannot properly refuse to obey his directions as to the mode in which the work shall be done and the persons to be employed upon it, is not a contractor, but a servant;¹³⁶ and this, although the employer should never exercise such control,¹³⁷ and the employee should be paid by the job instead of by the day.¹³⁸ But the fact that no price is fixed,¹³⁹ and no specifications are made, as to the work to be done, does not of itself create the relation of master and servant between the parties.¹⁴⁰

¹³⁴ *Geer v. Darrow*, 61 Conn. 230, 23 Atl. 1087; *Corbin v. American Mills*, 27 Conn. 274; *Groesbeck v. Pinson*, 21 Tex. App. 44, 50 S. W. 620 (1899).

¹³⁵ See *Forsyth v. Hooper*, 11 Allen, 419.

¹³⁶ For examples of nominal "contractors" held to be servants, see *Hughbanks v. Boston Inv. Co.*, 92 Iowa, 267, 60 N. W. 640; *Waters v. Greenleaf Lumber Co.*, 115 N. C. 648, 20 S. E. 718; *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906 [contract to furnish car and driver].

¹³⁷ *Linnehan v. Rollins*, 137 Mass. 123.

¹³⁸ In *Sadler v. Henlock*, 4 El. & Bl. 570, defendant employed P. to clean out a drain. P. was a common laborer not in defendant's service. P. cleaned out the drain without the further direction or inspection of defendant. He received five shillings for the job; held, P. was not a contractor, but a servant. s. p., *Burgess v. Gray*, 1 C. B. 578. So, where

lessees of a building employed a carpenter to repair an awning over a public way, and made no special contract; held, they were liable to a third person, injured through negligence of the carpenter (*Brckett v. Lubke*, 4 Allen, 138). s. p., *Bernauer v. Hartman Steel Co.*, 33 Ill. App. 491 [plumber].

¹³⁹ *Fuller v. Citizen's Nat. Bank*, 15 Fed. 875. One engaged in delivering coal at so much a load, and subject to control as to mode of delivery, is a servant and not an independent contractor (*Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52). s. p., *Clapp v. Kemp*, 122 Mass. 481. Laborers grading a roadbed, subject to the direction of the chief engineer, are not independent contractors, but are servants (*St. Johns, etc. R. Co. v. Shalley*, 33 Fla. 397, 14 So. 890).

¹⁴⁰ In *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, defendant engaged B., a roofer, to prevent pigeons from making nests under the eaves of his roof. B. was to work in his own

§ 166. Effect of employer's control over contractor. —

It is now practically settled that the reservation, in a contract, of the right to inspect the work at all times and to have it done subject to the approval of the employer, without any right to dictate the details of method or to interfere with servants, does not make the contractor a servant.¹⁴¹ Thus, in New York, Pennsylvania, and other States, it has been held that a clause requiring the contractor to conform to such further directions, of a specified nature, as might be given by the employer,¹⁴² or requiring him to do the work "under the direction and to the satisfaction" of a servant of the employer,¹⁴³ did not make the contractor a servant of the employer. So, where a contractor subcontracts a portion of the work, reserving no control over the manner of performance, save generally to insist that the work be done according

way, the contract containing no restrictions as to time or amount or specific services to be rendered. Held, that defendant was not liable for B.'s negligence, B. being an independent contractor.

¹⁴¹ *Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672; *Bibb v. Norfolk*, etc. R. Co., 87 Va. 711, 14 S. E. 163; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Louisville & Nashville Ry. Co. v. Cheatham*, 118 Tenn. 160, 100 S. W. 902 (1907); *Smith v. Humphreyville*, 104 S. E. (Tex. App.) 495 (1907). See § 164, note 131a, *ante*.

¹⁴² *Pack v. New York*, 8 N. Y. 222. Reserving the right to "vary, extend or diminish the quantity of work during its progress," and directing changes in grade of sidewalk, leaves him still an independent contractor (*Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262). See also *Vincennes Water-Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747.

¹⁴³ *Kelly v. New York*, 11 N. Y. 432. *Selden, J.*, there said: "The object of the clause relied upon was not to give the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every portion of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was done, nor *who* should do it." The same decision has been made in Pennsylvania (*Allen v. Willard*, 57 Pa. St. 374; *Hunt v. Penn. R. Co.*, 51 Id. 475); and Massachusetts (*Harding v. Boston*, 163 Mass. 14, 39 N. E. 411). To the same effect is *Clare v. National City Bank*, 40 N. Y. Superior, 104. The mere right of "supervision" does not make the employer responsible (*Samuelson v. Cleveland Mining Co.*, 49 Mich. 104). To the contrary, see *Schwartz v. Gilmore*, 45 Ill. 455; *St. Paul v. Seitz*, 3 Minn. 297; *Louisville & Nashville Ry. Co. v. Cheatham*, *supra*.

to the terms of the subcontract, the subcontractor is not his servant.¹⁴⁴ In Connecticut and South Carolina, a very large measure of control is permitted, without making the employer liable for a contractor's negligence.¹⁴⁵ But in Ohio, under a contract which provided not only that the contractor should do the work "under the direction" of the employer's agent, but also that such agent should "have entire control over the manner of doing and shaping all or any part of the same, and whose direction must be strictly obeyed," it was held that the contractor was a mere servant of his employer.¹⁴⁶ The right to complete control makes the employer liable, even though he never exercised it;¹⁴⁷ and so the actual exercise of control, though not reserved by the contract.¹⁴⁸

§ 167. Effect of right of dismissal. — It is presumably inconsistent with the legal character of a contractor that he should be subject to dismissal by his employer at any moment, at pleasure;¹⁴⁹ but this presumption is not con-

¹⁴⁴ *Slater v. Mersereau*, 64 N. Y. 138. architect, whose decisions on all points I agree to accept as final,"

¹⁴⁵ *Norwalk Gas Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Rogers v. Florence R. Co.*, 31 S. C. 378, 9 S. E. 1059. created the relation of master and servant (*Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363).

¹⁴⁶ *Cincinnati v. Stone*, 5 Ohio St. 38. So in *Missouri* (*Speed v. Atlantic, etc. R. Co.*, 71 Mo. 303); where the business of loading and unloading freight "was to be done in a manner satisfactory to the superintendent of defendant and subject to his control." See also *Annett v. Foster*, 1 Daly, 502. But not so, if the contractor is employed to do the work according to his own method, and is subject to control only as regards the result (*Burns v. McDonald*, 57 Mo. App. 599). A written contract that the "work of demolition is to be carried out according to the directions of the supervising

¹⁴⁷ *Linnehan v. Rollins*, 137 Mass. 123; conceded in *Norwalk Gas Co. v. Norwalk*, *supra*.

¹⁴⁸ *Stephenville, etc. Ry. Co. v. Couch*, 121 S. W. (Tex. App.) 189 (1909); *Taylor v. Winsor*, 30 R. I. 44, 73 Atl. 388 (1909); *Kansas City, etc. Ry. Co. v. Loosely*, 90 Pac. (Kans.) 990 (1907).

¹⁴⁹ The fact that the person employed is liable to dismissal at pleasure is strong evidence that he is a servant and not contractor (*Blake v. Thirst*, 2 Hurlst. & C. 20; *Morgan v. Bowman*, 22 Mo. 538; see *Charles v. Taylor*, L. R. 2 Ex. 251). In *Tiffin v. McCormack* (34 Ohio St. 638), where the owner of a

clusive where other circumstances exist inconsistent with that idea.¹⁵⁰ The owner of a house, for example, must surely have the right to stop the work of a plumber at any time or to discontinue an alteration which proves to be no improvement without becoming a "master" over the contractor. As to the effect of reserving a right to dismiss any of the contractor's servants, authorities differ. In Illinois and Missouri¹⁵¹ it is held that a contractor under such a restriction is a servant. In England¹⁵² and New Jersey¹⁵³ it is held that he is not. The discharge of servants, who give reasonable cause of complaint to the contractor's employer, without any general agreement to do so, has certainly no effect upon the relation of the parties.¹⁵⁴

quarry hired a person to quarry, break and pile up stone, and had no further control over the employee, who was to find powder and tools, and receive compensation at piece rates. Held, defendant was liable for employee's negligence in blasting; *McIlvaine, J.*, pointing out that there was no defined quantity of work contracted for; the employee's services might be determined at pleasure, and the compensation was to be measured by the amount of labor performed.

¹⁵⁰ In *Robinson v. Webb*, 11 Bush, 464, defendant contracted with the builder that the latter should construct a building, furnishing all the materials and labor. The work was to be done under the supervision of an architect authorized, in case of delay, to employ another builder, and without whose consent the builder was not to sublet any of the work. Held, a third person damaged by the falling of a wall could not recover from defendant. As to the effect of employer's reservation of the right to dismiss contractor's

servants, see *Kansas, etc. Ry. Co. v. Loosely*, 90 Pac. (Kans.) 990 (1907).

¹⁵¹ *Chicago v. Joney*, 60 Ill. 383; where the city contracted with third persons for the deepening of a canal, retaining a supervisory control over the work, and *power finally to dismiss any person employed on the work*; *Larson v. Metropolitan R. Co.*, 110 Mo. 234, 19 S. W. 416 [contractor agreeing to dismiss servants not obeying owner's orders]. S. P., *Blumb v. Kansas City*, 84 Mo. 112.

¹⁵² Where a railroad company engaged a contractor to make a viaduct, and, through the negligence of the latter's workmen, a man was killed; held, the company was not liable, although it reserved to itself the right of dismissing incompetent workmen (*Reedie v. Northwestern R. Co.*, 4 Exch. 244).

¹⁵³ *Cuff v. Newark, etc. R. Co.*, 35 N. J. Law, 17. See also *Rogers v. Florence R. Co.*, 31 S. C. 378, 9 S. E. 1059.

¹⁵⁴ *Harris v. McNamara*, 97 Ala. 181, 12 So. 103.

§ 168. Employer not liable for contractor's negligence.

— It appearing, from the definition which we have given of a contractor, that he is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce, it follows that his employer is not responsible to third persons for his negligence, nor for the negligence of his servants, agents or subcontractors, in the execution of the work.¹⁵⁵ To use the language of Baron Rolfe: "The party employing has the selection of the agent employed; and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from his want of skill or want of care. But neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned;"¹⁵⁶ though the employer is liable for such

¹⁵⁵ *Casement v. Brown*, 148 U. S. 88 Ala. 591, 7 So. 94 [same]; *Kep-
perly v. Ramsden*, 83 Ill. 354; *De
bins*, 2 Black, 418; *Kelly v. New
York*, 11 N. Y. 432; *Hexamer v.
Webb*, 101 Id. 377; *Duncan v. Find-
later*, 6 Clark & F. 894; *Allen v.
Hayward*, 7 Q. B. 960; *Reedie v.
Northwestern R. Co.*, 4 Exch. 244; *Wood v. School Dist.*, 44 Iowa, 27;
Eaton v. European, etc. R. Co., 59
Me. 520; *Clark v. Vermont, etc. R.
Co.*, 28 Vt. 103; *Hilliard v. Richard-
son*, 3 Gray. 349; *Allen v. Willard*,
57 Pa. St. 374; *Smith v. Simmons*,
103 Id. 32; *Chartiers Gas Co. v.
Lynch*, 118 Id. 362, 12 Atl. 435 [lay-
ing gas mains]; *Conway v. Furst*, 57
N. J. Law, 645, 32 Atl. 380; *Deford
v. State*, 30 Md. 179; *Bibb v. Nor-
folk, etc. R. Co.*, 87 Va. 711, 14 S. E.
163 [construction of railroad]; *Hunt
v. Vanderbilt*, 115 N. C. 559, 20 S. E.
168; *Atlanta, etc. R. Co. v. Kim-
berly*, 87 Ga. 161, 13 S. E. 277 [rail-
road]; *Rome, etc. R. Co. v. Chasteen*,
58 Ala. 591, 7 So. 94 [same]; *Kep-
perly v. Ramsden*, 83 Ill. 354; *De
Forrest v. Wright*, 2 Mich. 368;
Riedel v. Moran, 103 Mich. 262, 61
N. W. 509; *Charlebois v. Gogebic,
etc. R. Co.*, 91 Mich. 59, 51 N. W.
812; *Barry v. St. Louis*, 17 Mo. 121;
Miller v. Minnesota, etc. R. Co., 76
Id. 655, 39 N. W. 188; *St. Louis,
etc. R. Co. v. Willis (Kans.)* 16 Pac.
728; *Easter v. Hall*, 12 Wash. St.
160, 40 Pac. 728.

¹⁵⁶ *Reedie v. Northwestern R. Co.*,
4 Exch. 244; cited with approval in
Pack v. New York, 8 N. Y. 222, 225;
Kelly v. New York, 11 Id. 432;
Blake v. Ferris, 5 Id. 48; *McHarge
v. Newcomer & Co.*, 117 Tenn. 595,
100 S. W. 700, 9 L. R. A. (N. S.) 298
(1907); *Veitch v. Jenkins*, 57 S. E.
(Va.) 574 (1907); *Wm. Cameron &
Co. v. Realmuti*, 100 S. W. (Tex.
App.) 194 (1907); *Monroe v. Fred*

consequences as naturally flow from the execution of the work in a careful manner.¹⁵⁷ The principle here stated is now perfectly well settled both in England and America; but this conclusion has been reached through a series of contradictory decisions, some of which have not been overruled by name, and may therefore mislead the student.¹⁵⁸ The chief difficulty has arisen from an attempt to distinguish between the obligations of owners of real and personal property, to which we shall presently

T. Ley & Co., 156 Fed. 498, 84 C. C. etc. Ry. Co., 63 S. E. (W. Va.) 367, A. 278 (1908); Houghton v. Loma 20 L. R. A. (N. S.) 793 (1909); Pierta Lbr. Co., 93 Pac. (Cal.) 377 (1908); Johnson v. Helbing, 92 Pac. S. W. (Ky.) 320 (1909); Vogenan (Cal. App.) 390 (1908); Metzinger v. American Dock, etc. Co., 115 N. Y. Supp. 741, 131 App. Div. 216 (1909); Luce v. Holloway, 103 Pac. Fosburg L. Co., 60 S. E. (N. C.) (Cal.) 886 (1909); Seitzinger v. 654 (1908); Cole v. La. Gas Co., Burham, 223 Pa. 537, 72 Atl. 898 121 La. 771, 46 So. 801 (1908); (1909); Stephenville, etc. Ry. Co. v. Couch, 121 S. W. (Tex. App.) 189 Burns v. Michigan Paint Co., 152 (1909); Same v. Carter, Id. 192; Mich. 613, 116 N. W. 182, 16 L. R. A. Ala., etc. Ry. v. Talley-Bates Constr. Co., 50 So. (Ala.) 341 (1909); (N. S.) 816 (1908); Tex. & New Pearson v. M. M. Potter Co., 101 Orleans Ry. Co. v. Parsons, 190 S. Pac. (Cal. App.) 681, 10 Cal. App. W. (Tex. App.) 240, aff'd, 113 S. W. 245 (1909); Burke v. City & County 914 (1908); Drennon v. Patton- Contract. Co., 117 N. Y. Supp. 400, Worsham Drug Co., 109 S. W. (Tex. 133 App. Div. 113 (1909); Seattle 218 (1908); Chute v. Masser, Lighting Co. v. Hawley, 103 Pac. 6, 95 Pac. (Kans.) 398 (1908); Mc- 54 Wash. 137 (1909); DePalma v. Nulty v. Ludwig & Co., 109 N. Y. Weinman, 103 Pac. (N. M.) 782 Supp. 703, 125 App. Div. 291 (1908); (1909); Mehler v. Fisch, 120 N. Y. Kiser v. Suppe, 133 Mo. App. 19, Supp. 807, 65 Misc. 549 (1910); 112 S. W. 1005 (1908); Press v. Penny, 131 Mo. App. 121, 114 S. W. Patton v. Wharton Drug Store Co., 74 (1908); Gay v. Roanoke Lumber 123 S. W. (Tex. App.) 705 (1910); Co., 148 N. C. 336, 62 S. E. 436 Smith v. South, etc. Ry. Co., 151 (1908); Lampton v. Cedartown Co., N. C. 479, 66 N. E. 435 (1909); 6 Ga. App. 147, 64 S. E. 495 (1909); Ballard & Co. v. Lee's Admr., 115 Steger v. Barrett, 124 S. W. (Tex. S. W. (Ky.) 732 (1909); Carey v. App.) 174 (1910).
Baxter, 201 Mass. 522, 87 N. E. 901
(1909); Midgett v. Branning Mfg.
Co., 150 N. C. 333, 64 S. E. 5 (1909);
Missouri Valley Bridge & Iron Co.
v. Ballard, 116 S. W. (Tex. App.)
93 (1909); Vicker v. Kanawha,

¹⁵⁷ See § 175, *post*.

¹⁵⁸ The leading cases in error are Bush v. Steinman, 1 Bos. & P. 404; Randleson v. Murray, 8 Ad. & El. 109. They are entirely overruled.

allude; ¹⁵⁹ an attempt no longer made by any court. To this exemption from responsibility there is a single important qualification that the employer must have used ordinary care to select a contractor of proper skill and prudence.¹⁶⁰ A variety of personal obligations of the principal employer, such as, that the contract must not be unlawful, must not create a nuisance *per se*, must be such that it may be done with reasonable care without damage to others, must not be necessarily and intrinsically dangerous and not in violation of any duty imposed by law, are sometimes spoken of as qualifications of the doctrine under consideration. They are appropriately treated elsewhere.¹⁶¹

§ 169. Negligence of subcontractor and part-contractor. — The same principle is applicable to the case of subcontractors. A contractor who employs another contractor to execute the whole or a part of his job, leaving to the latter that freedom in the choice of means heretofore described as part of the attributes of a contractor, is not liable to strangers for the negligence of the subcontractor; ¹⁶² and the subcontractor may again sublet

¹⁵⁹ See § 173, *post*.

¹⁶⁰ *Norwalk Gas Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32; *Berg v. Parsons*, 84 Hun, 60, 31 N. Y. Supp. 1091; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451. This limitation has often been recognized (*Burns v. McDonald*, 57 Mo. App. 599).

¹⁶¹ "But the master, or principal or contractor is not liable for an injury, the result of the negligence of a wrongful act of the contractor, or of the latter's agents or servants, though the act complained of is collateral to the work to be done under the contract, unless the work to be done is nuisance *per se*, or is of such a kind or class that the doing of it, however carefully or skillfully

performed, will probably result in damage, or is necessarily and intrinsically dangerous, or the law imposes a duty on the master, owner, principal or contractor to keep the subject of the work in a safe condition" (*Baker v. Atlanta, etc. Ry. Co.*, 49 So. [Ala.] 751 (1909). §§ 171-3, and notes, *post*).

¹⁶² The head contractor was held not liable in *Wray v. Evans*, 80 Pa. St. 102 [trench left open by subcontractor]; *Slater v. Mersereau*, 64 N. Y. 138 [water accumulated in cellar]; *Pearson v. Cox*, L. R. 2 C. P. Div. 369 [subcontract for plastering house]; *Overton v. Freeman*, 11 C. B. 867; *Rapson v. Cubitt*, 9 Mees. & W. 710 [gas fittings]; *Boniface v.*

all or a part of his work and thus avoid liability for its details.¹⁶³ Of course, the original employer is not liable.¹⁶⁴ And the rule is applicable to the case of a contractor who is intrusted with only part of an entire job, as much as if he had charge of the whole. Thus, if the owner of land makes separate contracts with a stonemason, a bricklayer, a carpenter and a plumber, each to do the work of his own trade upon a single house, each of these mechanics is a contractor, within the meaning of the rule already stated, as much as if he had agreed to put up the entire building.¹⁶⁵ Even if a single species of work upon a single piece of property should be divided between two or more contractors, they would not thereby necessarily lose the character of contractors, and if their employer had no further control over them than he would have over a contractor for the whole work, he would not be liable for their negligence.¹⁶⁶

§ 170. [Omitted.]

Relyea, 5 Abb. N. S. 259, 36 How. Pr. 457 [undertaker not liable for carriage at funeral]; Powell v. Virginia Constr. Co., 88 Tenn. 692, 13 S. W. 691 [railroad construction]. But evidence of a subcontract must be clear, as this claim for exemption is looked upon with some suspicion (see Allen v. Willard, 57 Pa. St. 374; Berberich v. Ebach, 131 Id. 165, 18 Atl. 1008). Defendants contracted to lay a pavement in the street. To this end they piled up bricks. They engaged B. to lay the brick, agreeing to pay him a price per yard, and requested him to provide lamps. Plaintiff, passing at night, no lamps being visible, was injured. Held, defendants were liable; B. was only a servant (Wilson v. White, 71 Ga. 506). But a decision upon this point was unnecessary. The defendants were liable, because it was *their* duty to provide lamps. See § 176, *post*. Morning v. Cramp & Co., 170 Fed. 364 (1909).¹⁶³ King v. Livermore, 9 Hun, 298, aff'd, 71 N. Y. 605; Wray v. Evans, 80 Pa. St. 102. Knight v. Fox, 5 Exch. 721, is a doubtful case.¹⁶⁴ St. Louis, etc. R. Co. v. Knott, 54 Ark. 424, 16 S. W. 9.¹⁶⁵ Martin v. Tribune Asso., 30 Hun, 391.¹⁶⁶ "When we once arrive at the principle that employment, control, and supervision, or the right to such, over a person whose neglect was the immediate cause of the injury, is to test all these cases, the logical result seems inevitable, that such rule is as applicable to contracts for distinct portions of a building as to a contract for the whole" (per Hoffman, J., Potter v. Seymour, 4 Bosw. 140, 148).

§ 171. **Employer liable for servants selected by him.**— But servants appointed by the principal employer are *his* servants even though their wages are paid by the contractor.¹⁶⁷ This is not, however, to be understood as implying that the mere recommendation of a new servant to a contractor, by the latter's employer, is enough to make the employer responsible for such servant's acts. In order to have such an effect, the recommendation must be in substance a dictation of the choice. Much less does the employer of a contractor assume any liability for a servant of the latter, by simply expressing a preference for that servant over others, and thus inducing the contractor to assign to him the work. Indeed, so long as the employer confines his selection to one of several servants already employed by the contractor, he does not become responsible for such servant.¹⁶⁸ Where, however, the servants actually employed upon the work receive their wages directly from the person for whose benefit the work is done, the presumption is that they are his servants, although they are selected and superintended by another person hired by the former to render that service.¹⁶⁹ But this presumption is not at all conclusive.

§ 172. **Liability for servant compulsorily employed — pilots.**— A pilot, when taken on board a vessel without any legal compulsion, is considered the servant of the owner, who is responsible for the negligence of the pilot

¹⁶⁷ Thus, it was said by Parke, B., always drove for them]; *Jones v. Liverpool*, L. R. 14 Q. B. Div. 890. where defendants had hired a driver from the keeper of a livery stable: In *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54, Cooley, J., says: "The case is directly not by one of the regular servants, within *Quarman v. Burnett*, which, but by a stranger to the job-master, appointed by themselves, it would have made all the difference" (*Quarman v. Burnett*, 6 Mees. & W. 499). whether correctly decided or not, has been too often and too generally recognized and followed to be questioned now."

¹⁶⁸ *Quarman v. Burnett*, 6 Mees. & W. 499 [defendants hired from a livery stable a particular driver, who
¹⁶⁹ *Samyn v. McClosky*, 2 Ohio St. 536.

to the same extent as for that of any other servant;¹⁷⁰ but if the owner is compelled by law to take a particular pilot, who is entitled to control, he is not thus responsible.¹⁷¹ The owner is, however, liable to third persons for the negligence of the master and crew in all cases, even though a compulsory pilot is on board.¹⁷² And where the owner is at liberty to make a selection among pilots,¹⁷³ all qualified for the service, or to dispense with a pilot altogether, subject to the payment of pilotage for service not rendered,¹⁷⁴ he has been held liable for the pilot's negligence. There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the latter shall take upon himself the risk of injury from the negligence of the ship-owner's servants.¹⁷⁵ On similar principles, owners of mines have been exempted from liability to their own servants for the negligence of a mining boss, whom they are forced to employ by statute.¹⁷⁶

¹⁷⁰ *Yates v. Brown*, 8 Pick. 23; *Augusta*, 57 Law Times, 326, aff'g *Bussy v. Donaldson*, 4 Dallas, 206; 56 Id. 58).

Shaw v. Reed, 9 Watts & S., 72; *Fletcher v. Braddick*, 5 Bos. & P. 182; *The Stettin*, Brow. & Lush. 199, 21 L. J. [P. & D.] 208; *The Lion*, L. R. 2 Adm. 102.

¹⁷¹ Thus, the owner is exempt if required to employ the first pilot that offers (*National Steam Nav. Co. v. British, etc. Nav. Co.*, Law Rep. 3 Exch. 330; *Story on Agency*, § 456a; *The Halley*, L. R. 2 P. C. 193). Other English decisions go farther, but they are founded on peculiar statutes (see *Lucey v. Ingram*, 6 Mees. & W. 302; *McIntosh v. Slade*, 6 Barn. & Cr. 657; *Bennet v. Moita*, 7 Taunt. 258; *Ritchie v. Bowsfield*, Id. 309). If the pilot does not, as of right, supersede the master but is merely his adviser, the owners are not exempt from liability (*The*

¹⁷² *The Queen*, Law Rep. 2 Adp. 354; *The Protector*, 1 W. Rob. 45; *The Diana*, 1 W. Rob. 131; *Smith v. Condry*, 17 Pet. 20, 1 How. (U. S.) 28. The relation is that of master and servant (*Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819).

¹⁷³ *Martin v. Temperely*, 4 Q. B. 298. Is this consistent with the rule in *Quarman v. Burnett* (*supra*), query?

¹⁷⁴ *Williamson v. Price*, 16 Martin, 399; *Yates v. Brown*, 8 Pick. 23.

¹⁷⁵ *Smith v. Steele*, L. R. 10 Q. B. 125. If by his negligence he causes injury to the ship or loss to ship by injury to others, he is liable for indemnity (*Compagne De Navigation Francaise v. Burley*, 183 Fed. 166 (1910); *Donald v. Guy*, 127 Fed. 228).

¹⁷⁶ See § 231, *post*.

§ 173. **Liability of owner for persons employed on land.** — There is nothing in the nature of real property which requires that its owner should be held to a stricter liability than the owner of personal property; and he is not, therefore, responsible for the negligence of persons employed upon his land, any further than he would be if they were employed about his chattels.¹⁷⁷ Many attempts have been made to establish such a distinction, and to make the owner of land responsible for the misuse of his property by contractors and their servants; and for a long time the courts gave it a certain recognition; but, on more thorough consideration, they repudiated it altogether.¹⁷⁸ Even though the injury be caused

¹⁷⁷ *Reedie v. Northwestern R. Co.*, C. J., in *Bush v. Steinman* (1 Bos. & 4 Exch. 244; *Overton v. Freeman*, 11 C. B. 867; *Peachey v. Rowland*, 13 Id. 182; *Blake v. Ferris*, 5 N. Y. 48; *In Laughner v. Pointer* [1826] (5 Pack v. New York, 8 Id. 222; *Kelley v. New York*, 11 Id. 432; *King v. N. Y. Central R. Co.*, 66 Id. 181; *Hexamer v. Webb*, 101 Id. 377; *Hilliard v. Richardson*, 3 Gray, 349; *Connors v. Hennessey*, 112 Mass. 96; *Painter v. Pittsburgh*, 46 Pa. St. 213; *Conway v. Furst*, 57 N. J. Law, 645, 32 Atl. 380, aff'g *Cuff v. Newark, etc. R. Co.*, 35 N. J. Law, 17; *Prairie, etc. Co. v. Doig*, 70 Ill. 52; *Du Pratt v. Lick*, 38 Cal. 691; *Robinson v. Webb*, 11 Bush, 464. The propositions of the text were cited with approval in *McCafferty v. Spuyten, etc. R. Co.*, 61 N. Y. 178, where a railroad company was held not liable for damage caused by rocks cast into plaintiff's grocery through an overcharge of powder used by a contractor in blasting for defendant's road. *S. P.*, *Edmundson v. Pittsburgh, etc. R. Co.*, 111 Pa. St. 316.

¹⁷⁸ The history of the decisions and *dicta* upon this point is worth reviewing. The distinction seems to have been first suggested by *Eyre*, C. J., in *Bush v. Steinman* (1 Bos. & 4 Exch. 244), and again, in *Overton v. Freeman* (1851, 11 C. B. 867), which was decided in the same court which decided *Bush v. Steinman*. In *Gayford v. Nichols* (1854),

by actual contact of the soil with the person or property of the plaintiff, yet if such contact arises from the act of a mere contractor or his servant, the owner of the soil is not liable.¹⁷⁹

§ 174. Liability of employer for his own fault. — If the injury complained of is the consequence of the neglect of a duty which was incumbent upon the employer, and not upon the contractor, the existence of the contract is no defence.¹⁸⁰ This is obvious when stated as a general

9 Exch. 702, *Bush v. Steinman* of land, unless he has been guilty of was again cited and overruled; negligence in the selection of a contractor, is not liable for injuries and since that time we cannot find that it has ever been quoted as an authority in England. In this country the doctrine of *Bush v. Steinman* was approved and applied in *Lowell v. Boston & Lowell R. Co.*, 23 Pick. 24; *Stone v. Cheshire R. Co.*, 19 N. H. 427; *Wiswall v. Brinson*, 10 Ired. (N. C.) Law, 554 (Ruffin, C. J., dissenting); and *New York v. Bailey*, 2 Den. 433 (per Walworth, Ch., and Hand, Senator). But it has since been wholly repudiated in *New York* (*Blake v. Ferris*, 5 N. Y. 48; *Pack v. New York*, 8 Id. 222; *McCafferty v. Spuyten, etc. R. Co.*, 61 Id. 178, 185; *King v. N. Y. Central, etc. R. Co.*, 66 Id. 181, 184; and other cases); in *Massachusetts* (*Hilliard v. Richardson*, 3 Gray, 349); in *New Jersey* (*Cuff v. Newark, etc. R. Co.*, 35 N. J. Law, 17); in *Pennsylvania* (*Painter v. Pittsburgh*, 46 Pa. St. 213; *Allen v. Willard*, 57 Id. 374; *Reed v. Allegheny*, 79 Id. 300); in *Illinois* (*Prairie, etc. Co. v. Doig*, 70 Ill. 52); in *Texas* (*Cunningham v. International R. Co.*, 51 Tex. 503); and most of the other States. No case, which was once esteemed as authority, has been more completely overthrown (*Cuff v. Newark, etc. R. Co.*, 35 N. J. Law, 17, 22). The owner of land, unless he has been guilty of negligence in the selection of a contractor, is not liable for injuries caused by the contractor's negligence in erecting a building on his land (*Stubley v. Allison Realty Co.*, 124 App. Div. 162, 108 N. Y. Supp. 759 (1908)).

¹⁷⁹ So held, where the contractor with a city for the grading of a public street injured the plaintiff by blasting rock (*Pack v. New York*, 8 N. Y. 222; *Kelley v. New York*, 11 Id. 432; *Blumb v. Kansas City*, 84 Mo. 112); and so, under like contracts for constructing railways (*Edmundson v. Pittsburgh, etc. R. Co.*, 111 Pa. St. 316; *McCafferty v. Spuyten, etc. R. Co.*, 61 N. Y. 178). To same effect, *Gourdier v. Cormack*, 2 E. D. Smith, 254.

¹⁸⁰ *Pendlebury v. Greenhalgh*, L. R. 1 Q. B. Div. 36. Employer remains liable for the performance of non-delegable duties or exercise of franchise, see *Camblin v. Philadelphia, etc. Ry. Co.*, 215 Pa. 54, 66 Atl. 977 (1907); *St. Louis, etc. Ry. Co. v. Madden*, 93 Pac. (Kans.) 586 (1908); *Boucher v. N. Y., etc. Ry. Co.*, 196 Mass. 355, 82 N. E. 15, 13 L. R. A. (N. S.) 1177 (1908); *O'Hara v. Laclede Gas Light Co.*, 110 S. W. (Mo. App.) 642 (1908); *Murphy v. City of New York*, 112

principle; but in the practical application of the general rule exempting employers from liability for contractors' negligence, this consideration is in danger of being overlooked. Thus, in the leading case in the courts of New York upon the general rule, the employer was held not liable to third persons for the want of proper guards to a sewer, which the contractor dug in a public street.¹⁸¹ It was assumed that it was the duty of the contractor to place such guards around the excavation. But in the later cases it has been held that, in the absence of positive stipulations to that effect, the contractor owes no such duty to his employer, whatever he may owe to third persons.¹⁸² The correctness of the actual *decision* in *Blake v. Ferris* has therefore been justly questioned in the court which made it;¹⁸³ while the correctness of the *doctrine* expressed in that case has always been acknowledged. And it has been rightly held that where a plaintiff has been damaged by the want of proper precautions against injury to the public from work done by a contractor, the employer could not escape liability, without at least showing that the contractor had neglected to perform a duty in the premises which the employer had a right to enforce.¹⁸⁴ Where an injury is caused by de-

N. Y. Supp. 807, 128 App. Div. 463 (1908); Pine Mountain Ry. Co. v. Finley, 117 S. W. (Ky.) 413; Kampman v. Rothwell, 107 S. W. (Tex. App.) 120 (1909). In the case last cited it was held by the Texas Court of Civil Appeals that one who agrees to repair a sidewalk under the direction of the owner is not an independent contractor, modified, 109 S. W. (Sup. Ct.) 1089 (1908); McGrath v. City of St. Louis, 114 S. W. (Mo.) 611 (1909); Friedman v. City of New York, 116 N. Y. Supp. 750, 63 Misc. Rep. 310 (1910); Tennessee Coal & Iron Co. v. Burgess, 47 So. (Ala.) 1029 (1908); Louisville & Nashville Ry. Co. v. Smith's Admr., 119 S. W. (Ky.) 241 (1909); White v. People's Ry. Co., 72 Atl. (Del.) 1059 (1909); Kellogg v. Church Charity Foundation of L. I., 120 N. Y. Supp. 406, 135 App. Div. 839 (1909); St. Louis, etc. Ry. Co. v. Madden, *supra*; Pine Mountain Co. v. Finley, *infra*; Louisville, etc. Ry. Co. v. Smith's Admr., *infra*; Huey v. City of Atlanta, 8 Ga. App. 597, 70 S. E. 71 (1911).

¹⁸¹ Blake v. Ferris, 5 N. Y. 48.

¹⁸² Buffalo v. Holloway, 7 N. Y. 493.

¹⁸³ Per Comstock, J., Storrs v. Utica, 17 N. Y. 104.

¹⁸⁴ Defendants, who had contracted to build a house, employed a black-

¹⁸¹ Blake v. Ferris, 5 N. Y. 48.

¹⁸² Buffalo v. Holloway, 7 N. Y.

¹⁸³ Per Comstock, J., Storrs v. Utica, 17 N. Y. 104.

¹⁸⁴ Defendants, who had contracted to build a house, employed a black-

fects in the building or materials furnished by the employer, he is responsible, even though no injury would have happened but for the use prudently made thereof by a contractor.¹⁸⁵ So, if the employer undertakes to supply the contractor with anything necessary to enable the latter to avoid injury to others from the work, the employer, if he fails to supply it, cannot avoid liability for the contractor's neglect to avoid such injury.¹⁸⁶ But, as in other cases, the employer is liable only for the proximate consequences of his neglect; and, therefore, where he had simply neglected to furnish necessary materials as fast as the contractor was ready for them, and the

smith to put in a grating on the front area, the opening for which was left without a cover or fence.

Plaintiff fell through it. As it did not appear that the blacksmith was bound to protect the opening, except while engaged on his own work, the defendants were liable (*McCleary v. Kent*, 3 Duer, 27). So, where defendant, owner of a store, contracted with a builder for a new roof, but did not bind the latter to use means to keep out the rain during the progress of the work, defendant was held liable for damage to his tenants by rain (*Sulzbacher v. Dickie*, 6 Daly, 469). In an early case, A. being employed to plaster a house, caused two openings to be made through the wall. He did not close them up when he left his work, but they continued to be used by other parties; and, B., accidentally entering one of them, fell through the floor and was injured. Held, by the House of Lords, A. was bound to provide against accidents only while his workmen were on the premises; and the responsibility did not attach to the first opening of the passage, but to the subsequent neglect (*Milne v. Smith*, 2 Dow, 290).

¹⁸⁵ *Whitney v. Clifford*, 46 Wis. 138, 49 N. W. 835.

¹⁸⁶ Defendant engaged contractors to erect a building. He agreed to furnish iron pipe necessary for it, and, in consequence of his delay, plaintiff's premises were injured by water. Held, defendant was liable, notwithstanding another person had contracted with him to furnish the pipe (*Gilbert v. Beach*, 5 Bosw. 445, 455). Where a mining company contracted for certain work in the mine, but agreed to provide props, etc., for protection of the contractor's servants, it was liable to them for neglect to do so (*Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Kelly v. Howell*, 41 Ohio St. 438). *Kelleher v. Schmidt, etc. Mfg. Co.*, 122 Ia. 635, 98 N. W. 482 (1904); (unsafe appliances). But if the contractor merely contracts that the contractor shall have the use of such appliances, machinery and so forth as compose the contractee's plant on the ground, the latter is not liable for injury caused by their use in a defective condition (*Southern Oil Co. v. Church*, 32 Tex. App. 325, 74 S. W. 797, 75 S. W. 817 (1903)).

contractor thereupon recklessly proceeded without them, the employer was held not liable for the consequences of this recklessness.¹⁸⁷

§ 175. Employer liable for the act contracted for. —

The employer always remains responsible for the natural consequences of the act which he directs or contracts to have done, when it is done in the manner contemplated by the contract,¹⁸⁸ or with ordinary care.¹⁸⁹ If, therefore, a contractor is employed to do an unlawful act,¹⁹⁰ *c. g.*, to make an excavation in a highway, without author-

¹⁸⁷ *Slater v. Mersereau*, 64 N. Y. 138, aff'g 5 Daly, 445. See § 31, *ern Ry. Co. v. Lewis*, 165 Ala. 555, 51 So. 746 (1910).

ante.

¹⁸⁸ *Brannock v. Elmore*, 114 Mo. 45, 21 S. W. 451; *Lancaster v. Conn. Mut. L. Ins. Co.*, 92 Mo. 460, 5 S. W. 23; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, 28 Atl. 32 [blasting]; *Koch v. Sackman-Phillips Co.*, 9 Wash. St. 405, 37 Pac. 703 [piling sand against adjoining lot and buildings].

¹⁸⁹ *Chicago v. Robbins*, 2 Black, 418; see *O'Rourke v. Hart*, 7 Bosw. 511; *Carman v. Steubenville, etc. R. Co.*, 4 Ohio St. 399; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052; *Woodmen v. Metropolitan Ry. Co.*, 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213 (1889); *Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742 (1903); *Mullins v. Seigel Cooper Co.*, 183 N. Y. 129, 75 N. E. 1112, aff'g 95 N. Y. App. Div. 234, 88 N. Y. Supp. 737 (1905); *Paltey v. Egan*, 200 N. Y. 83, 93 N. E. 267 (1910); *Missouri Valley Bridge Co. v. Ballard*, 53 Tex. App. 110, 116 S. W. 93 (1909); *Moore v. Kopplin*, 135 S. W. (Tex. App.) 1033 (1911); *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310 (1909); *Doughty v. League*, 80 Atl. (N. J.) 473 (1911); *South-*

¹⁹⁰ Where defendant contracts for the repair of its canal, with soil taken from plaintiff's land, defendant is liable (*Williams v. Fresno Canal Co.*, 96 Cal. 14, 30 Pac. 961). *s. p.*, *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077 [excavating on stranger's land]. Defendant employed a contractor to shore up plaintiff's wall, to prevent it from falling into an excavation which defendant was making on an abutting lot. In doing this, plaintiff's property was injured. It was not claimed that the work was negligently or improperly done. Held, that the work done was necessarily injurious to plaintiff, and defendant was not relieved from liability by the fact that it was done by an independent contractor (*Ketcham v. Cohn*, 2 N. Y. Misc. 427, 22 N. Y. Supp. 181); *Stephenville, etc. Ry. Co. v. Couch*, 121 S. W. (Tex. App.) 189 (1909); *Press v. Penny*, 134 Mo. App. 121, 114 S. W. 74 (1908); *Rogers v. Parker*, 159 Mich. 278, 123 N. W. 1109 (1909). See *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391 (1898).

ity from the proper public officer,¹⁹¹ or to create a nuisance,¹⁹² or do work, intrinsically dangerous to others, as employing a contractor to blast under dangerous circumstances, without proper safeguards,¹⁹³ a person injured by such unlawful act, or by any result of it, may recover damages from either the contractor or the employer, or both. In such cases, the negligence is not that of the contractor alone: it is that of the employer, in directing him to do an act which in its nature was wrongful.¹⁹⁴

¹⁹¹ Where plaintiff was injured by a pile of stones left in a public street by servants working under a contract made by their master with defendants, unlawfully to excavate in a public street, defendants were held liable (*Ellis v. Sheffield Gas Co.*, 2 *Ellis & B.* 767). Lord Campbell, C. J., said: "It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done" (*Ib.*). The same point was decided in *Congreve v. Morgan*, 5 *Duer*, 495, *aff'd*, *sub nom.* *Congreve v. Smith*, 18 *N. Y.* 79; *Creed v. Hartmann*, 29 *N. Y.* 591; *Ohio So. R. Co. v. Morey*, 147 *Ohio St.* 207, 24 *N. E.* 269; and other cases cited under § 298, *post*.

¹⁹² *Water Co. v. Ware*, 16 *Wall.* 556; *s. c.*, below, 2 *Abb. U. S.* 261; *Robbins v. Chicago*, 4 *Wall.* 657; *Cincinnati v. Stone*, 5 *Ohio St.* 38; *Clark v. Fry*, 8 *Id.* 358; *Brusso v. Buffalo*, 90 *N. Y.* 679; *Storrs v. Utica*, 17 *Id.* 104; *Logansport v. Dick*, 70 *Ind.* 65; *Jones v. Chantry*, 1 *Hun.* 613. See, to same effect, *Hundhausen v. Bond*, 36 *Wis.* 29; *Young v. Humphrey & Trapp*, 26 *Ky. L. Rep.* 752, 82 *S. W.* 429 (1904); *Berg v. Parsons*, *supra*;

supra; *Rogers v. Parker*, *supra*; *Louisville, etc. Ry. Co. v. Hughes*, 134 *Ga.* 75, 67 *S. E.* 542 (1910).

¹⁹³ *Joliet v. Harwood*, 86 *Ill.* 110; *Brannock v. Elmore*, 114 *Mo.* 55, 21 *S. W.* 451. See also *Pye v. Faxon*, 156 *Mass.* 471, 31 *N. E.* 640. But blasting is not, *per se*, injurious, and one contracting to have it done is not liable for injuries caused by the negligence of the contractor in doing the work, as by failure to give warning (*Herrington v. Lansingburgh*, 110 *N. Y.* 145; *McCafferty v. Spuyten Duyvil R. Co.*, 61 *Id.* 178). But to the contrary, see *Jones v. McMinimy*, 93 *Ky.* 471, 20 *S. W.* 435.

¹⁹⁴ Where the work is in its nature dangerous the employer cannot delegate his responsibility by the employment of an independent contractor (*St. Louis, etc. Ry. Co. v. Madden*, *supra*; *Sherman House Hotel Co. v. Gallagher*, 129 *Ill. App.* 557 (1906); *McGrath v. City of St. Louis*, 114 *S. W. (Mo.)* 611 (1908); *Kendall v. Johnson*, 51 *Wash.* 477, 99 *Pac.* 310 (1909). But the employer will not be liable where the injury was due to the negligence of the contractor and not to the nature of the work (*Dorn v. Snare et al.*, 114 *N. Y. Supp.* 820, 62 *Misc.* 269 (1909); *Silberman v. Dinder*,

§ 176. Omission of duty not excused by contracting to have it done. — Neither can any one escape from the burden of an obligation imposed upon him by law, by engaging for its performance by a contractor. Whatever he is bound to do, must be done; and though he may have a remedy against his contractor for the failure of the latter to discharge his duty, strangers to the contract are still at liberty to enforce the rights conferred upon them by the law, without noticing the contract.¹⁹⁵ Thus, since

115 N. Y. Supp. 54, 130 App. Div. 581 (1909); to the same effect, Missouri Valley Bridge Co. v. Ballard, 116 S. W. (Tex. App.) 93 (1909). He is liable where the natural effect of the work is to create a condition dangerous to others (Davis v. Jno. L. Whiting & Son, 201 Mass. 91, 87 N. E. 199 (1909)); and the owner also continues liable where the injury could reasonably have been foreseen and no precaution is taken to provide against it (Phila., etc. Ry. Co. v. Mitchell, 69 Atl. (Md.) 422 (1908)). Where the work is inherently dangerous (Anderson v. Fentch, 103 Pac. (Nev.) 99 (1909)). or unlawful (Rogers v. Parker, 159 Mich. 278, 123 N. W. 1109 (1909)). Owner remains liable for concealed dangers whereby injury is caused to the servants of an independent contractor (Calvert v. Springfield Elec. Co., 231 Ill. 290, 83 N. E. 184 (1907); but see Johnson v. Weston, etc. Ry. Co., 4 Ga. App. 131 (1908)). The employer is also of course liable when the injury is directly caused by a stipulation of the contract (Press v. Penny, 134 Mo. App. 121, 114 S. W. 74 (1908)); and where furnishing, under stipulations of the contract, unsafe instrumentalities (Kiser v. Suppe, 133 Mo. App. 19, 112 S. W. 1005 (1908)).

¹⁹⁵ Mersey Docks v. Gibbs, L. R. 1

H. L. 93; Pickard v. Smith, 10 C. B. N. S. 480; City R. Co. v. Moores, 80 Md. 348, 30 Atl. 643. The occupier of a house is not excused from liability for an open coal-hole in the street, by the fact that it was left open by a coal-carrier, who ought to have closed it (Pickard v. Smith, *supra*); although the coal-carrier is primarily liable (Whiteley v. Pepper, L. R. 2 Q. B. Div. 276). In Allison v. Western, etc. R. Co., 64 N. C. 382, the hirer of a slave was held liable for an injury caused by gunpowder placed by the servant of a contractor in the room which the slave was directed by the hirer to occupy. This principle was applied where railroad companies sought, under the plea of "contractor," to escape liability for failure to perform their duty to passengers (Carrico v. West Va. R. Co., 39 W. Va. 86, 19 S. E. 571) or the public (Hole v. Sittingbourne R. Co., 6 Hurlst. & N. 488; Donovan v. Oakland R. Co., 102 Cal. 245, 36 Pac. 516). In Bower v. Peate, L. R. 1 Q. B. Div. 321, the owner of one of two adjoining houses employed a contractor to pull down his house, excavate and rebuild, the contractor agreeing to support, as far as might be necessary, the adjoining buildings. The adjoining house, which was entitled to the support of the

a municipal corporation is bound to keep its streets in a safe condition, it is liable for an injury caused by the want of proper guards around an excavation, made in the

soil, was injured by the excavation. *Downey v. Low*, 22 App. Div. 460, Held, the owner was liable. *Cockburn, C. J.*, says: "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." To similar effect, *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220. A building so defectively constructed as to be dangerous is a nuisance, and the doctrine of independent contractors does not apply (*Wilkinson v. Detroit Steel Works*, 73 Mich. 405, 41 N. W. 490). *Post*, § 174n, 160. A corporation cannot avoid liability for the negligent performance of its duty in the exercise of its franchise, by letting the work to an independent contractor (*Chicago Economic, etc. Co. v. Myers*, 168 Ill. 139, 48 N. E. 66 (1897), (laying gas pipes); *North Chicago, etc. Ry. Co. v. Dudgeon*, 83 Ill. App. 528, aff'd, 184 Ill. 477, 56 N. E. 796 (1900), (laying a street railway track); *Suburban Ry. Co. v. Balkwill*, 94 Ill. App. 454, aff'd, 195 Ill. 535, 63 N. E. 389 (1902); *Metropolitan, etc. St. Ry. Co. v. Dick*, 87 Ill. App. 40 (1900), (dropping a building piece of material on a pedestrian in course of the construction of elevated tracks); *Deming v. Terminal Ry. Co.*, 49 App. Div. 493, 63 N. Y. Supp. 615, aff'd, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521 (1901), (failure to keep highway in safe condition while grading track); *Weber v. Buffalo Ry. Co.*, 20 App. Div. 292, 47 N. Y. Supp. 7 (1897); *Downey v. Low*, 22 App. Div. 460, 48 N. Y. Supp. 207 (1897), (license to maintain a coal chute in sidewalk); *Wolf v. Third Ave. St. Ry. Co.*, 67 App. Div. 605, 74 N. Y. Supp. 336 (1902); *Shiverca v. Brooklyn, etc. Ry. Co.*, 89 App. Div. 340, 85 N. Y. Supp. 982 (1903); *Choctaw, etc. Ry. Co. v. Wilker*, 16 Okla. 384, 84 Pac. 1086, 3 L. R. A. (N. S.) 595 (1906); *Cameron Mill, etc. Co. v. Anderson*, 34 Tex. App. 105, 78 S. W. 8, aff'd, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. (N. S.) 198 (1904), (excavations in street under license); *Boucher v. New York, etc. Ry. Co.*, 196 Mass. 355, 82 N. E. 15, 13 L. R. A. (N. S.) 1177 (1907); *White v. People's Ry. Co.*, 72 Atl. (Del.) 1059 (1907), (constructing a street railway track through a city); *Louisville, etc. Ry. Co. v. Smith's Admr.*, 119 S. W. (Ky.) 241 (1909); *Stephenville, etc. Ry. Co. v. Couch*, 121 S. W. (Tex. App.) 189 (1909); *Peters v. St. Louis, etc. Ry. Co.*, 131 S. W. (Mo. App.) 917 (1910). Omission of duties generally (*Covington, etc. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 372 (1899); *Sandford v. Pawtucket St. Ry. Co.*, 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564 (1896); *Carrico v. West Virginia, etc. Ry. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 108 Pac. 509 (1910); *Louisville, etc. Ry. Co. v. Hughes*, 134 Ga. 75, 67 S. E. 542 (1910); *Philadelphia Ry. Co. v. Mitchell*, 107 Md. 600, 69 Atl. 422, 17 L. R. A. (N. S.) 974 (1910); *Boucher v. New York, etc. Ry. Co.*, 196 Mass. 255, 82 N. E. 15, 13 L. R. A. (N. S.) 1177 (1907).

street by a contractor at its request.¹⁹⁶ So one, who is bound to keep premises in repair, cannot relieve himself by contracting for repairs;¹⁹⁷ nor can one do so who is bound by statute to cover up or refill excavations.¹⁹⁸ So one, who obtains permission to excavate in a highway, is personally bound to repair it, and cannot delegate that duty by contract,¹⁹⁹ and where one obtained a license from a city to incumber its street, in order to perform certain work, which he thereupon let to a contractor, he could not shield himself by such contract from liability for the abuse of the license by the contractor, amounting to a nuisance.²⁰⁰ Much less can one relieve himself from responsibility for the non-performance of his own express contract, by making a contract with another person to perform it.²⁰¹ And this principle is especially to be borne in mind, when considering a claim on the part of a contractor to be relieved from responsibility for the defaults of a subcontractor. On the other hand, it is only a person in whose favor the contract creates a duty who can take advantage of this rule.

¹⁹⁶ *Storrs v. Utica*, 17 N. Y. 104; *Newcomber, etc. Co.*, 117 Tenn. 505, 100 S. W. 700 (1907).

¹⁹⁷ *Gray v. Pullen*, 5 Best & S. 970, 981.

¹⁹⁸ *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411; *Cameron Mill Co. v. Anderson*, 34 Tex. App. 105, 78 S. W. 8, aff'd, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. (N. S.) 198 (1904); *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590 (1894); *White v. People's Ry. Co.*, 6 Pennw. 476, 72 Atl. 1059 (1907); *Press v. Penny*, 134 Mo. App. 121, 114 S. W. 74 (1908).

¹⁹⁹ *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Brennan v. Ellis*, 70 Hun, 472, 24 N. Y. Supp. 426; *Thompson v. Lowell, etc. St. Ry. Co.*, 170 Mass. 577, 49 N. E. 913, 64 Am. St. Rep. 323, 40 L. R. A. 345 (1898); *Stickel v. Riverview Park Co.*, 95 N. E. (Ill.) 445 (1911); *Roper v. Agriculture Soc.*, 136 App. Div. 97, 120 N. Y. Supp. 644; *McHarge v.*

²⁰⁰ *Darmstaetter v. Moynahan*, 27 Mich. 188.

²⁰¹ *Lasker Real Est. Ass'n v. Hatcher*, 28 S. W. (Tex. App.) 404 (1894); *Atlanta, etc. Ry. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231.

CHAPTER X.

LIABILITY OF MASTERS TO SERVANTS.

- | | |
|---|---|
| <p>§ 176a. Workingmen's Compensation Acts.</p> <p>177. Limitations of master's liability to servant.</p> <p>177a. Limitations of master's liability to servant, <i>continued</i>.</p> <p>178. Reason assigned for rule.</p> <p>179. The real reason.</p> <p>180. The general rule.</p> <p>181. Who are servants.</p> <p>182. Volunteer, when considered servant.</p> <p>183. Who is a volunteer assistant.</p> <p>183a. Master's duties.</p> <p>183b. Servant's duties.</p> <p>183c. Rationale of foregoing rule.</p> <p>183d. Master's duties non-delegable.</p> <p>184. Master does not insure against risks.</p> <p>184a. <i>Res ipsa</i>.</p> <p>185. Master liable for his own negligence.</p> <p>186. Concurrent negligence.</p> <p>187. Degree of care required of master.</p> <p>188. Duration of master's duty and exemption.</p> <p>189. Duty to select competent fellow servants.</p> <p>190. Evidence of negligence in employment of servant.</p> <p>191. Duty to employ sufficient force.</p> <p>192. Duty to provide proper instrumentalities and place of work.</p> <p>193. Duty of inspection and repair.</p> | <p>§ 194. To what extent the duty of inspection may be cast on the servant.</p> <p>195. Limits of master's liability for instrumentalities and place of work.</p> <p>195a. Purchase of instrumentalities from reputable manufacturers.</p> <p>196. Master's duty as to instrumentalities not his own property.</p> <p>197. Illustrations of liability for instrumentalities.</p> <p>198. Low bridges.</p> <p>198a. Low bridges; contributory fault.</p> <p>199. Low bridges cases limited.</p> <p>200. [Omitted.]</p> <p>201. Other dangerous projections.</p> <p>202. Master's duty to prescribe and enforce rules.</p> <p>203. Master's duty to guard and warn against unusual risks.</p> <p>203a. Duty of supervision.</p> <p>204. Delegation of master's personal duties.</p> <p>205. Illustrations of non-transferable duties.</p> <p>206. What is sufficient notice to master.</p> <p>207. Contributory negligence.</p> <p>207a. What is not contributory negligence.</p> <p>207b. Disobedience of rules and orders.</p> <p>207c. Rule must be plain.</p> |
|---|---|

§ 176a. **Workmen's Compensation Acts.** — Workmen's Compensation Acts have been adopted in California, Illinois, Kansas, Massachusetts, New Hampshire, Nevada, New Jersey, New York, Ohio, Washington and Wisconsin. A bill of like character is now pending in Congress applicable to those engaged in interstate commerce. The acts of New York, Nevada and Washington are strictly compulsory. Those of the other States are classed as elective. The aim of all of these statutes being to take the subject of negligence in the relation of master and servant away from the courts, the statutes themselves can therefore constitute no appropriate part of a treatise on the law of negligence. Their compilation for the purpose of comparison by the sociologist and legislator would be instructive but furnishes no justification for including them in this work. As pertaining, however, to the history of the law of negligence it may be remarked that legislation along these lines was first adopted in England by the Act of 1897, amended in 1900, superseded by the Act of 1906, supplemented by the Workmen's Compensation Rules enacted in 1907-9-10. It is not restricted, as has been thought necessary to give constitutional validity to the compulsory feature of such laws in this country, to dangerous employments but embraces all employments except that of domestic service. The English law provides where injury is caused by the personal negligence or willful act of the employer the injured employee or beneficiaries may elect to proceed under the Employers' Liability Act or at common law. It also provides compensation for employees injured or killed without reference to their contributory negligence, but "if it is proved that the injury to the workman is attributable to serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disability, be disallowed." The amount payable in case of total disabil-

ity is one-half of the annual wages earned; it is payable in weekly installments, but may be compounded by agreement. In case of death the amount shall not exceed three times the annual wage, with a fixed minimum of £150 and a maximum of £300. It is chargeable exclusively against the employer. The compulsory provision of the New York act was declared unconstitutional by the New York Court of Appeals in *Ives v. S. Buffalo Ry. Co.*; while in Washington the act, which probably goes further in the same direction than the New York act itself, has been maintained as constitutional in the case of *State ex rel. Davis-Smith Co. v. Clausen*,^{1a} after a review of the New York decision. The grounds of political exigency upon which the validity of such compulsory legislation is rested are set forth in the declaration contained in the preamble to the Washington statute, as follows:

“ The welfare of the State depends on its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy; and sure and certain relief for the workmen, injured in extra-hazardous work, and their families and dependents, is hereby provided regardless of questions of fault, and to the exclusion of every other remedy, proceeding or compensation except as otherwise provided in this act.”

The New York act, the first of the kind adopted in this country, was declared unconstitutional, as above stated, on the ground that where the employer has been guilty of no violation of legal duty it is not competent to impose on him a liability based on the legislative declaration that his business is inherently dangerous. Under the American statutes the inquiries of negligence and contributory negligence are immaterial, unless the employee

¹ 201 N. Y. 271, 94 N. E. 431, rev'g 140 App. Div. 921 (1911).

^{1a} 117 Pac. (Wash.) 1101 (1911).

has been guilty of willful misconduct. They generally provide that the defences of assumed risk, including the fellow-servant doctrine, and contributory negligence shall not be available to employers who shall not assent to the compensation plan provided and pay the amounts chargeable against them. Various provisions are introduced to secure the assent of the employee, such as the repeal of Employers' Liability Acts, depriving him of the right to sue at common law unless he gives notice at the time of the contract of hiring that he reserves such right, and that subsequent contracts of hiring shall be presumed to be made with reference to the act. The Washington, Massachusetts and Ohio statutes create a State insurance fund; in other States no general fund is provided. In Kansas, taken as an illustration, where death results the amount payable is equal to three times the employee's earnings for the preceding year, not to exceed \$3,600, and not to be less than \$1,200; when total incapacity results weekly payments equal to one-half of average weekly earnings, to be not less than \$6 or more than \$12 a week during such incapacity. No payments to extend over a period of ten years. While the provisions of no two acts are identical the above may serve as a general outline.

§ 177. Limitations of master's liability to servant. — We now have to consider the limitations which have been devised by judges to the general rule of a master's liability for the negligence of his servants, by force of which his own servants have less claim against him than any one else has. In our first three editions we acquiesced in the principal English and American decisions on this question, partly because we had elsewhere criticised so many judicial opinions that we began to feel ourselves in danger of just censure for presumption. But no part of this treatise has been more useful or more approved by the highest courts than that in which it opposed and rejected ill-considered decisions; while most of the parts

which have been overruled are those which followed the apparent drift of authority. In our fourth and fifth editions, therefore, we undertook to discuss all these questions in the light of reason and on some basis of principle; and we continue to do so. The general rule of limitation will not be disputed; although the reasons given, even for that, have been often declared unsatisfactory or incomprehensible, by judges who assented to the rule itself.^{1b} But, while starting from the same foundation, the English and American decisions have been gradually diverging, the former in favor of the master and the latter against him, until English decisions upon new questions of difficulty are practically useless in most American courts. Some of the principal English and Massachusetts decisions, moreover, having been made under the influence of a class-interest, and looking solely to the interest and convenience of a single class, have gone so far as to shock the moral sense of that very class, and have compelled legislatures, composed almost exclusively of masters, to overrule these decisions by statute. Since the whole of this new law consists of judicial legislation, the example of the British Parliament, composed almost in solid mass of wealthy employers, in repudiating judge-made law, invented solely for the benefit of that class, should have a powerful influence, in every court not yet tied up by precedents, in the direction of enlarging the responsibility of the employing class, rather than of diminishing it.

The opportunities for the improvement of the law by judicial decision are more frequent than is generally

^{1b} In *Lovell v. Howell*, L. R. 1 C. P. D. 161, 167, Brett, J., says: "Now, I decline to say, because I feel a difficulty in understanding or defining it, what is the precise principle on which the immunity of the master in these cases rests. But I am bound by law and by the authority of decided cases to say that such immunity does exist." "The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdictions is to limit rather

than enlarge its range. It must be conceded that it cannot rest on reasons drawn from considerations of justice or of public policy" (per Carpenter, J., in *Zeigler v. Danbury*, etc. R. Co., 52 Conn. 543; and see *Chicago*, etc. R. Co. v. *Ross*, 112 U. S. 377, 383). "The limitation has no foundation in abstract or natural justice; and all attempts to place it upon any other foundation than that of public policy will prove unsatisfactory" (*Earl. J. Crispin v. Bab-bitt*, 81 N. Y. 516, 528).

supposed. Notwithstanding the wealth of wisdom to be found in the adjudged cases and the infinite variety of transactions to which it has been applied, yet the progress of our own age has been such in the arts and sciences, in industrial, commercial, mining, and manufacturing development and the means of communication and transportation, and in the increase of sympathy and the leveling of social barriers, that there are constantly occurring new questions, which should be determined in the light afforded by the spirit of the law and sympathetically with such progress, social, ethical and material. "It is a mistake to suppose that the jurist, any more than the legislator, must look only to the past. He must also study the present, and bring himself into actual contact with the existing conditions of society, its sentiments, its moral convictions, and its actual needs."² It is gratifying to observe that the judges of England and Massachusetts, within the last fifteen years, have manifested a disposition in this direction, so far as the harsh decisions of their predecessors would permit.

§ 177a. Limitations of master's liability to servant, continued. — The duty of the master to his servant has not been treated by common-law courts with that special reference to the relation of master and servant required for the development of the legal principles, which, had the subject been thus treated, would have been discovered peculiarly applicable to it. In short, the common-law principles regulating the duties of the master as declared by the courts have not grown out of the relationship. The principles actually applied are those of wide general application, established long before the duties of the master claimed special attention; and the courts, finding them ready at hand and consonant with the appreciation by the judges of the need of social conditions, applied them when the relationship of master and servant, *inter se*, first began to claim their attention, in the last decade of the first half of the nineteenth century. Indeed, the only notable

² Laws and Jurisprudence, Dillon, p. 387.

new doctrine declared as growing out of the relationship was that of the limitation of the master's responsibility by the rule of assumed risk, or implied acceptance by the servant of the ordinary risks, including the negligence of fellow servants — a rule entirely unknown in Continental European jurisprudence and exclusively of Anglo-Saxon growth. It was early held that the master's liability must be tested by the general doctrine which denies liability unless there has been some fault, remissness or blameworthiness, hence that loss from accidental injuries to the servant must rest where it fell, on the one least able to bear it.³

§ 178. Reason assigned for rule. — The reason usually assigned for the exemption of masters from liability to their servants, is that a servant, in bargaining for his wages, takes into account all the ordinary risks of the business upon which he enters, and obtains a compensation which, upon the average, covers these risks, among which are reckoned the negligence of fellow servants.⁴ Dr. Wharton thinks that this principle will not sustain the rule, because, he says: "no agreement that a party shall be held irresponsible for his negligence * * * is valid."⁵ That ought to be the law, if it is not;⁶ but it does not

³ Cp. Pollock & Maitland's History of English Law, (2d ed.) vol. 2, p. 528.

⁴ "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in a legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment; peril, which the servant is as likely to know, and against which he can as effectually guard, as the master" (Farwell v. Boston & Worcester R. Co., 4 Mete. 49). To same effect, Nashville, etc.

R. Co. v. Elliott, 1 Coldw. (Tenn.) 611; Holden v. Fitchburg R. Co., 129 Mass. 268; Little Rock, etc. R. Co. v. Townsend, 41 Ark. 382; Toledo, etc. R. Co. v. Black, 88 Ill. 112; Harrison v. Central R. Co., 31 N. J. Law, 293; State v. Malster, 57 Md. 287; Mad River R. Co. v. Barber, 5 Ohio St. 541; Morgan v. Vale of Neath R. Co., L. R. 1 Q. B. 149; Warburton v. Great Western R. Co., L. R. 2 Exch. 30. See also the following, which are less distinct and explicit in holding that the risks included are presumed to have been considered in estimating the compensation: Gibson v. Erie R. Co., 63 N. Y. 449; Sweeney v. Berlin, etc. Co., 101 Id. 520; Bartonshill Co. v. Reid, 3 Macq. H. L. 265, 266.

⁵ Wharton, Negligence, § 199.

⁶ See Harrison v. Central R. Co., 31 N. J. Law, 293, 298.

prove that a contract against liability for an *agent's* negligence is void. And the cases cited by him only hold that a principal cannot enforce an unreasonable restriction of his liability for his agent's negligence;⁷ a principle which we thoroughly approve. But even this principle is not universally accepted. Decisions can now be found both ways.⁸ The ingenious invention of Chief Baron Pollock, that no member of an establishment could maintain an action against its head for the fault of another member, which he was never weary of repeating,⁹ has never been accepted as a basis for this rule; and Dr. Wharton's proposed principle, that a co-adventurer assumes the consequences of all risks incidental to the business, is no more satisfactory.¹⁰ How can one "assume," by mere force of circumstances, a risk which he is not allowed to assume by express contract? Chief Justice Shaw's theory, that public policy requires that servants should have no remedy against their masters, in such cases, because the absence of any remedy will make them more careful of their own safety than they would otherwise be,¹¹ is entirely untenable. We fully agree with Mr.

⁷ See cases cited, Wharton on Western, etc. R. Co., 57 Id. 512; Negl., § 589, and § 505, *post*.

⁸ It is not the common law of England (McCawley v. Furness, etc. R. Co., L. R. 8 Q. B. 59); nor of New York (Blair v. Erie R. Co., 66 N. Y. 313; Poucher v. N. Y. Central, etc. R. Co., 49 N. Y. 263; Wilson v. N. Y. Central, etc. R. Co., 97 Id. 87); *New Jersey* (Kinney v. Central R. Co., 32 N. J. Law, 407); *Maryland* (Baltimore, etc. R. Co. v. Brady, 32 Md. 333); *Illinois* (Ill. Central R. Co. v. Read, 37 Ill. 484); *Michigan* (Hawkins v. Great Western R. Co., 17 Mich. 57). In Virginia, a principal, *e. g.*, a railroad company, cannot, by contract, exempt itself from liability for personal injuries to a stranger, caused by the negligence of its servants (Johnson v. Richmond, etc. R. Co., 86 Va. 975, 11 S. E. 829). Contracts exempting masters from the liability to their servants, imposed by law, were held valid in Griffiths v. Dudley, L. R. 9 Q. B. Div. 357; Western, etc. R. Co. v. Strong, 52 Ga. 461; Galloway v.

see Ingersoll v. Randall, 14 Minn. 400. They were held void, as against public policy, in Roesner v. Hermann, 8 Fed. 782, 10 Bissell, 486; Lake Shore, etc. R. Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467; Little Rock, etc. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808. In Massachusetts, Iowa, Kansas, and Alabama, some contracts of this kind are made void by statute (see Kansas, etc. R. Co. v. Peavey, 29 Kans. 169). The British Employers' Liability Bill (1893) was lost, only because the Lords insisted upon an amendment allowing such contracts in certain cases, while the Commons refused to assent thereto.

⁹ In Abraham v. Reynolds, 5 Hurlst. & N. 143, and other cases.

¹⁰ Wharton, Negligence, § 199.

¹¹ Farwell v. Boston, etc. R. Co., 4 Metc. 49, 59. With regard to the "supposed public policy" at the foundation of the rule, Field, J., well says: "It is assumed that the exemption operates as a stimulant to

Horace Smith,¹² and with the British Parliament,¹³ that true public policy is opposed to the whole rule of exemption to masters as against their servants, and that accidents would be far less frequent, and the public interest better served, if the rule were entirely abolished. The true rule, in our opinion, would be to hold masters to the obligation of ordinary care in each of their agents, as well toward fellow servants as toward strangers; but, in consideration of the well-attested fact that the familiarity of servants with danger always makes them more careless of their own safety than strangers to such work would be, requiring positive evidence of their due care at the time of the accident, or, if that is impracticable, as in cases of death or loss of reason, evidence of their constant habit of care at other times.

§ 179. The real reason. — If the exemption of masters from liability to servants for the negligence of fellow servants is founded upon any principle whatever, it must be upon an assumption that, in a majority of cases so large as to constitute a rule for all others, both employer and employee tacitly understand, when the employment begins, that the employee is not to expect indemnity from the employer against the negligence of other persons in the same common employment.¹⁴ If it is true that such is the universal understanding between the parties, though unexpressed, and that such was the case before the question had ever been passed upon by the courts, there is a good foundation for the rule, in all cases in which an express contract to the same effect would be binding. For, upon a familiar principle of the law of contracts, where both parties to the contract of hiring

diligence and caution on the part of the servant for his own safety as well as that of his master, * * * but it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to danger of life or limb, because * * * damages could be recovered by their representatives or themselves for the loss or injury" (Chicago, etc. R. Co.

v. Ross, 112 U. S. 377, 383, 5 S. Ct. 184).

¹²Smith's Negligence (Whit. ed.), 138.

¹³A bill abolishing this exemption passed both houses of Parliament, in 1893; yet it fell through, on account of amendments by the Lords, which the Commons rejected.

¹⁴Harrison v. Central R. Co., 31 N. J. Law, 293.

have, in fact, each understood the contract in that sense,¹⁵ or where the employee entered into the contract of service, knowing or believing that the employer understood this condition to be implied,¹⁶ the condition is implied, just as effectually as if it had been put down in writing. And if such a mutual understanding has always existed, in the vast majority of cases, and a contrary understanding has not been known to exist in any appreciable number of cases, such a state of facts creates a settled usage, the terms of which are implied in every contract from which they are not expressly excluded,¹⁷ even though one of the parties may not have known of the usage or intended to assent to it, so long as the other party was not aware of that circumstance. These are well-known principles in the law of contracts; and they are properly applicable to the law of master and servant. And, whatever may have been the fact fifty years ago, when the courts began to evolve this branch of the law, we think that it must be conceded that their long course of decisions, whether originally correct or not, have established a general and notorious usage, which every intelligent man now takes into account, when entering into a contract of service. We shall adopt this principle, as the only one which can justify any limitation of the master's liability to a servant, as distinguished from a stranger, and shall apply this test to all questionable decisions and doubtful cases.

The sooner those adjudications which cannot stand this test are overruled the better will be the state of the law. Upon the hypothesis of general knowledge and common understanding, the rule above suggested would be right enough, except that it presupposes the parties to the implied contract of service to stand upon an equal footing; but there is a growing indisposition among law writers and judges to make an assertion generally so obviously

¹⁵ See *Scranton v. Booth*, 29 Barb. 171; *Saltus v. Pruyne*, 18 How. Pr. 412; *Hartford, etc. R. Co. v. Jackson*, 24 Conn. 514; *Hazard v. New England Ins. Co.*, 1 Sumn. 218; *Pars. Contr.* (6th ed.) 475, note (a).

¹⁶ *Barlow v. Scott*, 24 N. Y. 40; *White v. Hoyt*, 73 Id. 505.

¹⁷ *Field v. Lelean*, 6 Hurlst. & N. 617; *Pollock v. Stables*, 12 Q. B. 765; *Dale v. Humfrey*, El., Bl. & El. 1004.

at variance with the truth.^{17a} If those cases, in which it has recently been held that all express contracts limiting the liability of master to their servants are void, as against public policy, were correctly decided, then the rule of limitation is founded upon no reason whatever; for no intelligent reason, other than that of implied contract, has ever been suggested by the courts; and they have always assigned that reason, even when suggesting others.

§ 180. The general rule. — Under the principles before stated, it must be conceded to be settled at common law that a master is not liable for injuries personally suffered by his servant through the ordinary risks of the business,¹⁸ including the negligence of a fellow servant,¹⁹ acting as such,²⁰ while engaged in the same common employment,²¹ unless the master is chargeable with negligence in the selection of the servant in fault,²² or in retaining him after actual or constructive notice of his incompetency.²³ This "bad exception to a bad rule," as Lord Esher called it, in his testimony before a parliamentary committee, was first suggested in 1837, in an English court, in

^{17a} *Schlemmer v. Buffalo, etc. Ry. Co.*, 205 U. S. 1 (1907), (Holmes, J.) "Probably the modification of this general principle (of assumed risk) by some judicial decisions and by statutes like paragraph 8" (of Safety Appliance Act of Congress of 1893), "is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist."

¹⁸ See § 184, *post*.

¹⁹ *Hutchinson v. York, etc. R. Co.*, 5 Exch. 343. As to who are fellow servants, see § 224 *et seq.*, *post*. In *Wilson v. Merry*, L. R., 1 Sc. App. 326, Lord Cairns objected to the use of the term "fellow servant," as inadequate to express the rule correctly. It certainly did not, if the doctrines advanced by him were sound. But, as will presently appear,

these doctrines are not accepted by any court in the United States, and have been condemned by the British Parliament as contrary to natural justice.

²⁰ When a fellow servant acts in place of the master, the rule does not apply. See § 204, *post*.

²¹ This is a necessary condition. See § 234, *post*. Contributory negligence of a fellow servant of a plaintiff is no defense for a defendant who is not the master of either (*Chicago, etc. R. Co. v. Chambers*, 15 C. C. A. 327, 68 Fed. 148).

²² This is conceded in all the foregoing cases. See § 189, *post*.

²³ §§ 189, 190, *post*. See *Weger v. Pennsylvania R. Co.*, 55 Pa. St. 460; *Chicago, etc. R. Co. v. Stafford*, 16 Ill. App. 84; *Ohio, etc. R. Co. v. Collarn*, 73 Ind. 261.

Priestly v. Fowler,²⁴ where the precise point did not arise. That case, however, is always spoken of as the foundation of the rule. The first real decision of the question was made in South Carolina in 1841.²⁵ This was cited and approved by Chief Justice Shaw, of Massachusetts, in 1842, in the Farwell case,²⁶ which is the leading case on the question, and contains all the reasoning in favor of the rule which is worth mentioning.²⁷ His opinion was followed in New York in 1847.²⁸ The precise point was first decided in England in 1850, and followed ever since.²⁹ Since then the rule has been forced upon Scotland, by the votes of English judges, overruling the Scotch courts;³⁰ and it has been accepted by all American courts, both Federal and State,³¹ with only some

²⁴ 3 Mees. & W. 1. "Meeson & Welsby" have been often said, in England, to have produced more bad law than can be found in many times the same number of volumes elsewhere. Lord Abinger, who delivered this judgment, and who, as Sir James Scarlett, was esteemed as the ablest advocate at the bar, was (for the same reasons) considered to be one of the poorest judges.

²⁵ Murray v. South Carolina R. Co., 1 McMull. Law, 385.

²⁶ Farwell v. Boston, etc. R. Co., 4 Metc. 49.

²⁷ Perhaps we should mention the slashing opinion in Ryan v. Cumberland R. Co., 23 Pa. St. 384, which, however, consists mainly of arguments which have since been almost universally rejected.

²⁸ The Farwell case was cited with approval in New York in 1844, in Brown v. Maxwell, 6 Hill, 592; and expressly adopted in 1847, in Coon v. Syracuse, etc. R. Co., 6 Barb. 231, aff'd, 1851, 5 N. Y. 492. The courts assigned no reasons of their own, and counsel did not even argue this question. See report in 6 Barb. 231.

²⁹ Hutchinson v. York, etc. R. Co., 5 Exch. 343; Wigmore v. Jay, Id. 354; Tarrant v. Webb, 18 C. B. 797; Morgan v. Vale of Neath R. Co., L. R. 1 Q. B. 149; Searle v. Lindsay, 11 C. B. [N. S.] 429; Griffiths v. Gidlow, 3 Hurlst. & N. 648.

³⁰ See a review of this doctrine in Dixon v. Ranken, 14 Dunlop, 480, where the courts of Scotland emphatically repudiated it; although the House of Lords, on a subsequent appeal, declared the law of Scotland to be the same in this respect as that of England (Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266). This was a gross example of bald judicial legislation: three English judges, who knew nothing of Scotch law, overruling fifteen Scotch judges, who had made it a lifelong study.

³¹ So held in the courts of the United States (Randall v. Baltimore, etc. R. Co., 109 U. S. 478); in Canada (O'Sullivan v. Victoria R. Co., 44 Upper Canada, 128); in New York (Coon v. Syracuse, etc. R. Co., 5 N. Y. 492; Keegan v. Western R. Co., 8 Id. 175; Russell v. Hudson Riv. R. Co., 17 Id. 134; Crispin v. Babbitt,

81 Id. 516); *Alabama* (Cook v. Parham, 24 Ala. 21, 36; Mobile, etc. R. Co. v. Thomas, 42 Ala. 672, 682); *California* (Yeomans v. Contra Costa S. N. Co., 44 Cal. 71; Hogan v. Central Pac. R. Co., 49 Id. 128; Civil Code, § 1970); *Colorado* (Summerhays v. Kansas Pac. R. Co., 2 Colo. 484; Atchison, etc. R. Co. v. Farrow, 6 Id. 498); *Connecticut* (Burke v. Norwich, etc. R. Co., 34 Conn. 474; Darrigan v. N. Y., New Haven, etc. R. Co., 52 Id. 285); *Florida* (Parrish v. Pensacola, etc. R. Co., 28 Fla. 251, 9 So. 696); *Georgia* (see Georgia, etc. R. Co. v. Rhodes, 56 Ga. 645); *Idaho* (Minty v. Union Pac. R. Co., 2 Idaho, 437, 21 Pac. 660); *Illinois* (Honner v. Illinois, etc. R. Co., 15 Ill. 550; Chicago, etc. R. Co. v. Murphy, 53 Id. 336; Pittsburgh, etc. R. Co. v. Powers, 74 Id. 341); *Indiana* (Madison R. Co. v. Bacon, 6 Ind. 205; Pittsburgh, etc. R. Co. v. Adams, 105 Id. 151); *Iowa* (Sullivan v. Mississippi, etc. R. Co., 11 Ia. 421; Benn v. Null, 65 Id. 407); *Kansas* (Union Pacific R. Co. v. Young, 8 Kans. 638); *Maine* (Blake v. Maine Cent. R. Co., 70 Me. 60); *Maryland* (O'Connell v. Baltimore, etc. R. Co., 20 Md. 212; Hanrathy v. Northern Cent. R. Co., 46 Id. 280); *Massachusetts* (Farwell v. Boston, etc. R. Co., 4 Metc. 49; Clifford v. Old Colony R. Co., 141 Mass. 564, 6 N. E. 751); *Michigan* (Davis v. Detroit, etc. R. Co., 20 Mich. 105; Michigan Cent. R. Co. v. Dolan, 32 Id. 510); *Minnesota* (Fraker v. St. Paul, etc. R. Co., 32 Minn. 54, 19 N. W. 349); *Missouri* (Rohbach v. Pacific R. Co., 43 Mo. 187; Lee v. Detroit, etc. Works, 62 Id. 565; Ryan v. McCully, 123 Mo. 636, 27 S. W. 533); *New Jersey* (McAndrews v. Burns, 39 N. J. Law, 118; Collyer v. Penn. R. Co., 49 N. J. Law, 59, 6 Atl. 437); *North Carolina* (Ponton v. Wilmington, etc. R. Co., 6 Jones Law, 245; Hardy v. Carolina Cent. R. Co., 76 N. C. 5; Hagins v. Cape Fear R. Co., 106 Id. 537, 11 S. E. 590); *Ohio* (Mad River, etc. R. Co. v. Barber, 5 Ohio St. 541, 562; Whaalan v. Mad River, etc. R. Co., 8 Id. 249); *Oregon* (Willis v. Oregon R. etc. Co., 11 Ore. 257, 4 Pac. 121); *Pennsylvania* (Ryan v. Cumberland R. Co., 23 Pa. St. 384; Reese v. Biddle, 112 Id. 72, 3 Atl. 813); *South Carolina* (Murray v. S. Carolina R. Co., 1 McMull. Law, 385; Boatwright v. Northeastern R. Co., 25 S. C. 128); *Tennessee* (Fox v. Sandford, 4 Sneed [Tenn.], 36); *Texas* (Price v. Houston Nav. Co., 46 Tex. 535, citing numerous cases; Railroad Co. v. Miller, 51 Tex. 270); *Vermont* (Noyes v. Smith, 28 Vt. 59; Hard v. Vermont, etc. R. Co., 32 Id. 473), and *Virginia* (Norfolk, etc. R. Co. v. Nuckols, 91 Va. 193, 21 S. E. 342). *Wisconsin* at first denied this judge-made law (Chamberlain v. Milwaukee, etc. R. Co., 11 Wis. 248); but the same court, solely out of deference to the overwhelming current of authority in other States, fell into line (Cooper v. Milwaukee, etc. R. Co., 23 Wis. 668); and remains there (Craven v. Smith, 89 Wis. 119, 61 N. W. 317). Donk Bros., etc. Co. v. Thil, 128 Ill. App. 249, aff'd, 228 Ill. 233, 81 N. E. 857 (1907); Southern Ry. Co. v. Elliott, 82 N. E. (Ind.) 1051, 81 N. E. 1180 (1907); Atoka Coal, etc. Co. v. Miller, 104 S. W. (Ind. Ter.) 555 (1907); Hoxie v. New York, etc. Ry. Co., 82 Conn. 352, 73 Atl. 754 (1909); Stearns, etc. Co. v. Fowler, 58 Fla. 362, 50 So. 680 (1909); Whitfield v. Louisville, etc. Ry. Co., 7 Ga. App. 268, 66 S. E. 972 (1910); Reliance, etc. Co. v. Williams, 122 S. W. (Ky.) 207, rehearing denied, 124 S. W. 850 (1910); Robichaud v. Mendell, 75 N. H. 391, 74 Atl. 1049 (1909); Tobler v.

qualifications in Kentucky³² and some Western and Southern States; which, however, turn rather upon the interpretation of the rule than upon the rule itself.³³

All the leading countries of the European continent have adopted compulsory insurance as a just provision against industrial accidents and disability through sickness and old age, for the protection of employees. In England legislation rests on Employer's Liability Act of 1880 and amendments, largely limiting the application and modifying the operation of the fellow-servant rule; and on the Workingmen's Compensation Act of 1897, providing compulsory insurance, as amended at different times and revised in 1906.³⁴ The former has constituted the basis of legislation for which organized labor has struggled in this country for the past twenty-five years.

Pioneer Mfg. Co., 52 So. (Ala.) 86 (1910); Hamm v. Bettendorf Axle Co., 125 N. W. (Ia.) 86 (1910); Mil-

ler v. American Sugar Refining Co., 138 App. Div. 512, 123 N. Y. Supp. 301 (1910); Bailey v. Meadows, 152 N. C. 603, 68 S. E. 11 (1910); Strehlau v. Schroeder Lbr. Co., 142 Wis. 215, 125 N. W. 429 (1910); Henson v. Pascola Stove Co., 131 S. W. (Mo. App.) 931 (1910); Eichorn v. Central, etc. Ry. Co., 185 Fed. 624 (1911); Cunningham v. Blake, etc. Co., 208 Mass. 68, 94 N. E. 450 (1911); Connerly v. North Jersey St. Ry. Co., 76 N. J. L. 1, 69 Atl. 487, aff'd, 78 Atl. 1134 (1910); Rosemand v. Southern Ry. Co., 66 S. C. 91, 44 S. E. 574 (1903); Zienke v. Northern Pac. Ry. Co., 8 Idaho, 54, 66 Pac. 828 (1901); Beleal v. Northern Pac. Ry. Co., 15 N. D. 315, 108 N. W. 33 (1906); Cochran v. Shanahan, 51 W. Va. 137, 41 S. E. 140, (1902); Stewart v. International Paper Co., 96 Me. 30, 51 Atl. 237 (1901); Weaver v. Goulden Log. Co., 116 La. 468, 40 So. 798 (1906); Mollhoff v.

Chicago, etc. R. Co., 15 Okla. 540, 82 Pac. 733 (1905).

³²In *Kentucky*, a master is held liable to his servant for the gross negligence of a superior fellow servant (Louisville, etc. R. Co. v. Robinson, 4 Bush, 507; Louisville, etc. R. Co. v. Filbern, 6 Id. 574), but for nothing short of that (Robinson v. Louisville, etc. R. Co. [Ky.], 24 S. W. 625); nor even for gross negligence of a fellow servant, of the same grade or rank, and engaged in the same field of labor (Volz v. Chesapeake, etc. R. Co., 95 Ky. 188, 24 S. W. 119; Fort Hill Stone Co. v. Orm, 84 Ky. 183).

³³See §§ 233b, 238, *post*.

³⁴History of British Labor Legislation, British Workingmen's Act, Bulletin of Labor, No. 70, May, 1907, United States Commer. & Labor. The Workingmen's Compensation Act of 1906, by N. R. Avonson, London, in 1909. Workingmen's Insurance in Illinois, American Economic Ass'n Quarterly, 3d Series, Vol. IX, April, 1908.

§ 181. **Who are servants.**—The same principles are applied to determining who is a servant, for the purpose of settling a question as to the master's liability or non-liability to him, as are applied to the question of his liability for him. Persons who, in a sense, serve another person, but are not his "servants," within the definition heretofore given,³⁵ stand upon the same footing as strangers.³⁶ Thus an independent contractor or the servant of such contractor is not within the rule; and he may recover against the employer of such contractor in like manner with any stranger.³⁷ On the other hand, he has no greater rights than any mere stranger has.³⁸ The wife, child, or servant of a servant is of course not a servant of his master in any sense. And the legal fiction, by which a servant is held to assume certain risks, does not bind him to assume any risks to his family. He has, therefore, the same right to recover from his master damage caused to him by injuries suffered by his wife, child, or servant, as any one else has.³⁹ Prisoners, compelled

³⁵ §§ 160, 164, *ante*. See a curious jury that a servant can, see Hanni- question as to what constitutes a gan v. Union Warehouse Co., 3 N. Y. servant within this rule in Fowler v. App. Div. 618, 38 N. Y. Supp. 272 Lock, L. R. 7 C. P. 272. See, also, [duty to furnish safe implements]; Bradley v. N. Y. Central R. Co., 3 Hartwig v. Bay State Shoe Co., 43 T. & C. 288, *aff'd*, 62 N. Y. 99; Hun, 425 [same, in favor of convict against contractor]; and so where no Kelly v. Johnson, 128 Mass. 530; where A., a servant of B., recovered such duty can be claimed (Bibb v. of C. for the negligence of C.'s ser- Norfolk, etc. R. Co., 87 Va. 711, 14 vants, while A. was aiding them in S. E. 163; Hanna v. Chattanooga, pursuance of their false representa- etc. R. Co., 88 Tenn. 310, 12 S. W. tions that B. had directed him so to 718).

³⁷ Galvin v. New York, 112 N. Y. 223, 19 N. E. 675; Neimeyer v. Weyerhaeuser, 95 Ia. 497, 64 N. W. 416; Chicago, etc. R. Co. v. Clark, 26 Neb. 645, 42 N. W. 703.

³⁸ Floette v. Third Av. R. Co., 10 N. Y. App. Div. 308, 41 N. Y. Supp. 792.

³⁹ Gannon v. Housatonic R. Co., 112 Mass. 234; Campbell v. Harris, 4 Tex. Civ. App. 636, 23 S. W. 35.

Mo. 49).

³⁶ For some peculiar cases, in which one who is not a "servant" may claim the same protection from in-

to work in or out of prison, are not servants of the persons controlling them nor fellow servants with each other.⁴⁰

§ 182. **Volunteer, when considered servant.** — One who, without being requested or authorized by the master to do so, assists his servants to serve him, is deemed to be so far their fellow servant as to limit the liability of the master to him, even though he would not be regarded as a servant so far as to make the master liable to strangers for his negligence.⁴¹ This is so where such assistance is given at the request of the servants;⁴² and it can make no difference in his favor that the person rendering such assistance does so unasked or even against the will of the master or of the servants, or both. In such case he may be a trespasser; and if so, he diminishes his right to recover for an injury received under such circumstances by his contributory fault.⁴³ On the

⁴⁰ *Buckalew v. Tennessee Coal Co.*, 112 Ala. 146, 20 So. 606; *Boswell v. Barnhart*, 96 Ga. 521, 23 S. E. 414; *Sloss-Sheffield Steel, etc. Co. v. Long*, 53 So. (Ala.) 910 (1910).

⁴¹ *Degg v. Midland R. Co.*, 1 Hurlst. & N. 773; *Potter v. Faulkner*, 1 Best & S. 800; *Osborne v. Knox, etc. R. Co.*, 68 Me. 49; *Geibel v. Elwell*, 19 App. Div. 285, 46 N. Y. Supp. 76 (1897), (one assisting at request of other servants, but having no other relation to the business and without expectation of pay, does not become a fellow servant).

⁴² *Osborne v. Knox, etc. R. Co.*, *supra*; *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823; *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. 491; *Helm v. Louisville, etc. R. Co. (Ky.)*, 33 S. W. 396. The contrary decision was made in the Scotch case of *Little v. Summerlee Iron Co.*, 27 Jur. 135, 17 Dunlop,

310. In *Pennsylvania Co. v. Gallaher*, 40 Ohio St. 637, an employee of a railroad company, while repairing a freight car, called upon his son aged eleven years, to assist him, who, while doing so, was injured by other servants of the company backing a train down on him. The company was held liable; the court considering that the father had an implied authority to call for mechanical assistance.

⁴³ It has been held that where a railroad company has not given its conductor express or apparent authority to employ help, and there is no exigency requiring extra help, a boy of 15 who willingly obeys his request to assist on a car, is a trespasser, and, if injured, cannot recover from the company in the absence of willful or gross negligence (*Hot Springs R. Co. v. Dial*, 58 Ark. 318, 24 S. W. 500). That case is one

other hand, if his assistance is rendered at the request of the master or his authorized agent, he becomes for the time a servant in every legal sense, with the benefits⁴⁴ as well as the burdens of that position.

§ 183. Who is a volunteer assistant. — It is not every act of literal assistance to a servant that makes the person doing it an “assistant” within the scope of the term as we have just used it. The act must be done with the intention of rendering a service *to the master*. If done for the benefit of himself or any one else, and the person doing it does so only because he cannot otherwise effect

of many, in which bad law was invented in order to overcome a perverse verdict against the obvious weight of evidence. Right of recovery only such as exists in case of trespassers (*Wagen v. Minneapolis, etc. Ry. Co.*, 80 Minn. 92, 82 N. W. 1107 (1900); *Yazoo, etc. Ry. Co. v. Kern*, 138 S. W. 988 (1911); *Louisville, etc. Ry. Co. v. Pendleton*, 126 Ky. 605, 104 S. W. 382 (1907); *Taylor v. Baltimore, etc. Ry. Co.*, 108 Va. 817, 62 S. E. 798 (1908). See *Belton Oil Co. v. Duncan*, 127 S. W. (Tex. App.) 884 (1910), (servants accustomed, with acquiescence of master, to exchange duties are not during such exchange mere volunteers).

⁴⁴ A person who without pay assists as a brakeman in making up a railroad train by the direction or with the express permission of a yardmaster, who has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, and it will be liable to him for an injury resulting from the use of a defective brake (*Central Trust Co. v. Texas, etc. R. Co.*, 32 Fed. 448). In an emergency, discretion and authority

of conductor to supply disabled or missing servants will be implied. But to bind the company the employment must come within the scope of his agency or implied power, and an order to do a single act, as turning the switch, will not constitute an employment binding on the company. Authority to supplement number of employees will not be implied in the absence of some unforeseen or unexpected emergency (*Georgia Pac. Railway Company v. Tropst*, 83 Ala. 518, 3 So. 764, 85 Ala. 203, 4 So. 711 (1888). Where a volunteer assistant was a minor about 12 year old, held that he could only recover against the company for an injury suffered by showing that it was willfully or wantonly inflicted (*Belt Ry. v. Charters*, 125 Ill. App. 322 (1905). Plaintiff was frequently employed by railway foreman and paid part of the time by the foreman himself and part of the time from he pay-car. He had been set to clean out a boiler and had no experience in such work. The foreman gave him in iron bar and told him to punch the manhead out, which he did, receiving injuries; held, that company was liable (*Ill. Cent. Ry. Co. v. Tim-*

his own purpose, he may or may not be a trespasser,⁴⁵ but he is not in any sense a servant of that master.⁴⁶

mons, 30 Ky. Law Rep. 1155, 100 S. W. 337 (1907). Where a freight train stopped at a station to place two cars on a siding, on which one car was already standing, plaintiff, who was present, attempted to couple the cars and was injured. The court said, referring to the conductor, "So far as third parties are concerned his actions, orders and employments in management and conduct respecting the trains under his control must be held binding on the company" (Newport News, etc. Ry. Co. v. Carroll, 17 Ky. Law Rep. 374, 31 S. W. 132 (1895). Where a stranger, present by permission in a cotton mill, was requested by a section boss to procure oil from an oil pan, it makes him an employee as to that part of the work and the company is liable for injury resulting from an unsafe place to work at (Tucker v. Buffalo Cotton Mills, 76 S. C. 539, 57 S. E. 626 (1907). Conductor has no implied authority to employ assistant in the ordinary operation of the train (Clarke v. Louisville, etc. Ry. Co., 33 Ky. Law Rep. 797, 111 S. W. 344 (1908). An agent in sole charge of heavy machinery called on a bystander for assistance; held, he was a servant of the principal while so engaged (Maxon v. J. I. Case, etc. Mach. Co., 116 N. W. (Neb.) 281 (1908). Where a stranger undertakes, at the request of one without authority to employ, to render service for the master, the master is not liable except for failure to discharge such duty as would have been incumbent upon him towards a trespasser after his peril was discovered (Central of Georgia Ry. Co. v. Mullins, 7 Ga. App. 381, 66 S. E. 1028 (1910). Where one at the time of the accident is in charge of the master's property with his assent and authority, it is sufficient to create the relation of master and servant; it is not necessary he should be in his general employment or under a special contract (Rhatigan v. Brooklyn Union Gas Co., 121 N. Y. Supp. 481, 136 App. Div. 727 (1910). See § 157, continued, *ante*.

⁴⁵ See notes 46, 47, *infra*.

⁴⁶ The cases of Degg v. Midland R. Co. and Potter v. Faulkner were distinguished in Wright v. Northwestern R. Co., L. R. 1 Q. B. Div. 252, where the defendant was held liable to one who was assisting its servants in delivering to him his own goods, for an injury caused to him during the process of delivery by the negligence of defendant's servants. Coleridge, C. J., says: "It is plain, therefore, that the plaintiff was not acting merely as a volunteer * * * nor was it the case of master and servant. * * * But the defendants being bound by contract to deliver the heifer to the plaintiff, they * * * allowed the plaintiff to take part in the delivery, and they were, therefore, bound to see that he did not get injured by the negligence of their servants." This case was followed where a street railway company was held liable to a passenger who, at the request of the driver, assisted in pushing a car, for an injury suffered through negligence of the driver of another car (McIntire St. R. Co. v. Bolton, 43 Ohio St. 224; Stastney v. Second Ave. R. Co., 18 N. Y. Supp. 800). The following hard case seems to be opposed to these deci-

Thus, if a horse is running away and is stopped by a person otherwise in danger of being run over, such person does not thereby become in any degree a servant of the owner of the horse. So one, whose house is threatened by the spread of a fire in his neighbor's, does not lose any rights as a stranger by helping to put out the fire. And where a foreman, authorized to employ in emergency, engages a stranger, the master is bound by any reasonable stipulation, such as the undertaking to give him notice of the approach of trains.⁴⁷

§ 183a. Master's duties.—The duty of the master is to use reasonable or ordinary care to secure the safety

sions: Defendant was delivering a large fly-wheel at the factory of B., plaintiff's employer, and the servants of both defendant and B. were jointly engaged in unloading the wheel. Defendant's foreman called for help as the wheel was being lowered, and B.'s foreman ordered plaintiff to assist, and while executing this order plaintiff was caught under the wheel and injured. Held, that plaintiff assumed the relation of servant to defendant, even though ordered to assist by his employer's foreman at the request for help from defendant's foreman, and that he could not recover for the negligence of the other servants of defendant (*Wischam v. Rickards*, 136 Pa. St. 109, 20 Atl. 532). See also *Billows v. Moors*, 162 Mass. 42, 37 N. E. 750.

⁴⁷ *Geibel v. Elwell*, 19 App. Div. (N. Y.) 285, 46 N. Y. Supp. 76, 80 N. Y. St. Rep. 86; *McDaniel v. Highland, etc. Ry. Co.*, 90 Ala. 64, 8 So. 41; *Marks v. Rochester Ry. Co.*, 41 App. Div. 66, 58 N. Y. Supp. 210, where stranger, called on by conductor to assist in driving a car back to switch, was held to be a ser-

vant, subject to the fellow-servant rule. It has been held in Virginia that where a freight conductor called upon a by-stander to assist in discharging freight, saying that he was late and his men out of place, the relation of master and servant, in view of a rule of the company forbidding the exercise of such authority, was not established. The court quotes from *Elliott on Railways*, § 1305 (2d ed.), "the overwhelming weight of authority sustains the doctrine that a volunteer cannot charge a railroad with the duty of an employer." The authority of the case, as applicable to the facts recited, is weakened by the statement of the court that the emergency which might clothe the conductor with authority to employ by implication was not alleged and the question therefore not presented. It was also held that the custom of freight conductors generally could not be given in evidence in opposition to a rule of the company (*Taylor v. Baltimore, etc. Ry. Co.*, 108 Va. 117, 62 S. E. 798 (1908); *ante*, note 43).

of the servant while engaged in the service, and to that end:

(1) To use reasonable or ordinary care to provide and maintain safe places to work and safe ways of passage over his premises.

(2) To use ordinary care to provide and maintain reasonably safe machinery, tools and appliances; not including, however, liability for secret defects, not discoverable by ordinary care in selection and inspection.

(3) To establish and promulgate rules and regulations for the reasonably safe conduct of a dangerous or complex service.

(4) To give special instruction where youth, inexperience, unusual methods of operation, dangerous work out of the course of employment, or new devices in machinery, reasonably require it.

(5) To use reasonable or ordinary care to provide competent co-employees and an adequate number of them; and to employ those only who are competent.

§ 183b. Servant's duties. — The servant of his part engages:

(1) Faithfully to render the service contemplated;

(2) That he is competent therefor;

(3) That he will conform to all reasonable rules and regulations;

(4) That he will use reasonable care for his own safety and that of others;

(5) That he will give notice of defects or incompetency affecting his own safety and the safety of the service;

(6) That he will assume all the ordinary risks of the service, including secret defects not discoverable by reasonable care of the master, and that he will assume the neglect of fellow servants, not including the neglect of the master.

§ 183c. Rationale of foregoing rules. — The rules with respect to the duty of the master are usually said to be

derived from the duty owing by the owner of premises to those present by his invitation, as are those engaged in his service; while those of the servant are said to grow out of the relation of master and servant; and the foregoing mutual stipulations are said to be imported by legal implication into the implied contract of employment and service on account of their inherent reasonableness and from considerations of public policy.

§ 183d. Master's duties non-delegable.—The duties of the master are commonly said to be non-delegable, meaning that legal responsibility therefore cannot be shifted by the master from himself to another selected to perform such duties. Duties indeed never can be shifted. The expression is a truism. But it is permissible in an exposition of the relation of master and servant because it serves to impress the idea of the character and continuity of the master's obligations. It means, for example, that the master cannot transfer his obligation to use due care to provide safe machinery to one whom he selects for the purpose of choosing the machinery, however competent he may be. He must be competent, but the master remains liable for his exercise of care in each instance, the same as though, being himself competent, he were personally present and acting directly therein. In like manner he is liable both for the competency of one vested with the power of selecting other competent employees and for the exercise by him of due care in doing so. He, in effect, guarantees the competency and fidelity of his representative and that these qualities shall be exercised in each instance with reasonable care; he does not, however, warrant the result, as that the machinery shall be safe; but only that all reasonable precautions have been used to see that it is so. It is precisely the same with regard to the master's duty in maintaining his machinery in safe condition and keeping competent servants in his employment. However originally safe a piece of machinery, the master is liable for injury

resulting from its having become defective from being out of repair, if by the exercise of due, reasonable or ordinary care in making inspections the defective condition could have been discovered in time to have prevented the injury. And so in case of an employee in whose original selection due care has been exercised, the master will, nevertheless, be liable in case of injury resulting from his incompetency subsequently developed, or his unfitness by bad habits, if by the exercise of reasonable or ordinary care the master or his representative could have learned of such incompetency or unfitness.

§ 184. Master does not insure against risks.—The master is not bound to protect his servants, at all hazards, against defects in materials or instruments used in his work, nor against the risks and perils of the business. The contract of employment does not imply an absolute warranty that the materials and instruments furnished shall be sound or fit for the purposes to which they are applied,⁴⁸ nor that the servant shall not be exposed to extraordinary risks.⁴⁹ A master is not liable to his ser-

⁴⁸ *Armour v. Hahn*, 111 U. S. 313, 4 S. Ct. 433 [projecting timber giving way]; *Devlin v. Smith*, 89 N. Y. 470; *Dillon v. Sixth Ave. R. Co.*, 97 Id. 627. This is substantially the form in which the doctrine is stated in the following cases, where masters were held not liable to servants for defects in materials, etc.: *Ormond v. Holland*, El., Bl. & El. 102; *Hard v. Vermont*, etc. R. Co., 32 Vt. 473; *Columbus*, etc. R. Co. v. *Webb*, 12 Ohio St. 475; *Mad River*, etc. R. Co. v. *Barber*, 5 Id. 541; *Indianapolis*, etc. R. Co. v. *Love*, 10 Ind. 554; *Murphy v. Crossan*, 98 Pa. St. 495; *Sykes v. Packer*, 99 Id. 465 [in construction of building, plaintiff, a rigger, injured by falling rafters]; *Ladd v. New Bedford*, etc. R. Co., 119 Mass. 412 [roadmaster injured by breaking of switch]; *Indianapolis*, etc. R. Co. v. *Toy*, 91 Ill. 474 [fireman injured by explosion of boiler]; *Richardson v. Cooper*, 88 Ill. 270 [machine which had previously been abundantly sufficient, but fell out of repair, unknown to master]; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496, 27 Pac. 371; *Watts v. Hart*, 7 Wash. St. 178, 34 Pac. 423, 771; *Memphis*, etc. R. Co. v. *Askew*, 90 Ala. 5, 7 So. 823; *St. Louis*, etc. R. Co. v. *Jagerman*, 59 Ark. 98, 26 S. W. 591; *Van Winkle v. Chicago*, etc. R. Co., 93 Iowa, 509, 61 N. W. 929.

⁴⁹ *Riley v. Baxendale*, 6 Hurlst. & N. 446; *Lasky v. Canadian Pac. Co.*, 83 Me. 461, 22 Atl. 367; *Toledo*, etc. R. Co. v. *Conroy*, 68 Ill. 567; *Illinois Central R. Co. v. Philips*, 49

vant for any defects in the materials furnished to the latter for use in the master's service, unless he, or those entrusted by him with the selection or inspection of such materials, had notice of such defects or could have discovered them by the use of ordinary care in selection or inspection,⁵⁰ and negligently omitted to warn the servant

Id. 234; *Pittsburgh, etc. R. Co. v. way truck*; *Seaver v. Boston & Thompson*, 56 *Id.* 138. *Compare* *Maine R. Co.*, 14 *Gray*, 466 [carpenter riding from work, injured by breaking of axle, and lack of safety beams]; *Gunter v. Graniteville Mfg. Co.*, 15 *S. C.* 443 [cotton machinery]. So held where the origin of the defect did not appear (*Warner v. Erie R. Co.*, 39 *N. Y.* 468; *Ormond v. Holland, El., Bl. & El.* 102; *Flynn v. Beebe*, 98 *Mass.* 575; *Columbus, etc. R. Co. v. Webb*, 12 *Ohio St.* 475; *Hayden v. Smithville Mfg. Co.*, 29 *Conn.* 548; *Buzzell v. Laconia Mfg. Co.*, 48 *Me.* 113; *Priestley v. Fowler*, 3 *Mees. & W.* 1; *Armour v. Russell*, 144 *Fed.* 614, 75 *C. C. A.* 416, 6 *L. R. A. (N. S.)* 602 (1906); *City of Greeley v. Foster*, 32 *Colo.* 292, 75 *Pac.* 351 (1904); *Charping v. Toxaway Mills*, 70 *S. C.* 470, 50 *S. E.* 186 (1905); *Foreman v. Eagle Rice Mill Co.*, 117 *La.* 227, 41 *So.* 555 (1906); *Atchison, etc. Bridge Co. v. Miller*, 71 *Kans.* 13, 80 *Pac.* 18, 1 *L. R. A. (N. S.)* 682 (1905); *International, etc. Ry. Co. v. Trump*, 42 *Tex. App.* 536, 94 *S. W.* 903, 100 *Tex.* 208, 97 *S. W.* 464 (1906); *Miller v. Moran*, 39 *Wash.* 631, 81 *Pac.* 1089, 109 *Am. St. Rep.* 917, 1 *L. R. A. (N. S.)* 283 (1905); *Stewart v. Harman*, 108 *Md.* 446, 70 *Atl.* 333, 20 *L. R. A. (N. S.)* 228 (1908); *Coin v. Talge Lounge Co.*, 222 *Mo.* 488, 121 *S. W.* 1, 25 *L. R. A. (N. S.)* 1179 (1909); *Norfolk, etc. Trac. Co. v. Ellington*, 108 *Va.* 245, 61 *S. E.* 779, 17 *L. R. A. (N. S.)* 117 (1908). See the

⁵⁰ *Washington, etc. R. Co. v. McDade*, 135 *U. S.* 554, 10 *S. Ct.* 1044; *Devlin v. Smith*, 89 *N. Y.* 470; *DeGraff v. N. Y. Central, etc. R. Co.*, 76 *Id.* 125 [defect in brake chain, not discoverable by usual means]; *Hanrathy v. Northern Central R. Co.*, 46 *Md.* 280 [alleged defect in steam hammer]; *Allerton Packing Co. v. Egan*, 86 *Ill.* 253 [explosion of steam tank]; *Nashville, etc. R. Co. v. Jones*, 9 *Heisk.* 273 [explosion of boiler]; *Jones v. N. Y. Central, etc. R. Co.*, 22 *Hun.* 284 [brakeman killed by breaking of a ladder on freight car]; *Smoot v. Mobile, etc. R. Co.*, 67 *Ala.* 13 [brakeman injured while coupling cars, by reason of a broken strap which supported bumper]; *Little Rock, etc. R. Co. v. Duffey*, 35 *Ark.* 602 [trackman injured by a defective spike maul]; *Lake Shore R. Co. v. McCormick*, 74 *Ind.* 440 [brakeman injured by catching his foot in switch frog, while coupling cars]; *Riley v. Baxendale*, 6 *Hurlst. & N.* 446 [porter killed at a station by a rail-

of their defects. A railroad company is, therefore, not *prima facie* liable to any of its servants for defects⁵¹ in its rolling stock,⁵¹ rails,⁵² ties,⁵³ or bridges,⁵⁴ even where such servant is not employed upon the particular thing which is defective, but upon work wholly unconnected therewith.⁵⁵ In short, the master does not insure the safety of his servants.⁵⁶

§ 184a. Res ipsa.—The doctrine of *res ipsa loquitur* does not generally apply to cases such as noted in the preceding section in favor of an employee, to whom the master's duty is ordinary care; though, from the same character of defect it would apply in case of a passenger to whom his duty is for all practicable care. In the latter case the defect is *prima facie* evidence of the want of the

enormous number of cases collected in 26 Cyc., p. 1102, note 34, and annotations 1911-1912.

⁵¹ Hard v. Vermont, etc. R. Co., 32 Vt. 473; Mad River, etc. R. Co. v. Barber, 5 Ohio St. 541; DeGraff v. N. Y. Central, etc. R. Co., 76 N. Y. 125.

⁵² Indianapolis, etc. R. Co. v. Love, 10 Ind. 554; Colorado R. Co. v. Ogden, 3 Colo. 499.

⁵³ Little Rock, etc. R. Co. v. Townsend, 41 Ark. 382.

⁵⁴ Warner v. Erie R. Co., 39 N. Y. 468, rev'g s. c., 49 Barb. 558.

⁵⁵ Where the plaintiff was employed by a railroad company upon work unconnected with its trains or tracks, and daily passed over its road free of charge, to and from his work, and the train carrying him was thrown from the track, in consequence of some rails not being properly joined together, it was held that the company was not liable (Seaver v. Boston & Maine R. Co., 14 Gray, 466; Moss v. Johnson, 22 Ill. 633). These decisions can only

be supported upon the assumption that no negligence in selecting or inspecting the rails was proved (*Compare* § 192). The reasoning in the latter case is very feeble; and it is practically overruled in Toledo, etc. R. Co. v. Conroy, 68 Ill. 567. Where a deduction was made on account of such transaction, from the wages that would otherwise have been allowed, it was held that the servant had for the time all the rights of other passengers (O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239). The opposite ruling was made in Vick v. N. Y. Central R. Co., 95 N. Y. 267. The question on which the two courts differed was whether the contract really amounted to payment of fare by the servant, or whether he was carried free, as a servant, and was in service, while traveling. If a servant is required to pay any fare whatever, on his way to work, there can be no doubt that he has all the rights of a passenger.

⁵⁶ Needham v. Louisville, etc. R.

high degree of care required, because it is not reasonable to suppose that had such high degree of care been exercised the defect would have existed; while it is not *prima facie* in the former, because it is not unreasonable to suppose that the defect could have existed consistently with ordinary care. In the United States Court for Minnesota it has been said that the rule of *res ipsa* never applies in favor of an employee in an action against his employer.⁵⁷ The rule thus stated is unsound and in conflict with a large number of decisions. It is supported by decisions in a few of the Circuit Courts of the United States.⁵⁸ The doctrine of *res ipsa* does not generally apply in actions by the servant against the master for damages on account of negligence, but nevertheless there are many cases where the plaintiff, though a servant, is entitled to the benefit of the presumption arising from the facts as where the accident happened under such circumstances as such accidents do not usually happen under when the master discharges the duties imposed upon him by law; and the courts are constantly in the habit of so adjudging, resting generally the reasoning of the case upon the statement that the doctrine is not dependent upon contractual relations but upon physical facts and the circumstances of the particular case.⁵⁹ It is sound doc-

Co., 85 Ky. 423, 11 S. W. 306; Hun (N. Y.), 512; ice company employee injured by fall of a slide because of insufficiently fastened braces and its poor construction (Finck v. Des Moines Ice Co., 84

90 Cal. 426, 27 Pac. 371; Colorado R. Co. v. Ogden, 3 Colo. 499. (Ia. 321, 51 N. W. 155); employee

⁵⁷ Northern Pac. Ry. Co. v. Dixon, 139 Fed. 737 (1905).

⁵⁸ Chicago, etc. Ry. Co. v. O'Brien, 132 Fed. 593, 67 C. C. A. 421 (1905); Shandrew v. Chicago, etc. Ry. Co., 142 Fed. 320, 73 C. C. A. 430 (1906); Mexican Cent. Ry. Co. v. Townsend, 114 Fed. 739, 52 C. C. A. 369 (1902).

⁵⁹ Where an object fell upon the servant while at work on the master's premises (Ford v. Lyons, 44 174 (1892); McCauley v. Norcross, 155 Mass. 584, 30 N. E. 464 (1892);

trine that it does not so apply in cases where the accident is due to the mere fact that an appliance proves to be defective.⁶⁰ Moreover, in those States where the common-law rule exempting the master from liability on account of the negligence of fellow-servants in the same common employment has been abolished *in toto* or in particular employments, as in the railway service, collisions and other accidents reasonably to be attributed to the negligence of a fellow servant may now give rise to the presumption of negligence on the part of the master.

Faerber v. T. B. Scott Lbr. Co., 86 Wis. 226, 56 N. W. 745 (1893); Texas & Pac. Ry. Co. v. Crow, 3 Tex. App. 266, 22 S. W. 928 (1893); Williams v. New York, etc. Ry. Co., 2 Misc. (N. Y.) 30, 29 N. Y. St. Rep. 568, 21 N. Y. Supp. 259; Byrne v. Brooklyn City R. Co., 6 Misc. (N. Y.) 441, 58 N. Y. St. Rep. 577, 27 N. Y. Supp. 126, aff'd, 145 N. Y. 619, 40 N. E. 163 (1895); Thompson on Negligence, 3883. For an instructive collection and arrangement of decisions, *pro* and *con*, on this subject the reader is referred to White on Personal Injuries on Railroads, §§ 117 to 120 and notes. See Missouri, etc. Ry. Co. v. Foreman, 174 Fed. 377, 98 C. C. A. 281 (1909); Williams v. Anniston Elec. Co., 51 So. (Ala.) 385 (1909); Texas, etc. Coal Co. v. Kowsikowski, 118 S. W. (Tex. App.) 829, rev'd, 125 S. W. (Sup.) 3 (1910); Galveston, etc. Ry. Co. v. Senn, 125 S. W. (Tex. App.) 322 (1910); Ashcraft v. Davenport Locomotive Wks., 126 N. W. (Ia.) 1111 (1910); Alabama, etc. Ry. Co. v. Groome, 52 So. (Miss.) 703 (1910), (the maxim of *res ipsa* applies in actions by the servant against the master, subject to such modifications as result from the rules peculiar to the relationship); Gibler v. Quincy, etc. Ry. Co., 128 S. W. (Mo. App.) 791 (1910); Anderson v. St. Louis, etc. Ry. Co., 130 S. W. (Mo. App.) 82 (1910); Graaf v. Vulcan Iron Wks., 109 Pac. (Wash.) 1016 (1910); Midland Valley Ry. Co. v. Fulgham, 181 Fed. (C. C. A.) 91 (1910), rev'g judgment, 167 Fed. 660; Scott v. Nauss, 141 App. Div. 225, 126 N. Y. Supp. 17 (1910), (doctrine does not apply to case of injury to employee by fall of an elevator since it may not have been caused by structural defect but by improper operation of a fellow servant); Schlappendorf v. American Ry. Traffic Co., 142 App. Div. 554, 127 N. Y. Supp. 44 (1911), (generally does not apply in actions by servant against master). But see Kain v. Roebling Constr. Co., 129 N. Y. Supp. 151 (1911); Stephen v. Duffy, 142 Ill. App. 219, aff'd, 86 N. E. 1082 (1909); Henson v. Lehigh Valley Ry. Co., 122 App. Div. 160, 106 N. Y. Supp. 602, rev'd, 194 N. Y. 205, 87 N. E. 85, 19 L. R. A. (N. S.) 790 (1909); Van Inwegan v. Erie Ry. Co., 194 N. Y. 534, 87 N. E. 1128 (1909).

⁶⁰ Bowen v. Chicago, etc. Ry. Co.,

In such cases it has been said that "the mere proof of a collision would raise the presumption, in the absence of other explanation, that the injury was due to a breach of duty owing to the plaintiff and his right to recover would be the same as if he had been a passenger."⁶¹

§ 185.* Master liable for his own negligence.—A master is liable to his servants, as much as to any one else, for *his own* negligence.⁶² Therefore a servant

85 Mo. 268, 8 S. W. 230 (1887); Neb. 748, 76 N. W. 462 (1898); Huff v. Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613 (1889); Wormell v. Maine Cent. Ry. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321 (1889); Quincy Min. Co. v. Kitts, 42 Mich. 41, 3 N. W. 240 (1880); Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338 (1886); Grant v. Ry. Co., 133 N. Y. 659, 31 N. E. 230 (1892); Whitcomb v. Detroit Elec. Ry. Co., 125 Mich. 572, 84 N. W. 1072 (1900); Higgins v. Fannin, 195 Pa. 599, 46 Atl. 102 (1900); Cincinnati, etc. Ry. Co. v. Cook's Admr., 24 Ky. Law Rep. 2152, 73 S. W. 765 (1903); Ouilette v. Overman Wheel Co., 163 Mass. 305, 38 N. E. 511 (1894); Chicago, etc. Ry. Co. v. Kellogg, 55

Ia. 254, 77 N. W. 1038 (1899); Texas, etc. Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136 (1897); Patton v. Texas, etc. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361 (1900).⁶¹ White on Personal Injuries on Railroads, 171; Schuler v. Omaha, etc. Ry. Co., 87 Mo. App. 624; Stubbs v. Kansas City, etc. Ry. Co., 85 Mo. App. 192; Lee v. St. Louis, etc. Ry. Co., 112 Mo. App. 372, 87 S. W. 12 (1905).⁶² Hough v. Texas, etc. R. Co., 100 U. S. 213; Brydon v. Stewart, 2 Macq. H. L. 30; Johnson v. Bruner, 61 Pa. St. 58; Leonard v. Collins, 70 N. Y. 90; Booth v. Boston, etc. R.

* Original number 187.

(Sections 185, 185a, 186 and 186a are transposed to conform to a change in the order of treatment, by which the duties of the master are presented before the discussion of risks assumed by the servant. The change in the order of arrangement is made that the discussion of assumed risks by the servant, ordinary and extraordinary, may be presented consecutively, and because assumed extraordinary risks' arising generally from a condition

brought about by the failure of the defendant to maintain places of work and instrumentalities in a reasonably safe condition, can best be considered after ascertaining what the master's duties are. Original § 185 becomes 207e, 185a becomes 207f, 185b becomes 207g, 186 becomes 207h, and 186a becomes 207i, 187 becomes 185, 188 becomes 186, 189 becomes 187, 190 becomes 188, 191 becomes 189, 192 becomes 190, 193 becomes 191, 194 becomes 192, 194a becomes 193.)

can recover for any injury caused by the personal negligence of the master, as, for example, by a defect in a thing made under his direct supervision,⁶³ or by the fall of a heavy substance down a pit which the master was personally guarding,⁶⁴ or by the fall of an elevator which the master was personally operating,⁶⁵ or by a defect in the work of a contractor, resulting from the master's interference.⁶⁶ The negligence of any member of a partnership, in conducting the partnership business, is, of course, for the purposes of a civil liability, attributed to every other partner.⁶⁷ As in every other case, the master is not liable, on the ground of his personal negligence, for any injury of which his negligence was not the proximate cause.⁶⁸

Co., 73 Id. 38; and many other cases cited under § 207f, note. To warrant a recovery against the master for an act of negligence on his part, the act complained of must be pleaded as the cause of action; to permit a recovery upon an act not pleaded, but incidentally revealed, would be obviously unfair (*Georgia, etc. R. Co. v. Oaks*, 52 Ga. 410). A complaint against a corporation, alleging "the defendant's negligence," may properly be construed as charging defendant with personal negligence (*Fifield v. Northern R. Co.*, 42 N. H. 225; *Harrison v. Central R. Co.*, 31 N. J. Law, 293; *McKinney v. Irish Northw. R. Co.*, *Irish R. 2 C. L.* 600).

⁶³ *Weems v. Mathieson*, 4 Macq. H. L. 215; *Roberts v. Smith*, 2 Hurlst. & N. 213 [scaffold].

⁶⁴ The plaintiff, a servant of two partners, was at work at the bottom of a coal shaft. The mouth of the shaft being carelessly guarded by one partner, a piece of iron fell down the shaft and injured the plaintiff. Held, that such paratner

was liable, on the ground of his personal negligence, and that the other partner was liable merely as such (*Ashworth v. Stanwix*, 3 El. & El. 701; approved, *Mellors v. Shaw*, 1 Best & S. 437; s. p., *Daley v. Schaaf*, 28 Hun, 314; *Rickhoff v. Heckman*, 54 Hun, 637, 7 N. Y. Supp. 471; *Moran v. Harris*, 63 Iowa, 390).

⁶⁵ *Lorentz v. Robinson*, 61 Md. 64.

⁶⁶ The building was constructed by a contractor, and defendants reserved no control over the erection, but told the builder that they guessed "single top plates" would do. Defendants knew the number of tiebeams in the section which fell. Held, that the jury were justified in saying that defendants were responsible for any weakness resulting from the single top plate and insufficient tiebeams when they set plaintiff at work (*Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174).

⁶⁷ *Ashworth v. Stanwix*, 3 El. & El. 701.

⁶⁸ *Evansville, etc. R. Co. v. Tohill* (Ind.), 41 N. E. 709. A railroad

§ 186.* **Concurrent negligence.** — Where an injury to a servant is proximately caused⁶⁹ in part by an act or omission for which the master is responsible, and in part by one for which he is not responsible, the master is liable for all the damage, in conformity to the general rule as to several contributory wrongdoers.⁷⁰ Therefore, it is no defence for a master, by whose personal negligence,⁷¹ or by the negligence of whose vice-principal,⁷² a servant has suffered damage, to prove that the negligence of a fellow servant in common employment,⁷³ or the fault of a

company is liable for a defective Va. 205, 17 S. E. 884 [fellow servant in fault].

roadbed, only where such defect was such as might have been expected to result in such an injury. (McGowan v. Chicago, etc. R. Co., 91 Wis. 147, 64 N. W. 891).

⁶⁹ Not otherwise (Kevern v. Providence Min. Co., 70 Cal. 392, 11 Pac. 740; Steinke v. Diamond Match Co., 87 Wis. 477, 58 N. W. 842).

⁷⁰ See § 65, *ante*, where many cases are cited, also § 122, *ante*, and note.

⁷¹ Cayzer v. Taylor, 10 Gray, 274; Elmer v. Locke, 135 Mass. 575; Boyce v. Fitzpatrick, 80 Ind. 526.

⁷² Grand Trunk R. Co. v. Cummings, 106 U. S. 700; Flike v. Boston, etc. R. Co., 53 N. Y. 549; Booth v. Boston, etc. R. Co., 73 Id. 38; Paulmier v. Erie R. Co., 34 N. J. Law, 151; Stetler v. Chicago, etc. R. Co., 46 Wis. 497; s. c., again, 49 Wis. 609; Pittsburgh, etc. R. Co. v. Henderson, 37 Ohio St. 549 [immediate cause of injury, negligence of a fellow servant]; Cone v. Delaware, etc. R. Co., 81 N. Y. 206 [defective engine; fellow servant in fault]; Towns v. Railroad Co., 37 La. Ann. 630; Norfolk, etc. R. Co. v. Phelps, 90 Va. 665, 19 S. E. 652; Norfolk, etc. R. Co. v. Thomas, 90

Fuel Co. v. Danielson, 57 Fed. 915, 6 C. C. A. 636; Louisville, etc. R. Co. v. Kenley, 92 Tenn. 207; New Jersey, etc. R. Co. v. Young, 1 U. S. App. 96, 49 Fed. 723; Coppins v. N. Y. Central R. Co., 122 N. Y. 557, 25 N. E. 915; Lilly v. N. Y. Central R. Co., 107 N. Y. 566, 14 N. E. 503 [defective brakes]; Morrissey v. Hughes, 65 Vt. 553, 27 Atl. 205; Richmond, etc. R. Co. v. George, 88 Va. 223, 13 S. E. 429 [broken car bumper]; Norfolk, etc. R. Co. v. Nuckols, 91 Va. 193, 21 S. E. 342; Bean v. Western N. C. R. Co., 107 N. C. 731, 12 S. E. 600; Louisville, etc. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326 [defect in car; negligent engineer]; Gulf, etc. R. Co. v. Kizziah, 86 Tex. 81, 23 S. W. 578 [machinery]; St. Louis, etc. R. Co. v. McClain, 80 Tex. 85, 15 S. W. 789; Louisville, etc. R. Co. v. Berkeley, 136 Ind. 181, 35 N. E. 3 [coupling]; Island Coal Co. v. Risher (Ind. App.), 40 N. E. 158 [roof of mine]; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210 [same]; Pullman Car Co. v. Laack, 143 Ill. 242, 32

- N. E. 285 [appliances]; Town v. etc. Ry. Co., 66 S. C. 302, 44 S. E. Michigan Cent. R. Co., 84 Mich. 214, 943 (1903); Texas, etc. Ry. Co. v. 47 N. W. 665 [open switch; no Eberhart, 40 S. W. 1060, aff'd, 91 lights]; Hunn v. Michigan Cent. R. Tex. 321, 43 S. W. 510 (1897); Ray Co., 78 Mich. 513, 44 N. W. 502; v. Pecos, etc. Ry. Co., 40 Tex. App. Sherman v. Menominee Lumber Co., 99, 88 S. W. 466 (1905); Merrill 72 Wis. 122, 39 N. W. 365; Craven v. Oregon, etc. Ry. Co., 29 Utah, 204, v. Smith, 89 Wis. 119, 61 N. W. 81 Pac. 85, 110 Am. St. Rep. 695 317; Cowan v. Chicago, etc. R. Co., (1905); Norfolk, etc. Ry. Co. v. 80 Wis. 284, 50 N. W. 180 [brake Phillips' Admx., 100 Va. 362, 41 rod]; Delude v. St. Paul R. Co., S. E. 726 (1902); Conine v. Olym- 55 Minn. 63, 56 N. W. 461; Franklin pic Log. Co., 42 Wash. 50, 84 Pac. v. Winona, etc. R. Co., 37 Minn. 407 (1906); Howard v. Beldenville 409, 34 N. W. 898; Browning v. Lbr. Co., 129 Wis. 98, 108 N. W. 48 (1906); Chicago, etc. Trac. Co. Wabash R. Co., 124 Mo. 55, 27 S. v. Sawusch, 218 Ill. 130, 75 N. E. W. 644; Deweese v. Meramec Iron 797, aff'g 119 Ill. App. 349, 1 L. Co., 128 Mo. 423, 31 S. W. 110; R. A. (N. S.) 670 (1905), (concur- The Anchovia, 120 Fed. 1017, rent negligence of vice principal and 56 C. C. A. 452 (1903); Tanner v. fellow servant); Texas, etc. Ry. Co. Harper, 32 Colo. 156, 75 Pac. 404 (1904); Hansel-Elcock, etc. Co. v. v. Pelfrey, 36 Tex. App. 501, 80 Clark, 214 Ill. 399, 73 N. E. 787, S. W. 1636 (1904); Illinois Steel aff'g, 115 Ill. App. 209 (1905); Co. v. Sitar, 199 Ill. 116, 64 N. E. Eureka Block, etc. Co. v. Wells, 29 984 (1902); Hamann v. Milwaukee Ind. App. 1, 61 N. E. 236, 94 Am. Bridge Co., 127 Wis. 550, 106 N. W. St. Rep. 259 (1901); Gordon v. 1081 (1906). Cudahy Pckg. Co. v. Chicago, etc. Ry. Co., 129 Ia. 747, Anthes, 117 Fed. 118, 54 C. C. A. 106 N. W. 177 (1906); Schwarzs- 504 (1902), (concurrence of defects child, etc. v. Drysdale, 69 Kans. and negligence of fellow servant); 119, 76 Pac. 441 (1904); Fuller v. Pennsylvania, etc. Ry. Co. v. Jones, Tremont Lbr. Co., 114 La. 266, 38 123 Fed. 753, 59 C. C. A. 87 (1902); So. 164, 108 Am. St. Rep. 348 Shugart v. Atlanta, etc. Ry. Co., 133 (1905); Lockwood v. Tennant, 137 Fed. 505, 66 C. C. A. 379 (1904); Mich. 305, 100 N. W. 562 (1904); Maupin v. Texas, etc. Ry. Co., 40 Thomas v. Smith, 90 Minn. 379, 97 C. C. A. 234, 99 Fed. 49 (1900); S. W. 621, 6 L. R. A. (N. S.) 212 The Luckenbach, 144 Fed. 940, 154 N. W. 141 (1903); Root v. Kansas Fed. 1004, 83 C. C. A. 678 (1907); City, etc. Ry. Co., 195 Mo. 348, 92 Kennedy v. Grace, 92 Fed. 116 (1906); Sirois v. Henry, 73 N. H. (1899); Jensen v. The Joseph 148, 59 Atl. 936 (1905); Cole v. Thomas, 81 Fed. 578 (1897). Mexi- Warren Mfg. Co., 63 N. J. L. 626, can, etc. Ry. Co. v. Glover, 107 Fed. 44 Atl. 647 (1899); Auld v. Man- 356, 46 C. C. A. 334 (1901), (injury hattan Life Ins. Co., 165 N. Y. 610, concurrently caused by negligent 58 N. E. 1085, aff'g, 34 App. Div. methods, rules, etc., and fellow ser- 491, 54 N. Y. Supp. 222 (1900); vant); Ryon v. Delaware, etc. Ry. Kremer v. New York Edison Co., Co., 114 App. Div. 268, 99 N. Y. 102 App. Div. 433, 92 N. Y. Supp. Supp. 794, aff'd, 188 N. Y. 559, 80 883, aff'd, 186 N. Y. 557, 79 N. E. N. E. 1119 (1907). "If the negli- 1109 (1906); Bodie v. Charleston, gence of the master in failing to pro-

stranger;⁷⁴ contributed to the injury.

§ 187.* Degree of care required of master. — The master is bound to use ordinary care, diligence and skill for the purpose of protecting his servants from encountering unnecessary risks in his service;⁷⁵ but he is not bound to use any higher degree of care.⁷⁶ A railroad company, for

vide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work (*Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Deserant v. Cerrillos Coal R. Co.*, 178 U. S. 409, 420, and cases there cited," *Kreigh v. Westinghouse*, 214 U. S. 257 (1909).

⁷⁴*Toomey v. Donovan*, 158 Mass. 232, 33 N. E. 396 [independent contractor].

⁷⁵*Hough v. Texas, etc. R. Co.*, 100 U. S. 213; *Baltimore, etc. R. Co. v. Rowan*, 104 Ind. 88; *Tissue v. Baltimore, etc. R. Co.*, 112 Pa. St. 91; *Noyes v. Smith*, 28 Vt. 59; *Ryan v. Fowler*, 24 N. Y. 410; see *Paterson v. Wallace*, 1 Macq. 748. A doubt as to the existence of this obligation was expressed in *Seaver v. Boston & Maine R. Co.*, 14 Gray, 466. But the opinions of Massachusetts courts, on questions like these, down to a recent period, were greatly biased by undue sympathy with corporate interests, and should be cautiously scrutinized.

It has been held by the Supreme Court of the United States: (1) It is the duty of the master to use reasonable diligence to provide a safe place for the men in his employ to work; (2) that the employee is not obliged to examine into the employ-

er's method of transacting his business that may render the place unsafe, but may assume, in the absence of notice, that reasonable care will be used; (3) that while the master cannot delegate this duty to another and escape liability, yet he is not responsible for the place of work becoming unsafe through the negligence of fellow servants in the manner of carrying on the work, if he has discharged his primary duty, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen; (4) but the duty is a continuing one, and is discharged only when the master furnished and maintains a place of that character. The court says, "As late as *Sante Fe & P. R. Co. v. Holmes*, 202 U. S. 438, 50 L. Ed. 1904, 26 S. Ct. 676, it was declared 'The duty is a continuing one and must be exercised whenever circumstances demand it.' (5) There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer" (*Kreigh v. Westinghouse, etc. Co.*, 214 U. S. 249 (1909).

⁷⁶In an action by a servant for injuries sustained by reason of dangerous machinery furnished by the master, an instruction that "defend-

* Original number § 189.

example, although bound to use the utmost care and diligence for the protection of its passengers from injury, owes no such duty to its own servants, although they may be exposed to the same perils.⁷⁷ Ordinary care, however,

ant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe," is not erroneous (*Washington, etc. R. Co. v. McDade*, 135 U. S. 554, 10 S. Ct. 1044). Such is the rule in *New York* (*Probst v. Delamater*, 100 N. Y. 266; *Burke v. Witherbee*, 98 Id. 562; *Leonard v. Collins*, 70 Id. 90 [excavating overhanging bank of earth]; *Devlin v. Smith*, 89 Id. 470); *Pennsylvania* (*Payne v. Reese*, 100 Pa. St. 301); *Massachusetts* (*Ladd v. New Bedford, etc. R. Co.*, 119 Mass. 412); *Vermont* (*Hard v. Vermont, etc. R. Co.*, 32 Vt. 473; *Noyes v. Smith*, 28 Id. 59); *Indiana* (*Louisville, etc. R. Co. v. Orr*, 84 Ind. 50 [crab for hoisting timbers, which had nothing to prevent it from flying out of gear]); *Missouri* (*McMillan v. Union Brick Co.*, 6 Mo. App. 434; *Aldridge v. Midland, etc. Furnace Co.*, 78 Mo. 559 [excavating overhanging earth bank]); *Iowa* (*Cooper v. Central R. Co.*, 44 Ia. 134); *Minnesota* (*Gates v. Southern Minn. R. Co.*, 28 Minn. 110); *Kansas* (*Atchison, etc. R. Co. v. Winston*, 56 Kans. 456, 43 Pac. 777); *California* (*Rodgers v. Central Pac. R. Co.*, 67 Cal. 607, 8 Pac. 377; Civil Code, § 1971); *South Carolina* (*Ex parte Johnson*, 19 S. C. 492; *Sanders v. Etiwan Phosphate Co.*, Id. 510); *Alabama* (*Smoot v. Mobile, etc. R. Co.*, 67 Ala. 13); *Texas* (*Missouri Pac. R.*

Co. v. Lyde, 57 Tex. 505). Threats, which had *not* been communicated to the mine owners, did not require the duty of special diligence to guard against fire; and their failure to use such diligence did not render them liable for the death of a miner through incendiarism (*Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387). Where it was not customary for a switch engine, running through the company's yard, to ring or whistle, omission to do so is not negligence, so far as employees are concerned (*Galvin v. Old Colony R. Co.*, 162 Mass. 533, 39 N. E. 186).

⁷⁷ See railroad cases in last previous note, and many cases cited under §§ 192, 195. A railroad company need exercise ordinary care and diligence, and only such, in furnishing its employees reasonably safe machinery and appliances (*Atchison, etc. R. Co. v. Wagner*, 33 Kans. 660, 7 Pac. 204; *Kansas City, etc. R. Co. v. Ryan*, 52 Kans. 637, 35 Pac. 292; *Gulf, etc. R. Co. v. Wells*, 81 Tex. 685, 17 S. W. 511; *Nutt v. Southern Pac. R. Co.*, 25 Ore. 291, 35 Pac. 653). So as to tracks (*Williams v. St. Louis, etc. R. Co.*, 119 Mo. 316, 24 S. W. 782; *St. Louis, etc. R. Co. v. Weaver*, 35 Kans. 412, 11 Pac. 408; *International, etc. R. Co. v. Bell*, 75 Tex. 50, 12 S. W. 321). An instruction "that a railway company owes the duty to its employees to do all that human care, vigilance and foresight can do, consistently with the practical operation of its road, in providing a safe road, roadbed,

means such as is commensurate with the perils of the situation;⁷⁸ and it requires that, in all occupations attended with great and unusual danger, all appliances readily attainable, known to science, should be used for the prevention of accidents.⁷⁹ This rule, affirmed by our

track, ties and rails, and to keep the same in repair," is erroneous (*Chicago, etc. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117). Where a railroad company voluntarily employs a physician for its injured employee, it is only bound to exercise reasonable care in selecting a competent person, and is not liable for the physician's negligence or tortious acts (*Pittsburg, etc. R. Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138; *Atchison, etc. R. Co. v. Zeiler*, 54 Kans. 340, 38 Pac. 282; *Chicago, etc. R. Co. v. Howard*, 45 Neb. 570, 63 N. W. 872; *Quinn v. Kansas City, etc. R. Co.*, 94 Tenn. 713, 30 S. W. 1036).

⁷⁸ *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 S. Ct. 932; *Central R. Co. v. Ryles*, 84 Ga. 420, 11 S. E. 499. In Alabama, "due" care and diligence are required (*Ala., etc. R. Co. v. Weller*, 48 Ala. 459).

⁷⁹ "In all occupations attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents," and the neglect to provide such readily attainable appliances is proof of culpable negligence (*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464). Such as general use has demonstrated to be reasonably safe, as business is usually carried on (*The Chico*, 140 Fed. 568 (1906); *Drake v. San Antonio, etc. Ry. Co.*, 99 Tex. 240, 89 S. W. 407 (1906); *Bryan v. International, etc. Ry. Co.*, 90 S. W. (Tex. App.) 693 (1906); *DeMase v.*

Oregon, etc. Nav. Co., 40 Wash. 108, 82 Pac. 170 (1906). Master not bound to furnish the newest, safest or best (*Washington, etc. Ry. Co. v. McDade*, 135 U. S. 554 (1890); *Fisher's Admr. v. Chesapeake, etc. Ry. Co.*, 52 S. E. 373 (Va.) (1906); *Wilcox v. Hebert*, 90 Ark. 145, 118 S. W. 402 (1909); *Rice v. Von Why*, 111 Pac. (Col.) 599 (1909); *Orr v. Watterson*, 228 Ill. 138, 81 N. E. 823 (1907); *Indianapolis, etc. Abbattoir Co. v. Neidlinger*, 92 N. E. (Ind.) 169 (1910); *Flaig v. Andrews Steel Co.*, 141 Ky. 391, 132 S. W. 1015 (1910); *Simon v. Black Lake Lbr. Co.*, 127 La. 1071, 54 So. 354 (1911); *Podvin v. Pepperell Mfg. Co.*, 104 Me. 561, 72 Atl. 618 (1908); *Burgess v. Humphrey Bookcase Co.*, 156 Mich. 345, 120 N. W. 790 (1909); *Monsen v. Crane*, 99 Minn. 186, 108 N. W. 933 (1906); *Chrismer v. Bell Teleph. Co.*, 194 Mo. 189, 92 S. W. 378, 6 L. R. A. (N. S.) 492 (1906); *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 1179 (1909); *Gregory v. Chicago, etc. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123 (1911); *Burke v. Paper Co.*, 128 App. Div. 680, 112 N. Y. Supp. 893; *Paul v. Fireworks Co.*, 141 App. Div. 776, 126 N. Y. Supp. 768; *Bailey v. Meadows Co.*, 154 N. C. 71, 69 S. E. 746 (1910); *Blust v. Pacific States Tel. Co.*, 48 Ore. 34, 84 Pac. 847 (1906); *Merrigan v. Evans*, 221 Pa. 1, 69 Atl. 1113 (1908); *Bunker v. Union Pac. Ry. Co.*, 114 Pac. (Utah)

highest national court, has too often been practically denied. It is founded upon the sound principle that "ordinary care," in extraordinary dangers, means what would be extraordinary care, in ordinary dangers.⁸⁰ Ordinary care requires obedience to statutes or valid ordinances, enacted for the protection of servants, whether separately, as a class, or as a part of the public.⁸¹ The master is allowed a reasonable time in which to discover defects which he ought to remedy,⁸² and a reason-

764 (1911); Potomac, etc. Ry. Co. v. Chichester, 111 Va. 152, 68 S. E. 404 (1910); Sowards v. Amer. Car, etc. Co., 66 W. Va. 266, 66 S. E. 329 (1909); Atoka Coal, etc. Co. v. Miller, 170 Fed. 584, 95 C. C. A. 664 (1910); Stock v. Kern, 142 Wis. 219, 125 N. W. 447 (1910). But to keep reasonably abreast with improved methods and appliances, when utility has been tested and demonstrated (Norfolk, etc. Ry. Co. v. Bell, 52 S. E. (Va.) 700 (1906); Seals v. Whitney, 130 Mo. App. 412, 110 S. W. 35 (1908); Jewell v. Excelsior, etc. Mfg. Co., 143 Mo. App. 200, 127 S. W. 598 (1910); Phillips v. Salem Iron Works, 146 N. C. 209, 59 S. E. 660 (1907); El Paso, etc. Ry. Co. v. Foth, 45 Tex. App. 275, 101 Tex. 133, 100 S. W. 171, 105 S. W. 322 (1907).

⁸⁰ A railroad company, in putting a car on a repair track, whereon are other cars under which its employees are at work, should exercise that degree of care which very careful and prudent men exercise in their own affairs (Louisville, etc. R. Co. v. Davis, 91 Ala. 487, 8 So. 552). This expression is used in a great number of decisions, see preceding note; but its use in instructions to juries is to be avoided because misleading and confusing.

⁸¹ Where a city ordinance limits

the speed of locomotives, within the city, to five miles an hour, it is negligence, *per se*, as to employees whose duty requires them to cross or be on the tracks, to violate the ordinance by running at a higher speed (Central Railroad Co. v. Brantley, 93 Ga. 259, 20 S. E. 98).

⁸² Hansen v. Schneider, 58 Hun, 60, 11 N. Y. Supp. 347 [defective elevator in building, newly occupied by defendant]. The reasonable time allowed the master to discover defects which have developed in the course of use is the reasonable time within which inspection should be made that would result in this discovery (Green v. Minneapolis, etc. Ry. Co., 31 Minn. 246, 17 N. W. 378, 47 Am. St. Rep. 785 (1883). Alabama, etc. Coal Co. v. Hammond, 156 Ala. 253, 47 So. 248 (1908); Bryant Lbr. Co. v. Stastney, 87 Ark. 321, 112 S. W. 740 (1908); Denver, etc. Ry. Co. v. Reiter, 47 Colo. 417, 107 Pac. 1100 (1910); Walls v. People's Ry. Co., 80 Atl. (Del.) 355 (1911); Pagan v. Highland, 152 Ill. App. 607; Monarch Tobacco Wks. v. Northern, 124 S. W. (Ky.) 350 (1910); Scheurer v. Banner Rubber Co., 227 Mo. 347, 126 S. W. 1037 (1910); Petterson v. Composition Co., 127 App. Div. 32, 111 N. Y. Supp. 329; Young v. Mason Stable Co., 193 N. Y. 188,

able time after discovery, or after they should have been discovered, to remedy them.^{82a}

§ 188.* Duration of master's duty and exemption. — The obligations of the master, as stated in this chapter, continue in force, not only during all the time in which his servants are actually engaged in his service,⁸³ but also during the time reasonably occupied by them on his premises in going to and returning from their work,⁸⁴ and in intervals of rest between.⁸⁵ He is bound to use the same degree of care for the purpose of making their access and departure safe, as for the purpose of providing

86 N. E. 15, 127 Am. St. Rep. 939 (1908); *El Paso Foundry, etc. Co. v. DeGuereque*, 46 Tex. App. 86, 101 S. W. 814 (1907); *Corn, etc. Refining Co. v. King*, 168 Fed. 892, 94 C. C. A. 304.

^{82a} *Kerrigan v. Chicago, etc. Ry. Co.*, 86 Minn. 407, 90 N. W. 976 (1902); *Fenderson v. Atlantic City Ry. Co.*, 56 N. J. Law, 708, 31 Atl. 767 (1894); *Williams v. Anniston Elec. Co.*, 164 Ala. 84, 51 So. 385 (1909); *Woodson v. Prescott, etc. Ry. Co.*, 91 Ark. 388, 121 S. W. 273 (1909); *Wickham v. Detroit, etc. Ry. Co.*, 160 Mich. 277, 125 N. W. 22 (1910); *Howard v. Beldenville Lbr. Co.*, 129 Wis. 98, 108 N. W. 48 (1906).

⁸³ The fact that a workman was advised by vice-principal of defendant not to work beyond a certain hour, but that he worked longer, did not sever the relation of master and servant or show contributory negligence so as to prevent recovery for his death resulting from defendant's negligence (*McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094). It is a question for the jury whether deceased was in the line of his duty

when killed by a boiler explosion some minutes before working hours, where it appears that he often came early, using his time in oiling and getting ready his machine (*Walbert v. Trexler*, 156 Pa. St. 112, 27 Atl.

65).
⁸⁴ *Brydon v. Stewart*, 2 Macq. H. L. 30; *Chicago, etc. R. Co. v. Artery*, 137 U. S. 507, 11 S. Ct. 129 [returning on hand car]; *Ewald v. Chicago, etc. R. Co.*, 70 Wis. 420, 36 N. W. 12.

⁸⁵ *Cleveland, etc. R. Co. v. Martin*, 13 Ind. App. 485, 39 N. E. 759 [escape of steam in dinner-time]; *Broderick v. Detroit Union Depot*, 56 Mich. 261 [workman while eating dinner was asked by foreman to open ventilator and did so; being defective, it fell and crushed his hand]; *Atlanta Cotton Co. v. Speer*, 69 Ga. 137 [child playing after work]. Servant while at work at 4 A. M. obtained permission to go into a building to warm himself, and while attempting to enter, fell into an uncovered cistern containing boiling water. Held, jury justified in finding that "at the time of his injury the employee was engaged in

* Original number § 190.

a safe and proper place in which the work is to be done.⁸⁶ So far, therefore, as their road to his work lies through his premises, he is bound to use ordinary care to keep those premises in a safe condition for their entry at all times when he invites such entry; and he is bound to use such care for the purpose of enabling them to depart in safety, whether their departure is rightful or wrongful.⁸⁷ But he is under no obligation to keep in safe condition for their use any part of the premises to which their duties do not call them and to which he has not given them permission to go.⁸⁸ On the other hand, the master's exemption from liability for risks which the servant is

the line of his duty" (Parkinson Sugar Co. v. Riley, 50 Kans. 401, 31 Pac. 1090).

⁸⁶ *Burke v. Manhattan Ry. Co.*, 109 App. Div. 722, 96 N. Y. Supp. 516 (1905); *Rinake v. Victor Mfg. Co.*, 58 S. C. 360, 36 S. E. 700 (1900); *Haber v. Jenkins Rubber Co.*, 72 N. J. Law, 171; 61 Atl. 382 (1905); *Urquhart v. Smith, etc. Co.*, 192 Mass. 257, 78 N. E. 410 (1906); *Indiana Pipe, etc. Co. v. Neusbaum*, 21 Ind. App. 361, 52 N. E. 471 (1899); *Feneff v. Boston, etc. Ry. Co.*, 82 N. E. (Mass.) 705 (1907); *Nappa v. Erie Ry. Co.*, 123 App. Div. 915, 108 N. Y. Supp. 1141, rev'd, 195 N. Y. 176, 88 N. E. 30 (1909); *Langenfeld v. Union Pac. Ry. Co.*, 85 Neb. 527, 123 N. W. 1086 (1909); *Kirby v. Montgomery*, 126 App. Div. 922, 111 N. Y. Supp. 1127, rev'd, 197 N. Y. 27, 90 N. E. 52 (1909); *Philadelphia, etc. Co. v. Tucker*, 35 App. D. C. 123 (1910).

⁸⁷ In *Brydon v. Stewart*, 2 Macq. H. L. 30, a minor who wished to leave his employment, while coming up from the pit for that purpose, was killed by a defect due to the defendant's personal fault. Held, that the

defendant was liable; having let the workman down, he was bound to bring him up in safety, even if he came up without lawful excuse or proper cause.

⁸⁸ *Baker v. Chicago, etc. R. Co.*, 95 Ia. 163, 63 N. W. 667 [walking on track]. A carpenter, who was working on the upper deck of defendant's steamer, on quitting work at night went to the lower deck with the engineer, who hid his tools in the boiler, and on going to get his tools next morning he fell into a bunk hole. Held, that defendant was not liable (*Belford v. Canada Shipping Co.*, 35 Hun, 347; s. p., *Wright v. Rawson*, 52 Ia. 329). Where an employee's work was on the ground, and he climbed up an elevated railroad structure, in building which he was employed, for his own purposes, before commencing work, his employer is not liable (*Cowhill v. Roberts*, 71 Hun, 127, 24 N. Y. Supp. 533). But one working in a ship, who, after the work is finished or suspended, goes into the hold to get his coat, is lawfully there, and the shipowner is liable for want of reasonable care (*Boden v. Demwolf*, 56 Fed. 846).

held to assume, continues for the same time. So long as he is required to use care for the servant's protection, as a servant, he is only liable as far as a master is liable to a servant.⁸⁹ Outside of these limits, these respective liabilities and limitations cease; and each party has the same rights and duties as any other strangers have towards each other under similar circumstances. Thus a servant of a common carrier, riding in his master's vehicle on the same footing with strangers and not on service,⁹⁰ or a railroad servant crossing the track when off duty, and neither going to nor returning from his work,⁹¹ has as much right to recover for injuries caused by negligence of his fellow servants as any stranger would have, but no more.⁹²

§ 189.* Duty to select competent fellow servants.— Among the duties which the master personally owes to his servants is that of using ordinary care to select competent servants,⁹³ that is, servants of sufficient care, skill,

⁸⁹ *McDonough v. Lanher*, 55 Minn. R. Co. v. *Conley*, 89 Ky. 402, 20 501, 57 N. W. 152 [servant riding to work on elevator]. S. W. 816.

⁹⁰ *Wink v. Weiler*, 41 Ill. App. 336

⁹¹ *Doyle v. Fitchburg R. Co.*, 162 [going home in master's wagon].

Mass. 66, 37 N. E. 770. See, also, * Original number § 191.

Richardson v. Coal Co., 6 Wash. 52; ⁹³ *Wabash R. Co. v. McDaniels*, 107

Sagers v. Nuckolls, 3 Colo. App. 95; U. S. 454; *Curley v. Harris*, 11

Vormus v. Coal Co., 97 Ala. 326; Allen, 112, 121; *Chicago, etc. R. Co.*

Christian v. Railway Co., 90 Ga. 124. v. *Harney*, 28 Ind. 28; *Laning v.*

Dickinson v. West End St. R. Co., N. Y. Central R. Co., 49 N. Y. 521;

177 Mass. 365, 59 N. E. 60, 83 Am. New Orleans, etc. R. Co. v. *Hughes*,

St. Rep. 284, 52 L. R. A. 326 49 Miss. 258; *Porter v. Waters-Allen*

(1901); *Williams v. Oregon Short Co.*, 94 Tenn. 370, 29 S. W. 227;

Line Ry. Co., 18 Utah, 210, 54 Pac. Lewis v. *Emery*, 108 Mich. 641, 66

991, 72 Am. St. Rep. 777 (1898); N. W. 569. A competent man is one

McGrieken v. Western New York, who may be relied on to execute the

etc. Ry. Co., 77 Hun, 69, 28 N. Y. rules of the master, unless prevented

Supp. 298, 59 N. Y. St. 846. by causes beyond his own control.

⁹¹ *Savannah, etc. R. Co. v. Flanna-* Hence, incompetency exists, not

gan, 82 Ga. 579, 9 S. E. 471 [killed alone in physical or mental attri-

at street crossing]; *Cincinnati, etc. butes, but in the disposition with*

*Original number § 191.

prudence and good habits to make it probable that they will not cause injury to each other, and to dismiss servants who show such a want of these qualifications as to give reasonable ground for apprehension that they will injure their fellow servants.⁹⁴ Ordinary care, in such

which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and, although he may be well able to do all that is required of him, his disposition makes him an incompetent man (*Coppins v. N. Y. Central R. Co.*, 122 N. Y. 557, 25 N. E. 915). That this is the master's personal duty is conceded in every court, even by the British Lords, in *Wilson v. Merry*, L. R. 1 Scotch App. 326.

⁹⁴ *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; *Tonnesen v. Ross*, 58 Hun, 415, 12 N. Y. Supp. 150; *Gates v. Chicago, etc. R. Co.*, 2 S. Dak. 422, 50 N. W. 907; *Norfolk, etc. R. Co. v. Nuckols*, 91 Va. 103, 21 S. E. 342; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 425 (1899); *Giordano v. Brandywine, etc. Co.*, 3 Pennw. 423, 52 Atl. 332 (1902); *Metropolitan, etc. Ry. Co. v. Fortin*, 203 Ill. 454, 67 N. E. 977 (1903); *Hall v. Bedford Quarries Co.*, 156 Ind. 460, 60 N. E. 149 (1901); *Scott v. Iowa Tel. Co.*, 126 Ia. 524, 102 N. W. 432 (1905); *Baird v. New York Cent., etc. Ry. Co.*, 172 N. Y. 637, 65 N. E. 1113 (1903); *Northern Pac. Ry. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. R. A. 206 (1887). Care to be exercised in the selection of fit and competent co-employees (*Southern Pac. Co. v. Hetzer*, 115 La. 722, 39 So. 967, 3 L. R. A. (N. S.) 1105 (1905), (where plaintiff as a member of the Longshoremen's Association had stipulated for the employment of such co-servants as the association might designate, he thereby relieved the stevedore of his obligation to him to exercise care to employ competent fellow servants). *Donnelly v. Booth, etc. Co.*, 90 Me. 110, 37 Atl. 874; *Secombe v. Detroit Elec. Co.*, 133 Mich. 170, 94 N. W. 747 (1903); *Jenson v. Great Northern Ry. Co.*, 72 Minn. 175, 75 N. W. 3, 71 Am. St. Rep. 475 (1898); *Haviland v. Kansas City, etc. Ry. Co.*, 172 Mo. 186, 72 S. W. 515 (1903); *McDonald v. Standard Oil Co.*, 69 N. J. Law, 445, 55 Atl. 289 (1903); *Lamb v. Littman*, 128 N. C. 361, 38 S. E. 911, 53 L. R. A. 852 (1901); *Galveston, etc. Ry. Co. v. Davis*, 45 S. W. 956, rev'd, 92 Tex. 372, 48 S. W. 570 (1898); *Consumer's Cotton Oil Co. v. Jonte*, 36 Tex. App. 18, 80 S. W. 847 (1904); *Kampe v. Cox*, 122 Wis. 206, 99 N. W. 366 (1904); *Lafayette Bridge Co. v. Olsen*, 108 Fed. 335, 477 C. C. A. 365, 54 L. R. A. 33 (1901); *Lake Shore, etc. Ry. Co. v. Ehlert*, 25 Ohio Cir. Ct. 37 (1903); *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081 (1903), (incompetency has relation to want of ability suitable to the work, inexperience or deficiency of disposition). *Inexperience*, *Brower v. Locke*, 31 Ind. App. 353, 67 N. E. 1015 (1903); *Walkowski v. Penokee, etc. Mines*, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33 (1898); *Kellogg v. Stephens Lbr. Co.*, 125 Mich. 222, 84 N. W. 136 (1900), (where the position is filled by promotion from the next lower grade if one thereto-

cases, implies the usual diligence, which a prudent man, in the same line of business, would use in making inquiry,

fore found competent, there can be no negligence); *Baird v. New York, Ry. Co.*, 64 App. Div. 14, 71 N. Y. Supp. 734, aff'd, 172 N. Y. 637, 65 N. E. 1113 (1902), (physical condition of one employed as brakeman); *Smith v. St. Louis, etc. Co.*, 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368 (1899), (care exercised in selection should be proportioned to the danger of the service); *Southern Pac. Co. v. Huntsman*, 118 Fed. 412, 55 C. C. A. 366 (1902); *Murphy v. Hughes*, 1 Pennw. 250, 40 Atl. 187 (1898); *Illinois, etc. Ry. Co. v. Smiesni*, 104 Ill. App. 194 (1902); *Bell v. Globe Lbr. Co.*, 107 La. 725, 31 So. 994 (1902); *El Paso, etc. R. Co. v. Kelly*, 83 S. W. 855, rev'd, 99 Tex. 87, 87 S. W. 660 (1905); *Pennsylvania Ry. Co. v. Hartel*, 157 Fed. 667 (1907); *Woodward Iron Co. v. Curl*, 44 So. (Ala.) 969 (1907); *Carter v. McDermott*, 29 App. (D. C.) 45, 10 L. R. A. (N. S.) 1103 (1907); *Indiana Union Trac. Co. v. Pring*, 83 N. E. 733 (1908); *Horton v. Seaboard, etc. Ry. Co.*, 145 N. C. 132, 58 S. E. 993 (1907); *Jackson v. Southern Ry. Co.*, 77 S. C. 550, 58 S. E. 605 (1907); *Wendell v. Leo*, 108 N. Y. Supp. 1150, rev'd, 195 N. Y. 76, 87 N. E. 790 (1909), (employer not bound to furnish regular attendant to operate elevator for use of employees); *Frisberg v. Builders', etc. Co.*, 201 Mass. 461, 87 N. E. 897 (1909); *Jellow v. Fore River, etc. Co.*, 201 Mass. 464, 87 N. E. 906 (1909); *Pfudl v. Romer Sons*, 107 Minn. 353, 120 N. W. 302 (1909); *Longpre v. Big Blackfoot, etc. Co.*, 38 Mont. 99, 99 Pac. 131 (1909); *Long v. McCabe*, 52 Wash. 422, 100 Pac. 1016 (1909); *St. Louis, etc. Ry. Co. v. Reed*, 92 Ark. 350, 122 S. W. 645 (1909); *Pittsburgh Rys. v. Thomas*, 174 Fed. 591, 98 C. C. A. 437 (1909); *Streicher v. Davenport, etc. Co.*, 124 N. W. 327 (1910); *Kronzer v. Spencer, etc. Co.*, 109 Minn. 392, 124 N. W. 6 (1910); *Roberts v. Virginia, etc. Co.*, 84 S. C. 283, 66 S. E. 298 (1909); *Furlong v. New York, etc. Ry. Co.*, 78 Atl. (Conn.) 489 (1910), ("fit and competent" mean more skillful and experienced, carefulness and faithfulness being also required); *Swift Mfg. Co. v. Phillips*, 69 S. E. (Ga. App.) 585 (1910); *Robins v. Lewiston, etc. Ry. Co.*, 77 Atl. (Me.) 537 (1910). Knowledge of servant's unfitness or incompetency (*Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26 (1905), (master may generally rely on presumption that a servant competent when employed continues so); *Walkowski v. Penokey, etc. Co.*, 115 Mich. 629, 73 N. W. 895, 41 L. R. A. 33 (1898); *Elliott v. Canadian Pac. Ry. Co.*, 129 Fed. 163, rev'd, 137 Fed. 904, 70 C. C. A. 242 (1905); *First Nat. Bank v. Chandler*, 144 Ala. 286, 39 So. 822, 113 Am. Rep. 39 (1905), (master's knowledge of servant's incompetency must be shown or that such fact could have been known to him by the exercising of ordinary care); *Helton, etc. Lbr. Co. v. Ingram*, 119 Ga. 652, 46 S. E. 895, 100 Am. St. 204 (1904); *Consolidated Coal Co. v. Seginer*, 179 Ill. 370, 53 N. E. 733, aff'g 79 Ill. App. 456 (1899), (master's knowledge of incompetency may be shown notwithstanding employee held proper certificate); *Scott v. Iowa Tel. Co.*,

for the purpose of protecting himself from danger.⁹⁵ If he fails in the performance of this duty, the master is liable to any servant for the consequences of such negligence or incompetency, on the part of a servant thus negligently employed or retained, as might reasonably be anticipated as not unlikely to occur, from such information as could have been obtained about such servant, by the use of ordinary care.⁹⁶ Much more is he responsible, if he has actual notice of the negligent habits or incompetency of a servant employed by him.⁹⁷ But even the

126 Ia. 524, 102 N. W. 432 (1905); *Id.* 26; *Nordyke, etc. Co. v. Van Baird v. New York, etc. Ry. Co.*, 64 App. Div. 14, 71 N. Y. Supp. 734, *aff'd*, 172 N. Y. 637, 65 N. E. 1113 (1901), (notice of incompetency to officers of the company, though dead or out of office at time of injury, is notice to the company); *Big Stone Gap, etc. Co. v. Ketrone*, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839 (1903); *Kamp v. Cox*, 122 Wis. 206, 99 N. W. 366 (1904); *Johnson v. St. Paul, etc. Co.*, 126 Wis. 492, 105 N. W. 1048 (1906); *Igo v. Boston Elev. Ry. Co.*, 204 Mass. 197, 90 N. E. 574 (1910); *Jackson v. Chicago, etc. Ry. Co.*, 178 Fed. 432, 102 C. C. A. 159 (1910), (where one has been in the same employment for years without complaint); *Furlong v. New York, etc. Ry. Co.*, 83 Conn. 568, 78 Atl. 489 (1910), (habitual violation of rule affects the master with notice); *Missouri, etc. Ry. Co. v. Day*, 136 S. W. (Tex.) 435 (1910); *Cabin Branch Min. Co. v. Hutchinson's Admx.*, 70 S. E. (Va.) 480 (1911).

⁹⁵ *Jungnitsch v. Michigan Iron Co.*, 105 Mich. 270, 63 N. W. 296.

⁹⁶ *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Chicago, etc. R. Co. v. Swett*, 45 Ill. 197; *Chicago, etc. R. Co. v. Harney*, 28 Ind. 28; see *Thayer v. St. Louis, etc. R. Co.*, 22

Sant, 99 Id. 188; *Blake v. Maine Central R. Co.*, 70 Me. 60; *Baulec v. N. Y. Central, etc. R. Co.*, 59 N. Y. 356; *Mann v. Delaware, etc. Canal Co.*, 91 Id. 495 [engineer of a train killed by collision through inefficiency of brakeman, who was a new hand without proper knowledge of the signals; question for the jury]; *Chicago, etc. R. Co. v. Sullivan*, 63 Ill. 293 [servant causing injury was in charge of a gravel train while intoxicated, and his character as intemperate must have been known to the company]. But the mere fact that an engineer of a locomotive is near sighted is not sufficient to establish negligence in retaining him (*Texas, etc. R. Co. v. Harrington*, 62 Tex. 597); *Scott v. Iowa Telegraph Co.*, *supra*; *Baird v. New York Cent., etc. Ry. Co.*, *supra*; *Mulhern v. Lehigh, etc. Co.*, 161 Pa. St. 270, 28 Atl. 1087 (1894).

⁹⁷ *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321; *Laning v. N. Y. Central, etc. R. Co.*, 49 N. Y. 521; *Gilman v. Eastern R. Co.*, 10 Allen, 233; *Huntingdon, etc. R. Co. v. Decker*, 84 Penn. St. 419 [habitually intemperate conductor, whose unfitness was known to superintendent]; *Smith v. Backus Lum- ber Co.*, 64 Minn. 447, 67 N. W. 358.

master's knowledge of this fact is only some evidence of negligence on his part; and the issue must still be left to the jury.⁹⁸ It is held, in New York, that a master is not bound to use as much diligence in inquiring about a servant's habits, while employed, as he is when selecting the servant.⁹⁹ And the master does not become responsible for the incompetency of a servant, of which he had originally neither actual nor constructive notice, until he has had sufficient time to inquire and act upon subsequent notice.¹⁰⁰ But he must use ordinary care and diligence to keep himself informed.¹⁰¹ He must maintain

This is conceded in all the cases cited under § 180. In *Illinois Central R. Co. v. Jewell*, 46 Ill. 99, the fact that the incompetency of an engineer was known to some officers of the company (not apparently directors), was held sufficient to make the company liable to a brakeman for the engineer's fault. A single instance of negligence in a servant does not necessarily make it the duty of his master to discharge him (*Baulec v. Harlem R. Co.*, 59 N. Y. 356; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484). An employer is liable for injury to an employee, caused by the incompetency of a co-employee whom the employer, with knowledge of his incompetency, retains in his service, if such incompetency was not known to the person injured (*Texas, etc. R. Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042). Where the master has been notified of the incompetency of a servant, he cannot defend by showing that he considered such servant competent (*Ross v. Chicago, etc. R. Co.*, 2 McCrary, 235, aff'd, 112 U. S. 337).

⁹⁸ *Hoey v. Dublin, etc. R. Co.*, Irish Rep. 5 C. L. 206.

⁹⁹ *Chapman v. Erie R. Co.*, 55 N. Y. 579.

¹⁰⁰ *Louisville, etc. R. Co. v. Breedlove*, 10 Ind. App. 657, 38 N. E. 357; *Lake Shore R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246. Where a flagman's unfitness for the position was known to the defendant long enough before the accident to enable it to procure some one else, the liability of defendant is a question for the jury (*Hughes v. Baltimore, etc. R. Co.*, 164 Pa. St. 178, 30 Atl. 383).

¹⁰¹ *Norfolk, etc. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342. "The difference in the effect of general reputation upon the rights and duties of the railroad company and Johnson, lies in this, that, it being the duty of the former to inform itself of the character of its servants, the proof of general bad reputation fixed the liability of the company without proving knowledge of the reputation of the character of the servant, but, as to the servant Johnson, the proof was simply a means by which it might be shown he knew of the character of Roberts as a conductor. * * * It would be absurd to say that Johnson might prove the general reputation of Roberts as a conductor to fix liability on the part of the railroad company, but that, having made the

watch and supervision over his servants;¹⁰² and he is responsible to every servant for his failure to do so. Putting a servant, generally competent, to a task for which he is incompetent, with notice, is as culpable as the employment of a servant equally incompetent for all purposes.¹⁰³

proof, he is charged with knowledge of the general reputation to the same extent as the defendant, and therefore, could not recover," (Texas & Pac. Ry. Co. v. Johnson, 89 Tex. 519, 35 S. W. 1042 (1896); Queen v. Schwann, 119 La. 495, 44 La. 276 (1907). Habits and reputation (First National Bank v. Chandler, 144 Ala. 286, 39 So. 822, 113 Am. St. Rep. 39 (1905), (habitual negligence affects the master with notice); Consolidated Coal Mines v. Seniger, 79 Ill. App. 456, aff'd, 179 Ill. 379, 53 N. E. 733 (1899); Baird v. New York, etc. Ry. Co., 64 App. Div. 14, 71 N. Y. Supp. 734, aff'd, 172 N. Y. 637, 65 N. E. 1113 (1901); Moloy v. Mt. Morris Elec. Co., 41 App. Div. 574, 58 N. Y. Supp. 659 (1899); Lake Shore, etc. Ry. Co. v. Ehlerly, 25 Ohio Cir. Ct. R. 37 (1903); Galveston, etc. Ry. Co. v. Doris, 92 Tex. 372, 48 S. W. 570 (1906); Pratt v. McKee, 135 App. Div. 752, 119 N. Y. Supp. 967 (1909); Johnson v. Lake Shore, etc. Ry. Co., 127 N. W. (Mich.) 271 (1910); Missouri, etc. Ry. Co. v. Day, 136 S. W. (Tex.) 435 (1911).

¹⁰² Baltimore, etc. R. Co. v. Henthorne, 19 C. C. A. 623, 73 Fed. 634. There was evidence that the engineer, during two weeks, had repeatedly disobeyed signals. Held, that it was error to grant a nonsuit on the ground that deceased had the same means of knowledge as to the engineer's negligence as defendant had (Daly v. Sang, 91 Wis. 336, 64 N. W. 997). It is the duty of the

master, personally or by vice-principals, to exercise such general supervision over the work as is essential to its conduct with ordinary prudence, including the furnishing of fit and competent employees, and for injury received by one servant from the incompetency of others of which incompetency the master would have had knowledge had he performed such duty, he will be liable unless the injured employee was himself guilty of contributory negligence in continuing in the employment with such negligent employees; and such supervision must be exercised with a vigilance proportioned to the danger to employees involved in its omission (Hill v. Big Creek Lbr. Co., 108 La. 162, 32 So. 372, 58 L. R. A. 346 (1904); Sweat v. Boston, etc. Ry. Co., 156 Mass. 284, 31 N. E. 296 (1892); Gerrish v. New Haven, etc. Ry. Co., 63 Conn. 9, 27 Atl. 235 (1894); Steel, etc. Co. v. Holloway, 144 Ala. 280, 40 So. 211 (1906); James v. Fountain Inn Mfg. Co., 80 S. C. 232, 61 S. E. 391 (1908); Chicago, etc. Ry. Co. v. Donovan, 160 Fed. 826, 87 C. C. A. 600 (1908).

¹⁰³ Missouri Pac. R. Co. v. Patton, (Tex. Civ. App.), 25 S. W. 339 [engineer, never before on road, sent out after storm]; Core v. Ohio River R. Co., 38 W. Va. 456, 18 S. E. 596 [inexperienced fireman in charge of engine]; Evansville, etc. R. Co. v. Guyton, 115 Ind. 450, 17 N. E. 101 [brakemen set to run wild train].

§ 190.* **Evidence of negligence in employment of servant.** — The burden of proving negligence in selecting or continuing an unfit servant is upon the plaintiff.¹⁰⁴ He must prove (1) the specific negligent act on which the action is founded,¹⁰⁵ which may, in some cases, but not generally,¹⁰⁶ be such as to prove incompetency, but never can, of itself, prove notice thereof to the master;¹⁰⁷ (2) incompetency, by inherent unfitness¹⁰⁸ or previous spe-

¹⁰⁴ *Cameron v. N. Y. Central R. Co.*, 145 N. Y. 400, 40 N. E. 1; *Mentzer v. Armour*, 18 Fed. 373, and all other cases cited under this section. *Hilton v. Fitchburg Ry. Co.*, 73 N. H. 116, 59 Atl. 625, 68 L. R. A. 428 (1904), (master will be presumed to have exercised due care in the selection of co-employees in the absence of evidence to the contrary); *Triggs v. Lindsay*, 101 Va. 193, 43 S. E. 349 (1903); *Wilkinson, etc. Co. v. Dickinson*, 35 Ind. App. 23, 73 N. E. 967 (1905); *Chicago, etc. Ry. Co. v. Leach*, 104 Ill. App. 30, rev'd, 208 Ill. 198, 70 N. E. 222, 100 Am. St. Rep. 216 (1904); *Pittsburg Rys. Co. v. Thomas*, 174 Fed. 591, 98 C. C. A. 437 (1909).

¹⁰⁵ It is astonishing that any decision to this effect should ever have been called for; but it seems that efforts have been made to recover on mere proof of *previous* negligence or general incompetency, without proving any fault connected with the plaintiff's injury. Of course such attempts have always failed (*Kersey v. Kansas, etc. R. Co.*, 79 Mo. 36; *Galveston, etc. R. Co. v. Faber*, 77 Tex. 153, 8 S. W. 64).

¹⁰⁶ *Sullivan v. New Haven, etc. R. Co.*, 62 Conn. 209, 25 Atl. 711; *Craig v. Chicago, etc. R. Co.*, 54 Mo. App. 523.

¹⁰⁷ *Conrad v. Gray*, 109 Ala. 130, 19 So. 398. See *Murphy v. Pollock*, 15 Irish C. L. 224; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562; *Harvey v. N. Y. Central, etc. R. Co.*, 88 Id. 481.

¹⁰⁸ *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213 [engineer; no proof of incompetency]. Jury may find servants given to drink incompetent (*Campbell Co. v. Roediger*, 78 Md. 601, 28 Atl. 901; *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; *Kean v. Detroit Rolling Mills*, 66 Mich. 277, 33 N. W. 395; *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. 1098 [engineer]). Examples of evidence insufficient to prove negligence in employing (Ohio, etc. R. Co. v. Dunn, 138 Ind. 18, 36 N. E. 702; *Baltimore v. Warr*, 77 Md. 593, 27 Atl. 85 [recommendation of politician]; *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226, 57 N. W. 116; *Kansas, etc. Coal Co. v. Brownlie*, 60 Arrk. 582, 31 S. W. 453 [boy over 14, as trapper in mine]; *Smillie v. St. Bernard Dollar Store*, 47 Mo. App. 402 [boy 12, to run elevator]; *Sutherland v. Troy, etc. R. Co.*, 125 N. Y. 737; s. c., more fully, 26 N. E. 609 [telegraph operator of 17]; *Cosgrove v. Pitman*, 103 Cal. 268, 37 Pac. 232 [engineer occasionally under the influence of drink]. Competency was

cific acts of negligence, from which incompetency may be inferred;¹⁰⁹ and (3) either actual notice to the master of such unfitness or bad habits,¹¹⁰ or constructive notice,¹¹¹ by showing that the master could have known the facts, had he used ordinary care in "oversight and supervision,"¹¹² or by proving general reputation of the ser-

held well proved in *Roblin v. Kansas City, etc. R. Co.*, 119 Mo. 476, 24 S. W. 1011 [engineer]; *Rhatigan v. Brooklyn Union Gas Co.*, 136 App. Div. 727, 121 N. Y. Supp. 401 (1910), (unfitness may be inferred from servant's physical condition).

¹⁰⁹ *Baulec v. Harlem R. Co.*, 59 N. Y. 356, 360; *Pittsburgh, etc. R. Co. v. Ruby*, 38 Ind. 294; *Evansville, etc. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101; *Hilts v. Chicago, etc. R. Co.*, 55 Mich. 437, 21 N. W. 878; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 11 S. W. 736; *Baltimore, etc. R. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233. See *Coppins v. N. Y. Central R. Co.*, 122 N. Y. 557, 25 N. E. 915. To the contrary, on the ground that such evidence multiplied the issues, were *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860; *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Robinson v. Fitchburg R. Co.*, 7 Gray, 92. The former decision was reviewed and condemned in *Baulec v. N. Y. & Harlem R. Co.*, 59 N. Y. 356; *Pittsburgh, etc. R. Co. v. Ruby*, 38 Ind. 294.

¹¹⁰ Some notice is indispensable to liability (*Cameron v. N. Y. Central R. Co.*, 145 N. Y. 400, 40 N. E. 1; *Burke v. Syracuse, etc. R. Co.*, 69 Hun, 21, 23 N. Y. Supp. 458 [switchman of 17]; *Jungnitsch v. Michigan Malleable Iron Co.*, 105 Mich. 270, 63 N. W. 296 [boy of 16; arm broken, but this unknown]). Actual notice was held proved in *Laning v.*

N. Y. Central R. Co., 49 N. Y. 521 [servant known to be drunk]; *McPhee v. Scully*, 163 Mass. 216, 39 N. E. 1007 [servant obviously drunk]; *Wabash R. Co. v. Brow*, 65 Fed. 941, 13 C. C. A. 222 [servant drunk at accident, drunk before at similar accident; notice]. Notice to any agent of the master, entrusted with the power of dismissing the servant in fault, is clearly enough (*Chapman v. Erie R. Co.*, 55 N. Y. 579; *Sutton v. N. Y., Lake Erie, etc. R. Co.*, 66 Hun, 632, 21 N. Y. Supp. 312 [conductor's negligence known to superintendent]). Notice to an agent without authority to hire or discharge such servants cannot be imputed to the company (*Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Id. 175). *Layzell v. Sommers Coal Co.*, 117 N. W. (Mich.) 179 (1908); *Campbell v. Wing*, 5 Tex. App. 431, 24 S. W. 360 (1894); *Stevens v. San Francisco, etc. Ry. Co.*, 100 Cal. 554, 35 Pac. 165 (1893); *Cosgrove v. Pitman*, 103 Cal. 268, 37 Pac. 232 (1894); *Young v. Milwaukee Gas L. Co.*, 133 Wis. 9, 113 N. W. 59 (1907); *Ballard's Admx. v. Louisville, etc. Ry. Co.*, 33 Ky. L. Rep. 301, 423, 110 S. W. 296 (1908); *Johnson v. Lake Shore, etc. Ry. Co.*, 127 N. W. (Mich.) 271 (1910). See note 101, § 189, *ante*.

¹¹¹ *Galveston, etc. R. Co. v. Arispe*, 81 Tex. 517, 17 S. W. 47.

¹¹² *Whittaker v. Delaware, etc. Canal Co.*, 126 N. Y. 544, 27 N. E. 1042; *Ohio, etc. R. Co. v. Collarn*, 73

vant for incompetency or negligence;¹¹³ and, (4) that the injury complained of resulted from the incompetency proved.¹¹⁴ For evidence of a defect or bad habit is of no effect, if the injury complained of was in no way brought about by that defect or habit.¹¹⁵ The mere fact of the

Ind. 261. Continuous negligence for two weeks, held sufficient to go to jury as evidence of such want of oversight (*Daly v. Sang*, 91 Wis. 336, 64 N. W. 997). Proof of unfitness of a servant, at the time of his employment, makes out a *prima facie* case against the master, and throws upon him the burden of disproving negligence in the selection (*Crandall v. McIlrath*, 24 Minn. 127; *Fines v. Sillery*, 73 Hun, 549, 26 N. Y. Supp. 181 [no inquiries made on employing servant]). *Giorodana v. Brandywine Granite Co.*, 3 Pen. (Del.) 423, 52 Atl. 332 (1902). See note 94, § 189, *ante*.

¹¹³ Common reputation is admissible to charge master with notice of incompetency, without bringing notice of such reputation home to the master (*Monahan v. Worcester*, 150 Mass. 439, 23 N. E. 228; *Driscoll v. Fall River*, 163 Mass. 105, 39 N. E. 1003; *Lake Shore R. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246; *Davis v. Detroit, etc. R. Co.*, 20 Mich. 105; *Chicago, etc. R. Co. v. Sullivan*, 63 Ill. 293; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241; *Nofolk, etc. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994; *Texas, etc. R. Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042; *Baltimore, etc. R. Co. v. Henthorne*, 19 C. C. A. 623, 73 Fed. 634; *Park v. N. Y. Central R. Co.*, 85 Hun, 184, 32 N. Y. Supp. 482). Evidence of reputation for incompetency is no proof of incompetency in fact (*Gier v. Los Angeles R. Co.*, 108 Cal. 129, 41 Pac. 22), except in Massa-

chusetts (*Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807); *Missouri (Grube v. Missouri Pac. R. Co.)*, 98 Mo. 330, 11 S. W. 736, and perhaps *Pennsylvania*. General reputation of a servant for competency and care at the time and place of employment, of such character as to imply information to the employer, is admissible as tending to disprove alleged negligence in employing such servant (*Illinois Cent. R. Co. v. Morrissey*, 45 Ill. App. 127). Sec. 189 and note. See also *Lambrecht v. Pfizer*, 49 N. Y. App. Div. 82, 63 N. Y. Supp. 591; *Queen v. Schwann*, 119 La. 495, 44 So. 276 (1907). Evidence of incompetency, to affect the master, must be of general reputation and not of specific acts (*Frazier v. Pennsylvania Ry. Co.*, 38 Pa. St. 104, 110. See note 101., § 189, *supra*. *Am. Steel, etc. Co. v. Keefe*, 165 Fed. 189 (1908); *Still v. San Francisco, etc. Ry. Co.*, 98 Pac. (Cal.) 672 (1909); *Indianapolis, etc. Co. v. Kinney*, 85 N. E. (Ind.) 954 (1908); *Beers v. Isaac Prouty & Co.*, 200 Mass. 19, 85 N. E. 864 (1908); *Columbia Creeting Co. v. Beard*, 89 N. E. (Ind. App.) 321 (1909).

¹¹⁴ *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596 [fireman in charge engine]. Plaintiff cannot recover merely on proof of reputation for recklessness and carelessness, without also proving that the servant was in fact reckless and careless (*Gier v. Los Angeles R. Co.*, 108 Cal. 129, 41 Pac. 22).

¹¹⁵ *Cosgrove v. Pitman*, 103 Cal.

incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him.¹¹⁶ But the evidence by which such incompetency is proved may be of such a nature as to raise a fair inference that the master either had notice of the fact,¹¹⁷ or else omitted to make such inquiries as common prudence would have dictated.¹¹⁸ Thus, proof of the employment of one, who had always been a mere clerk, or a common laborer, to run a steam engine, would justify a finding of negligence on the part of the master, without showing that he had

268, 37 Pac. 232 [intoxication]; Harrington v. N. Y. Central R. Co., 50 Hun, 602, 4 N. Y. Supp. 640 [foreman sometimes drunk, but sober at time of accident]; Englehardt v. Delaware, etc. R. Co., 78 Hun, 588, 29 N. Y. Supp. 425 [short sight, not causing injury].

¹¹⁶ The bare fact of habitual negligence of a servant, without proof that it came to the notice of the master or of any agent charged with the duty of reporting it, or of some circumstance which should have called attention to it, is not enough to charge the master with notice (Cameron v. N. Y. Central R. Co., 145 N. Y. 400, 40 N. E. 1; Moss v. Pacific R. Co., 49 Mo. 167; Jordan v. Wells, 3 Woods, 527; East Tenn., etc. R. Co. v. Gurley, 12 Lea, 46; Huffman v. Chicago, etc. R. Co., 78 Mo. 50 [engineer alleged to have run his train too fast, to the damage of brakeman]; Chapman v. Erie R. Co., 55 N. Y. 579 [employee originally competent, subsequently became unfit]; Harvey v. N. Y. Central R. Co., 88 N. Y. 481 [negligence but not incompetent switchman]; Pilkinton v. Gulf, etc. R. Co., 70 Tex. 226, 7 S. W. 805). Proof of incompetency alone does not throw upon the master the burden of show-

ing care in selection (Murphy v. St. Louis, etc. R. Co., 71 Mo. 202; *contra*, Skerritt v. Scallan, 11 Irish R. C. L. 389). Master must have notice in *some* form to be chargeable (Stevens v. San Francisco, etc. R. Co., 100 Cal. 554, 35 Pac. 165; Reiser v. Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 175; Mulhern v. Lehigh Val. Coal Co., 161 Pa. St. 270, 28 Atl. 1087 [rule not changed by statute, 1885]).

¹¹⁷ O'Loughlin v. N. Y. Central R. Co., 87 Hun, 538, 34 N. Y. Supp. 297 [conductor forced to act as switchman].

¹¹⁸ Evidence of incompetency and notice held sufficient to go to jury, in Coppins v. N. Y. Central R. Co., 122 N. Y. 557, 25 N. E. 915 [habit of leaving post of duty]; Hiltz v. Chicago, etc. R. Co., 55 Mich. 437, 21 N. W. 878 [locomotive engineer had for nine months habitually been noticeably drunk]; Wall v. Delaware, etc. R. Co., 54 Hun, 454, 7 N. Y. Supp. 709 [frequent acts]. Giordano v. Brandywine Granite Co., 3 Pennw. 423, 52 Atl. 332 (1901) [master will be presumed to have known what was generally known respecting the competency of a servant by those among whom the latter worked and lived].

actual notice of the servant's antecedents;¹¹⁹ for it would be improbable that the master could be so grossly deceived if he had made any inquiry. Evidence of only one other negligent act of the servant in fault is not usually sufficient,¹²⁰ especially if no injury resulted from it.¹²¹ A jury cannot be allowed to decide, *merely* from the looks and manner of a servant appearing before them, that he was incompetent, and that the master ought to have known it.¹²²

§ 191.* Duty to employ sufficient force.—Another duty which the master owes to his servants is that of employing a sufficient number to do the work, so far as may be necessary to enable them to do it in safety;¹²³

¹¹⁹ Such proof will sustain a verdict, but it does not raise a legal presumption. It is entirely for the jury (*Joch v. Dankwardt*, 85 Ill. 331). See *Bunnell v. St. Paul, etc. R. Co.*, 29 Minn. 305, where one, who had never learned the trade of carpenter, was employed as foreman of a gang of carpenters.

¹²⁰ *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa, 337, 60 N. W. 651. Proof of single act may be enough with other facts (*East Line, etc. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298).

¹²¹ *Holland v. Southern Pac. R. Co.*, 100 Cal. 240, 34 Pac. 666 [running train too fast].

¹²² *Corson v. Maine Central R. Co.*, 76 Me. 244. See *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155, 25 N. E. 71. Yet the court on appeal cannot say, as matter of law, that the conduct of the servant, in presence of the jury, in connection with other testimony will not warrant a finding of his incompetency (*Keith v.*

New Haven, etc. R. Co., 140 Mass. 175, 3 N. E. 28).

¹²³ *Flike v. Boston, etc. R. Co.*, 53 N. Y. 549; *Booth v. Boston, etc. R. Co.*, 73 Id. 38; *Lake Shore, etc. R. Co. v. Lavalley*, 36 Ohio St. 221; *Burlington, etc. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921 [absence of watchman]; *Chicago, etc. R. Co. v. Taylor*, 69 Ill. 461. A railroad company is liable for the death of an employee, caused by the absence from a train, for the purpose of getting something to eat, of part of a train crew, who were required to remain on duty nineteen hours without any way of getting meals, though decedent was a fellow servant (*Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 38 N. E. 67). See *Thorpe v. Mo. Pacific R. Co.* (89 Mo. 650), where it was held that if the insufficiency of the staff or force employed to do the work is obviously so great that even with the use of great caution there is imminent danger to those actually taking part,

* Original section number 193.

but, as in other cases, he is only bound to use ordinary care for this purpose.¹²⁴ It is not always consistent with such care, however, to provide a force just sufficient for the regular, every-day course of business. Preparation must be made for those extraordinary emergencies which, although they do not frequently occur, are still known in

they are chargeable with contributory negligence in uniting in it. Fed. 465, 59 C. C. A. 269 (1903); *Hill v. Big Creek Lbr. Co.*, 108

¹²⁴ See *Northern Pacific R. Co. v. La. 162, 32 So. 372, 58 L. R. A. 346* Herbert, 116 U. S. 642, 6 S. Ct. 590; (1902) [where the injury results from the inadequacy of the force employed the fellow-servant doctrine constitutes no defence]; *Masner v. Saxton v. Hawksworth*, 26 L. T. 851; *Atchison, etc. Ry. Co.*, 177 Fed. 618, 101 C. C. A. 244 (1910) [insufficient Skipp v. Eastern Counties R. Co., 9 Exch. 223; *Ocean S. S. Co. v. number of switchmen*]; *Denver, etc. Cheeney*, 95 Ga. 381, 22 S. E. 544, 101 C. C. A. 244 (1910) [insufficient aff'g 92 Ga. 726, 19 S. E. 33, 44 Am. Ry. Co. v. Reiter, 47 Colo. 417, 107 St. Rep. 113 (1894); *Beresford v. Pac. 1100* (1910); *Doir v. New Am. Coal Co.*, 124 Iowa, 34, 98 N. York, etc. S. S. Co., 139 App. Div. W. 902, 70 L. R. A. 256 (1904); 751, 124 N. Y. Supp. 295 (1910) *Bokamp v. Chicago, etc. Ry. Co.*, 100 [less number than required by general custom furnished to handle S. W. (Ky.) 689 (1907); *Di Bari bundles of iron in the hold of a v. J. W. Bishop Co.*, 199 Mass. 254, vessel]; *Jackson v. Old Dominion 85 N. E. 89* (1908); *Brown v. Rome Min. Co.*, 132 S. W. (Mo. App.) 306 etc., Co., 9 Ga. App. 142, 62 S. E. (1910); *Lapier v. Beaubien, etc. 720* (1908); *Meily v. St. Louis, etc. Co.*, 162 Mich. 533, 127 N. W. 692 Ry. Co., 114 S. W. (Mo.) 1013 (1910). See *Nanico v. Interbor- (1908); Standard Sanitary Co. v. ough, etc. Co.*, 140 App. Div. 378, Minor, 33 Ky. L. Rep. 982, 112 S. W. 125 N. Y. Supp. 388 (1910); *San 572* (1908); *Fitter v. Iowa Tel. Co.*, Antonio Trac. Co. v. Rodriguez, 77 121 N. W. (Iowa) 48 (1909); *Turner S. W. (Tex. App.) 420* (1903); *Bonn v. Galveston, etc. Ry. Co.*, 82 App. 650, 119 S. W. 719 (1909); *S. W. (Tex. App. 808* (1904); *Coughlan v. Pennsylvania, etc. Ry. Hyland v. Southern, etc. Tel. Co.*, 70 Co., 6 Pennw. 242, 67 Atl. 148 S. C. 315, 49 S. E. 879 (1904) [the (1906); *Meily v. St. Louis, etc. Ry. duty to furnish proper instrumentalities embraces human agencies as well as mechanical devices*]; *Chan- Co.*, 215 Mo. App. 567, 114 S. W. non Co. v. Hahn, 189 Ill. 28, 59 N. 1013 (1909); *Biggers v. Catawba E. 522* (1901) [failure to employ operator for freight elevator as required by ordinance of city of Chicago]. It has been held otherwise in the absence of such requirement by statute or ordinance (*Wendell v. Power Co.*, 72 S. C. 264, 51 S. E. 822 (1905); *Pagan v. Southern Ry. Co.*, 78 S. C. 413, 59 S. E. 32 Leo, 108 N. Y. Supp. 1150, reversed (1907); *Rosin v. Danaher Lbr. Co.*, 115 Pac. (Wash.) 833 (1911); 195 N. Y. 76, 87 N. E. 790 (1909); *Pennsylvania Ry. Co. v. Hartell*, 157 Pennsylvania Co. v. Fishback, 123 Fed. 667, 85 C. C. A. 335 (1907).

common experience to be likely to occur occasionally. Thus, in case of a sudden flood, washing away a part of a railroad, the company must have men promptly stationed at points of danger, to warn servants who are unconscious of it.¹²⁵ If men enough are not previously engaged, new ones should be instantly procured; or, if there is not time to do this, some part of the general business must be suspended, so as to release a sufficient number of men to attend to the new and more pressing duty. When a sufficient number have been furnished the casual absence of one from the post of duty will not impose liability on the master, where the failure to observe it is not due to neglect in supervision.^{125a} Nor will the employment of a sufficient number exonerate him in case the work is actually undertaken with less.^{125b}

§ 192.* Duty to provide proper instrumentalities and place of work. — The master personally ¹²⁶ owes to his

¹²⁶ *Hardy v. Carolina Central R. Co.*, 76 N. C. 5. In that case, a brakeman in defendant's employment, was killed by the wrecking of his train in a washout, immediately after an extraordinary storm. The corporation was held liable on the ground of their failure to have a man at the break in the road, to warn the train; Read, J., saying: "There must be a man for every place, as need may be" (see 74 N. C. 734).

^{125b} *Gerrish v. New Haven Ice Co.*, 63 Conn. 9, 27 Atl. 235.

^{125a} The master is bound to use due care in furnishing safe instrumentalities for performing the work. This is a personal obligation, which cannot be escaped by delegating it (*Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 S. Ct. 140; *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590; *Fuller v. Jewett*, 80 N. Y. 46; *Pullman Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285; *Morton v. Detroit, etc. R. Co.*, 81 Mich. 423, 46 N. W. 111; *Bushby v. N. Y., Lake Erie, etc. R. Co.*, 107 N. Y. 374, 14 N. E. 407; *Kranz v. Long Island R. Co.*, 123 N. Y. 1, 25 N. E. 206, and, in fact, all the cases cited under this section).

^{126a} *Ocean S. S. Co. v. Cheeney*, *supra*; *Parker v. New York, etc. Ry. Co.*, 18 R. I. 773, 30 Atl. 849; *Potter v. New York, etc. Ry. Co.*, 136 N. Y. 77, 32 N. E. 603. Otherwise where train hands were required to remain on duty nineteen hours without opportunity to get their meals and absented themselves to get something to eat (*Pennsylvania Co. v.*

servants the duty of using ordinary care and diligence¹²⁷ to provide for their use reasonably safe instrumentalities of service.¹²⁸ Among these are a reasonably safe place in which to do their work¹²⁹ or to stay while waiting

¹²⁷ Ordinary care is always required. It is error to charge that anything less will suffice in any case (St. Louis, etc. R. Co. v. Eggmann, 161 Ill. 155, 43 N. E. 620). Ordinary care implies such care in the matter as the master would take if it were possible for him to occupy at the same time the position of both master and servant (Morrisey v. Hughes, 65 Vt. 553, 27 Atl. 205). The ordinary care which a railroad company is bound to use to furnish safe machinery and appliances is measured by the character and risks of the business (Mather v. Rillston, 156 U. S. 391, 16 S. Ct. 464; Texas, etc. R. Co. v. Thompson, 17 C. C. A. 524, 70 Fed. 944). A railroad company owes to its servants a greater degree of diligence and care, according as the service in which they are engaged is more dangerous (Central R. Co. v. Ryles, 84 Ga. 420, 11 S. E. 499).

¹²⁸ Gardner v. Mich. Central R. Co., 150 U. S. 349, 14 S. Ct. 140; Central R. Co. v. Keegan, 160 U. S. 259, 16 S. Ct. 269. The rule applies to animals as well as inanimate appliances (Hammond Co. v. Johnson, 38 Neb. 244, 56 N. W. 967 [horses]; Wrought Iron Range Co. v. Martin [Tex. Civ. App.] 28 S. W. 557).

¹²⁹ Union Pac. R. Co. v. O'Brien, 161 U. S. 451; Plank v. N. Y. Central R. Co., 60 N. Y. 607 [trench in place where brakemen were required to stand]; Benzinger v. Steinway, 101 N. Y. 547, 5 N. E. 449 [platform]; Kranz v. Long Island R. Co., 123 N. Y. 1, 25 N. E. 206 [trench]; Wilson v. Willimantic Linen Co., 50 Conn.

433 [defective shafting; making workshop dangerous]. Servant crushed between a car and a building while moving the car in obedience to orders, recovered; space between track and building being too narrow, and constantly narrowing; but plaintiff did not know, and could not reasonably be expected to know, this (Ferren v. Old Colony R. Co., 143 Mass. 197, 9 N. E. 608). Deceased was digging in a deep trench, the sides of which were not braced, and on one side of which a water pipe had been buried; and this side caved in. Held, that a verdict against the master could not be set aside (Van Steenburgh v. Thornton [Ct. Errors], 58 N. J. Law, 160, 33 Atl. 380). It is the duty of a master to exercise reasonable care to see that the place furnished for a servant to work is reasonably safe, and if he leaves the performance of such duty to other servants, he is liable for the manner in which they perform it, without regard to his personal knowledge, or notice of dangerous conditions (Hess v. Rosenthal, 160 Ill. 621, 43 N. E. 743). To the same effect, Phil. & Reading R. Co. v. Trainor, 137 Pa. St. 148, 20 Atl. 632; Big Creek Stone Co. v. Wolf, 138 Ind. 496, 38 N. E. 52; Engstrom v. Ashland Iron Co., 87 Wis. 166, 58 N. W. 241; Kelley v. Ryus, 48 Kans. 120, 29 Pac. 144; Hammond Co. v. Mason, 12 Ind. App. 469, 40 N. E. 642; Gisson v. Schwabacher, 99 Cal. 419, 34 Pac. 104 [dark room with dangerous machinery]; Akeley Lumber Co. v. Rauen, 58 Fed. 668, 7 C. C. A. 424

orders,¹³⁰ reasonably safe ways of entrance and departure,¹³¹ an adequate supply¹³² of sound and safe materials, implements and accommodations,¹³³ with such

[dangerous place, insufficiently lighted]. A railroad track is the "place of work" for trainmen; and the master is bound to see to its safety (*Union Pac. R. Co. v. O'Brien*, 161 U. S. 451; *Pidgeon v. Long Island R. Co.*, 87 Hun, 43, 33 N. Y. Supp. 870; *Bessex v. Chicago, etc. R. Co.*, 45 Wis. 477 [track]; *Hulehan v. Green Bay, etc. R. Co.*, 58 Id. 319, 17 N. W. 17 [track]; *St. Louis, etc. R. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250; *Davis v. Button*, 78 Cal. 247, 18 Pac. 133 [bridge]; *Woods v. Lindvall*, 4 U. S. App. 49, 1 C. C. A. 37, 48 Fed. 62 [defective trestle]). Safe place to work (*White on Personal Injuries by Railroads*, § 245, n. 4; *Pahlan v. Detroit, etc. Ry. Co.*, 122 Mich. 232, 81 N. W. 103 (1900); *Nadau v. White River, etc. Co.*, 76 Wis. 120, 43 N. W. 1135 (1889); *Middle Georgia, etc. Ry. Co. v. Barnett*, 104 Ga. 582, 30 S. E. 771, 12 Am. & Eng. Ry. Cas. (N. S.) 732 (1898); *Kuhn v. Deleware, etc. Ry. Co.*, 97 Hun (N. Y.) 74, 36 N. Y. Supp. 332, 71 N. Y. St. 233, aff'd, 153 N. Y. 683; *Doyle v. Missouri, etc. Trust Co.*, 140 Mo. 1, 41 S. W. 255 (1901); *Chicago, etc. Ry. Co. v. Eaton*, 96 Ill. App. 570, aff'd, 194 Ill. 441, 62 N. E. 784 (1902); *Westman v. Wind River Lbr. Co.*, 91 Pac. (Ore.) 478 (1907); *Williams v. Citizens' Steamboat Co.*, 106 N. Y. Supp. 975, 122 App. Div. 188; *Hach v. St. Louis, etc. Ry. Co.*, 208 Mo. 581, 106 S. W. 525 (1907); *Missouri Ry. Co. v. Wise*, 106 S. W. (Texas) 465, aff'd, 109 S. W. 12 (1908); *Chopin v. Combined Locks Paper Co.*, 114

N. W. (Wis.) 95 (1907); *Connolly v. Hall, etc. Co.*, 192 N. Y. 182, 84 N. E. 807 (1908); *Georgetown Water, etc. Co. v. Forwood*, 113 S. W. 112 (1908); *Commonwealth Elec. Co. v. Rooney*, 138 Ill. App. 275 (1908); *Flannagan v. F. W. Carlin Const. Co.*, 118 N. Y. S. 953, 134 App. Div. 236 (1909); *Gorseger v. Burnham*, 142 Wis. 486, 125 N. W. 914 (1910).

¹³⁰ *Peters v. Harrison Wire Co.*, 14 Mo. App. 599 [heavy wheel, left unfastened on an inclined track over a place where plaintiff, a servant, was waiting to go to his work, and another servant set in motion the wheel, which fell upon plaintiff]. So while eating meals during short interval (*Cleveland, etc. R. Co. v. Martin* [Ind. App.], 39 N. E. 759). ¹³¹ *Brydon v. Stewart*, 2 Macq. H. L. 30; s. p., *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113. Safe ways of entrance and departure; and for going about his work (*Bookman v. Seaboard, etc. Ry. Co.*, 152 Fed. 686, 81 C. C. A. 612 (1907); *Feneff v. Boston, etc. Ry.*, 196 Mass. 575, 82 N. E. 705 (1907)).

¹³² Supply of tools and appliances must be sufficient (*Cleveland, etc. R. Co. v. Brown*, 20 C. C. A. 147, 73 Fed. 970). The neglect to provide readily attainable appliances for the prevention of accidents, in occupations attended with unusual danger, is proof of culpable negligence. (*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464).

¹³³ *Paterson v. Wallace*, 1 Macq. H. L. 748; *Brydon v. Stewart*, 2 Macq. H. L. 30; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; *Keegan v. West-*

other appliances as may reasonably be required to insure their safety,¹³⁴ while at their work or passing over his premises to or from work.¹³⁵ These things must, more-

ern R. Co., 8 N. Y. 175; Ryan v. L. R. 1045, 104 S. W. 708 (1907); Fowler, 24 Id. 410; Laning v. N. Y. Gulf, etc. Ry. Co. v. Griggs, 101 Central R. Co., 49 Id. 521; Houston S. W. (Tex.) 473, aff'd, 105 S. W. v. Brush, 66 Vt. 331, 29 Atl. 380; 486 (1907); Pennsylvania, etc. Co. Fifield v. Northern R. Co., 42 N. H. v. Forstall, 159 Fed. 893, 87 C. C. A. 225; Hanley v. Grand Trunk R. Co., 73 (1908); Cristanelli v. Saginaw 62 Id. 274; Moynihan v. Hills Co., Mining Co., 154 Mich. 423, 117 N. W. 146 Mass. 586, 16 N. E. 574 [machine]; Elkins v. Penn. R. Co., 171 910 (1908); Reed v. Norfolk, etc. Pa. St. 121, 33 Atl. 74 [defect in Ry. Co., 162 Fed. 750, rev'd, (C. C. steps of freight car]; Norfolk, etc. A.) 167 Fed. 16 (1908); Clancy v. R. Co. v. Jackson, 85 Va. 489, 6 S. E. New York, etc. Ry. Co., 112 N. Y. Supp. 541, 128 App. Div. 141 (1908); 220 [cross-grained defective push- Jellow v. Fore, etc. Co., 201 Mass. pole]; Campbell v. Louisville, etc. R. 464, 87 N. E. 906 (1909); Burgess Co., 109 Ala. 520, 19 So. 675 [defective car brake]; Nordyke, etc. M. v. Humphrey, etc. Co., 156 Mich. Co. v. Van Sant, 99 Ind. 188; Chicago, etc. R. Co. v. Swett, 45 Ill. 197 345, 120 N. W. 790 (1909); Texas, [a very emphatic decision]; Perry etc. Ry. Co. v. Geiger, 118 S. W. v. Ricketts, 55 Id. 234; Fink v. Des (Tex. App.) 179 (1909); McMichael Supp. 998, 139 App. Div. 225 (1910). v. Fed. Printing Co., 123 N. Y. ¹³⁴ Hough v. Texas, etc. R. Co., 100 Moines Ice Co., 84 Ia. 321, 51 N. W. U. S. 213; Benzing v. Steinway, 101 155 [slide in ice house]; Rodney v. N. Y. 547, 5 N. E. 449; Corcoran v. St. Louis, etc. R. Co., 127 Mo. 676, Holbrook, 59 N. Y. 517 [laborer in 28 S. W. 887 [car]; Kelley v. Ryus, cotton mill, injured through failure 48 Kans. 120, 29 Pac. 144 [machinery]; Prosser v. Montana R. Co., of general agent to keep an elevator 17 Mont. 372, 43 Pac. 81 [bent brake- in repair]; Vosburgh v. Lake Shore, staff]; Hallower v. Henley, 6 Cal. etc. R. Co., 94 N. Y. 374. 209; Johnson v. Bellingham Imp. ¹³⁵ Cases cited, note 131, *supra*. Co., 13 Wash. St. 455, 43 Pac. 370 This principle applies to vehicles and [rotten plank]. It is the duty of an ways in or over which the master employer to exercise ordinary care carries the servant to or from work in providing reasonably safe and (Conlon v. Oregon, etc. R. Co., 23 suitable machinery for the use of his Ore. 499, 32 Pac. 397 [servant riding servant, and, in the absence of notice over bridge to his work]; San to the contrary, the servant is Antonio, etc. R. Co. v. Adams, 6 warranted in assuming that his employer has performed this duty (Tex. Civ. App. 102, 24 S. W. 839 [bridge]; Pendergast v. Union R. (Richland's Iron Co. v. Elkins, 90 Co., 10 N. Y. App. Div. 207, 41 N. Y. Va. 249, 17 S. E. 890). Safe place Supp. 927 [cars]). Safe place to work (Godfrey v. Ill. Cent. Ry. Co., materials and implements (Harrod v. 42 So. (La.) 571 (1906); Forquer Hammond Packing Co., 125 Mo. App. v. Slater Brick Co., 37 Mont. 426, 357, 102 S. W. 637 (1907); Webster 97 Pac. 843 (1908); Bailey v. Stix, v. Stewart Iron Works Co., 31 Ky.

over, be adapted to the work in hand. It is not enough that they should be good, under ordinary conditions. They must be suitable for the work to which they are applied by the master, and properly adjusted to each other.¹³⁶ If, therefore, the master knows¹³⁷ or would have known if he had used ordinary care to ascertain the facts,¹³⁸ that the buildings, ways, machinery, tools or ma-

etc. Dry Goods Co., 129 S. W. (Mo. App.) 739 (1910).

¹³⁶ Where machinery was perfect, of its kind, and in good repair, but unsuitable for the purpose for which it was used, the master was held liable (*Geloneck v. Dean Pump Co.*, 165 Mass. 202, 43 N. E. 85). The proper adjustment of brake-rod is a master's duty (*Woods v. Long Island R. Co.*, 11 N. Y. App. Div. 16, 42 N. Y. Supp. 140). The requirement of fitness has relation to adaptation for the work to be performed and the safety of the servant using the appliance (*Garnett v. Phoenix Bridge Co.*, 98 Fed. 192 (1900); *Amer. Malting Co. v. Lelivelt*, 101 Ill. App. 320; *Spencer v. Worthington*, 44 App. Div. (N. Y.) 496, 60 N. Y. Supp. 873; *Sappenfield v. Main St., etc. Ry. Co.*, 91 Cal. 48, 27 Pac. 590 (1891). Where injury was caused by the bursting of a check valve in an air hoist, purchased from a reputable manufacturer will not relieve the master from liability unless it was adapted to the use to which it was put (*Slatery v. Walker*, 179 Mass. 307, 60 N. E. 782 (1897); *Babcock Lbr. Co. v. Johnson*, 120 Ga. 130, 48 S. E. 438 (1904); *Buey's Admx. v. Chess*, 27 Ky. L. Rep. 198, 84 S. W. 563 (1905); *Riverside Mills v. Jones*, 121 Ga. 33, 48 S. E. 700 (1904). But the master is not obliged to adopt any particular kind of appliance or device and may exercise rea-

sonable judgment and discretion in the selection of appliances and devices (*Eckhart, etc. Co. v. Schaefer*, 101 Ill. 500 (1902); *Wolf v. New Bedford, etc. Co.*, 189 Mass. 591, 76 N. E. 222 (1905); *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467 (1904). Nor is he under obligation to discard machinery merely because it is old and adopt new and the most improved (*Sweeney v. Berlin, etc. Co.*, 101 N. Y. 520, 5 N. E. 358, 74 Am. Rep. 722; *Nutt v. Southern Pac. Co.*, 25 Ore. 291, 35 Pac. 653).

¹³⁷ *Ryan v. Fowler*, 24 N. Y. 410; *Keegan v. Western R. Co.*, 8 Id. 175; *Cayzer v. Taylor*, 10 Gray, 274; *Perry v. Ricketts*, 55 Ill. 234.

¹³⁸ *Benzing v. Steinway*, 101 N. Y. 547; *Chicago, etc. R. Co. v. Jackson*, 55 Ill. 492; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Elliott v. St. Louis, etc. R. Co.*, 67 Mo. 272; *Spicer v. South Boston Iron Co.*, 138 Mass. 426 [flaw in iron hook used to raise furnace door, which a careful inspection would have revealed]; *Texas, etc. R. Co. v. McAtee*, 61 Tex. 695 [defect in car-brake, of which the master should have known]; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Noyes v. Smith*, 28 Vt. 59 [defect in fire-box of engine, which master might have discovered by proper vigilance]; *Paine v. Eastern R. Co.*, 91 Wis. 340, 64 N. W. 1005. Where a piece of mechanism is manifestly incomplete, and is used in that condition, the master cannot

terials which he provides for the use of his servants are unsafe, and a servant, without contributory fault, suffers injury thereby, the master is liable therefor;¹³⁹ although he is not thus liable, in the absence of actual or constructive notice.¹⁴⁰ The master is not entitled to time to discover defects in things which are defective when put in use. He should examine them *before* putting them in use.¹⁴¹ He cannot evade his responsibility in these re-

shield himself from responsibility by alleging ignorance of its condition and of the danger thereof (Broderick v. Detroit, etc. Depot Co., 56 Mich. 261 [defective ventilator in grain elevator]; Ogden v. Rummens, 3 Fost. & F. 751 [arch fell and killed a workman; defendant held liable if he had reasonable cause to apprehend the fall]). Where a servant was injured by the giving way of wood which had been allowed to remain in the soil an unreasonable length of time, he was held entitled to recover against his master (who owned the wood and soil) without proof of an actual scienter (O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239; Webb v. Rennie, 4 Fost. & F. 608). The plaintiff's son was at work for the defendant under a cylinder suspended by chains and bolts, and the tackle being insufficient for the purpose, the cylinder fell and killed the plaintiff's son. The manner in which the cylinder was suspended was unusual and dangerous, and was suggested by the defendant himself. Held, that the defendant was liable (Weems v. Mathieson, 4 Macq. H. L. 215). When an elevator fell a second time and injured a servant, proof of the former fall was held admissible to show the master's knowledge of its defective character (Malone v. Hawley, 46 Cal. 409).

¹³⁹ Complaint alleging that "de-

fendant, by the exercise of ordinary care, might have known," states cause of action (Seckinger v. Philibert Co., 129 Mo. 590, 31 S. W. 957). Master who himself made ladder furnished servant, chargeable with knowledge of such defects as ordinary care during manufacture would have disclosed (Standard Oil Co. v. Bowker, 141 Ind. 12, 40 N. E. 128). In that case, the master being a corporation, was of course held responsible for neglect of its servants in the course of manufacture.

¹⁴⁰ Welfare v. Brighton, etc. R. Co., L. R. 4 Q. B. 696; Priestly v. Fowler, 3 M. & W. 1; Indianapolis, etc. R. Co. v. Love, 10 Ind. 554; Wright v. N. Y. Central R. Co., 25 N. Y. 566; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Hull v. Hall, 78 Id. 114, 3 Atl. 38. See § 195, note 3; Schulz v. Rohe, 149 N. Y. 132, 43 N. E. 420 [no notice of particular defect]. But, as will be seen in the next succeeding section, he has constructive notice if by reasonable inspection such defects would have been discovered (§ 193, note 153).

¹⁴¹ If appliances furnished by the master "are shown to have been originally defective and unsafe, the burden does not rest on an employee, when injured by such defect, to produce further evidence that the mas-

spects by simply giving general orders that servants shall examine for themselves, before using the place, materials, etc., furnished by him. The fact that a servant could, by care and caution, so operate a defective and dangerous machine as not to produce injury to his fellow servants, does not exempt the master from his liability for an omission to exercise reasonable care and prudence in furnishing safe and suitable appliances.¹⁴² The master fails to supply a "safe place" for work, if he allows work to be conducted there habitually, in a manner needlessly dangerous to servants.¹⁴³

§ 193.* Duty of inspection and repair. — The master is also personally¹⁴⁴ bound, from time to time,¹⁴⁵ to in-

ter had notice thereof" (*Union Pacific R. Co. v. James*, 56 Fed. 1001, 6 C. C. A. 217).

¹⁴² *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575 [warehouse elevator which fell, in consequence of lack of safety-guard]. See *McGee v. Boston Cordage Co.*, 139 Mass. 445, 1 N. E. 745, and note. *Pluck-*

ham v. Amer. Bridge Co., 104 App. Div. 404, 93 N. Y. Supp. 748, aff'd, 186 N. Y. 561, 79 N. E. 1114 (1906)

[quoting text].

¹⁴³ *Doing v. N. Y., Ontario, etc. R. Co.*, 151 N. Y. 579, 45 N. E. 1028; *Fredenburg v. Northern Cent. R. Co.*, 114 N. Y. 582, 21 N. E. 1049.

¹⁴⁴ The duty of a railroad company

¹⁴⁵ *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Toledo, etc. R. Co. v. Conroy*, 68 Ill. 560; *Quincy Coal Co. v. Hood*, 77 Id. 68; *Wedgwood v. Chicago, etc. R. Co.*, 44 Wis. 44; *Houston, etc. R. Co. v. Dunham*, 49 Tex. 181; *Bridges v. St. Louis, etc. R. Co.*, 6 Mo. App. 389; *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662 [icy walk, on which workman slipped while carrying melted iron]; *Cooper v. Pittsburgh, etc. R. Co.*, 24 W. Va. 37, 51. Strips, used to hold lumber upon a flat car, are part of the equipment, which the railroad company was obliged to make reasonably safe for the use of its employees (*Dougherty v. Rome, etc. R. Co.*, 64 Hun, 633, 18 N. Y. Supp. 841). Company liable for an

injury caused by section boss allowing blocks of wood to remain on the tracks (*Hulehan v. Green Bay, etc. R. Co.*, 68 Wis. 520, 32 N. W. 529). In *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216, it was held that mere dullness of a saw, resulting from use, is not a "defect" within the meaning of this rule; s. p., *Little Rock, etc. R. Co. v. Duffey*, 35 Ark. 602. But where part of a machine is so worn by use as to be dangerous, defendant's negligence was a question for the jury (*Sneider v. Treichler*, 56 Hun, 309, 9 N. Y. Supp. 584; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631 [worn brake on hoisting machinery]). See 41 L. R. A. 70-100.

* Original number § 194a.

spect and examine all instrumentalities furnished by him, and to use ordinary care, diligence and skill to keep them in good and safe condition.¹⁴⁶ "The duty of inspection is affirmative and must be continuously fulfilled and positively performed."¹⁴⁷ Such duty is not discharged

to exercise reasonable care in furnishing adequately safe trains for the use of its employees is not discharged by simply using reasonable care to employ and retain only competent and diligent inspectors, but it is liable if its inspectors, in fact, fail to discover a defect which a reasonable examination would have disclosed (*Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 14 S. Ct. 756, aff'g *Daniels v. Union Pac. R. Co.*, 6 Utah, 357, 23 Pac. 762). In short, their duty of inspection and repair cannot be delegated (*Id.*; *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552; *Houston v. Brush*, 66 Vt. 33, 29 Atl. 380; *Davis v. Central R. Co.*, 55 Vt. 84 [derrick]; *Daley v. Boston & A. R. Co.*, 147 Mass. 101, 16 N. E. 690 [defective rope]; *Myers v. Hudson Iron Co.*, 150 Mass. 125 [mining machinery recently inspected, but defective];

Elmer v. Locke, 135 Mass. 576; *Ingebregtsen v. Nord Deutscher S. S. Co.* [Ct. Errors], 57, N. J. Law, 400, 31 Atl. 619; *Torians v. Richmond*, etc. R. Co., 84 Va. 192, 4 S. E. 339; *Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419; *Bean v. Western N. C. R. Co.*, 107 N. C. 731, 12 S. E. 600 [loose rocks falling on track; track-walker employed]; *Chicago*, etc. R. Co. v. *Kneirim*, 152 Ill. 458, 39 N. E. 324; *Romona Stone Co. v. Phillips*, 11 Ind. App. 118, 39 N. E. 96; *Coontz v. Missouri Pac. R. Co.*, 121 Mo. 652, 26 S. W. 661). The duty of keeping its track in proper repair rests on the master (*McClarney v. Chicago*, etc. R. Co., 80 Wis. 277, 49 N. W. 963; *Fox v. Spring Lake Iron Co.*, 89 Mich. 387, 50 N. W. 872 [hoisting apparatus]; *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572 [dock on which work was done]).

¹⁴⁶ *Goodrich v. N. Y. Central*, etc. R. Co., 116 N. Y. 398, 22 N. E. 397 [car-bumper fallen out of place]; *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552 [shuttle flying out of loom]; *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. 682 [switch-rod]; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631 [shoe-brake on mining bucket]; *Simmons v. Peters*, 85 Hun, 93, 32 N. Y. Supp. 680 [door to elevator shaft]; *New York*, etc. Min. Co. v. *Rogers*, 11 Colo. 6, 16 Pac. 719 [frozen rope to mining bucket]. A switch must be kept properly con-

nected and a new lock furnished when required (*Coleman v. Wilmington*, etc. R. Co., 25 S. C. 446).

¹⁴⁷ *Brann v. Chicago*, etc. R. Co., 53 Ia. 595, 6 N. W. 5; *Cooper v. Pittsburgh*, etc. R. Co., 24 W. Va. 37, 56; *Settle v. St. Louis*, etc. R. Co., 127 Mo. 336, 30 S. W. 125; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380. Liability for failure to make proper inspection and repairs (*In re California Nav.*, etc. Co., 110 Fed. 670 (1901) [steam drum]). *The Ethelred*, 96 Fed. 446 (1899) [rope used to suspend sailor from the mast which had been exposed to

deterioration]; *Rincicotti v. O'Brien*, etc. Co., 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936 (1905) [derrick]; *Central of Ga. Ry. Co. v. Grady*, 113 Ga. 1045, 39 S. E. 441 (1901) [railway washout]; *Chicago, etc. Ry. Co. v. Hillison*, 72 Ill. App. 207, aff'd, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117 (1898) [draw-bar connecting cars]; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12 (1903) [safe place to work]; *Baltimore, etc. Ry. Co. v. Amos*, 20 Ind. App. 378, 49 N. E. 854 (1898) [handle of hammer]; *Baltimore, etc. Ry. Co. v. Spaulding*, 21 Ind. App. 327, 52 N. E. 410 (1898) [safe place to work]; *Illinois, etc. Ry. Co. v. Hilliard*, 99 Ky. 684, 37 S. W. 75 (1896) [car ladder]; *Budge v. Morgan*, etc. Ry. Co., 108 La. 349, 32 So. 535, 58 L. R. A. 333 (1902). Where the appliance is dangerous or is to be used in a dangerous service, it is the duty of the master to see that it is kept in repair. (*Mergenthaler, etc. Co. v. Taylor*, 28 Ky. L. Rep. 923, 90 S. W. 968 (1906); *Trombley v. Consolidated Elec. Co.*, 98 Me 353, 57 Atl. 85, 64 L. R. A. 551 (1903) [suitable appliances]; *Mekins v. O'Leary*, 176 Mass. 258, 57 N. E. 342 (1900) [duty to make inspection after "missed shots" of *Mahan v. McHale*, 174 Mass. 320, 58 N. E. 854 (1899) [derrick]; *Hopdynamite*]; *contra*, *Browne v. King*, 100 Fed. 561, 40 C. C. A. 545 (1900); *Mooney v. Beattie*, 180 Mass. 451, 62 N. E. 725, 70 L. R. A. 831 (1902) [there is no duty of inspection owing, where stone is delivered from quarry, for "missed shots"]. See *Hoe v. Boston, etc. Ry. Co.*, 187 Mass. 67, 72 N. E. 341 (1904) ["missed shots"]; *Robson v. Leighton*, 187 Mass. 432, 73 N. E. 540 (1905) [staging]; *Dawson v. Lawrence, etc. Co.*, 188 Mass. 481, 74 N. E. 412 (1905) [electric light poles]; *Chambers v. Wampanoag Mills*, 189 Mass. 529, 75 N. E. 1093 (1905) [must promulgate a system of inspection]; *Miller v. Great Northern Ry. Co.*, 85 Minn. 272, 88 N. W. 758 (1902) [crowbar weakened by fire and water]; *Carroll v. Tidewater Oil Co.*, 67 N. J. Law, 679, 52 Atl. 275 (1902); *Noble v. Bessimer, etc. Co.*, 127 Mich. 103, 86 N. W. 520, 89 Am. St. Rep. 461, 54 L. R. A. 456 (1901); *Woods v. Long Island R. Co.*, 11 App. Div. 16, 42 N. Y. Supp. 140, aff'd, 159 N. Y. 546, 54 N. E. 1095 (1899) [defective brakes]; *Womble v. Merchants' Grocery Co.*, 135 N. C. 474, 47 S. E. 493 (1904) [freight elevator]; *Sharpley v. Wright*, 205 Pa. 253, 54 Atl. 896 (1903); *Gulf, etc. Ry. Co. v. Larkin*, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A. (N. S.) 944 (1904). An ordinary railway lantern globe is such a common tool or appliance as a railway fireman should understand and protect himself against; rule requiring inspection by the master only applies to tools and appliances of such character as one of ordinary prudence would inspect as a precaution against injury to servants (*Koschman v. Ash*, 98 Minn. 312, 108 N. W. 514, 116 Am. St. Rep. 373 (1906) [master is not required to guard against common tools becoming defective from use]; *Miller v. Erie Ry. Co.*, 21 App. Div. 45, 47 N. Y. Supp. 285 (1897); *Healy v. Buffalo, etc. Ry. Co.*, 111 App. Div. 618, 97 N. Y. Supp. 801 (1906); *Drossman v. Drake Standard Mach. Wks.*, 232 Ill. 412, 83 N. E. 936 (1908); *Vincent v. Clement*, 150 Mich. 406, 114 N. W. 330 (1907), (an engineer making the inspection is barred from recovery for injury caused by defects that

he ought to have discovered); *Fulton v. Grieb Rubber Co.*, 60 Atl. (N. J. Sup.) 37, aff'd, 68 Atl. 116 (1907), (the duty of making inspection extends only to such reasonable foresight of harm from the failure of its exercise as one of ordinary prudence exercises); *Combs v. Delaware, etc. Tel. Co.*, 218 Pa. 440, 67 Atl. 751 (1907) [telephone poles and lines]; *Kiley v. Rutland Ry. Co.*, 80 Vt. 536, 68 Atl. 713 (1908), 68 Atl. 713 (1908) [negligent manner of inspecting a car ladder]; *Williams v. Garbutt Lbr. Co.*, 132 Ga. 221, 64 S. E. 65 (1909), (tools requiring or not requiring inspection cannot be catalogued; the duty must depend to some extent on the circumstances under which they were furnished); *Golden v. Ellis*, 104 Me. 177, 71 Atl. 649 (1908) [does not apply to small common tools about which an employe is ordinarily competent to judge himself]; *Denker v. Wolff Milling Co.*, 135 Mo. App. 340, 115 S. W. 1035 (1909); *Longpre v. Big Blackfoot, etc. Co.*, 38 Mont. 99, 99 Pac. 131 (1909); *Donaldson v. Brooklyn, etc. Ry. Co.*, 129 App. Div. 433, 114 N. Y. Supp. 11 (1908); *DeBock v. Amer. Bridge Co.*, 131 App. Div. 480, 115 N. Y. Supp. 461 (1909); *Corn Products, etc. Co. v. King*, 168 Fed. 892, 94 C. C. A. 304 (1909); *Erie Ry. Co. v. Schomer*, 171 Fed. 798, 96 C. C. A. 458 (1909); *Ozan Lbr. Co. v. Bryan*, 119 S. W. (Ark.) 73 (1909); *Mondou v. New York, etc. Ry. Co.*, 82 Conn. 373, 73 Atl. 762 (1909); *Chicago, etc. Ry. Co. v. Wilfong*, 88 N. E. (Ind. App.) 953, rev'd, 90 N. E. 307 (1910), (a railway company is not required to apply impracticable or oppressive tests, or such as are incompatible with conduct of business, except to secure absolute safety, but to observe rules in gen-

eral use by prudently conducted roads and do what men of ordinary prudence are in the habit of doing under similar circumstances); *Harris v. Consol. Coal Co.*, 111 Md. 209, 73 Atl. 805 (1909); *Delaney v. Framingham, etc. Co.*, 202 Mass. 359, 88 N. E. 773 (1909) [not required to inspect if complicated and bought of reputable dealer, or if simple tools]; *McConnell v. Pennsylvania Ry. Co.*, 223 Pa. 442, 72 Atl. 849 (1909); *Beaumont, etc. Ry. Co. v. Olmstead*, 120 S. W. (Tex. App.) 596 (1909); *Washington, etc. Ry. Co. v. Taylor*, 109 Va. 737, 64 S. E. 975 (1909); *Lehman v. Chicago, etc. Ry. Co.*, 140 Wis. 497, 122 N. W. 1059 (1909); *St. Louis, etc. Ry. Co. v. Reed*, 92 Ark. 350, 122 S. W. 645 (1909); *DeFrates v. Central Union Tel. Co.*, 243 Ill. 356, 90 N. E. 719 (1910) [duty to telephone company to inspect poles below the ground]; *LaDuke v. Hudson, etc. Tel. Co.*, 136 App. Div. 136, 120 N. Y. Supp. 171 (1909); *Winslow v. Com. Bldg. Co.*, 124 N. W. (Ia.) 320, 126 N. W. 173 (1910) [inspecting of fire escapes]; *Monarch Tobacco Wks. v. Northern*, 124 S. W. (Ky.) 350 (1910) [installing an old radiator and subjecting it to heavy pressure without previous test]; *Alamo Dressed Beef Co. v. Yeargan*, 123 S. W. (Tex. App.) 721 (1910). Purchase from a reputable dealer does not absolve from duty of inspection, and defect that would have been thus discovered is not a latent defect (*Pagan v. City of Highland*, 152 Ill. App. 607 (1910). Timbers, ropes, chains, etc. that when used are to be subjected to a great strain should be subjected to at least equal test before use (*White v. Newbury*, 208 Mass. 279, 94 N. E. 269 (1911)).

by giving directions for its performance,¹⁴⁸ or by promulgating rules requiring it to be performed,¹⁴⁹ or by employing competent and careful persons for that purpose.¹⁵⁰ The master is not responsible for the want of repairs when he has neither actual nor constructive notice of their need; and this notice is not presumed, but must be proved by the servant.¹⁵¹ And it must be proved that he was chargeable with notice of the particular defect complained of.¹⁵² But he is chargeable with constructive notice of whatever, by the use of ordinary care and diligence, he might have discovered,¹⁵³ or avoided the

¹⁴⁸ *Van Dusen v. Letellier*, 78 Mich. 492, 44 N. W. 572; see, also, § 204, *post*; and note 144, *supra*.

¹⁴⁹ *Bailey v. Rome, etc. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Missouri Pac. R. Co. v. McElyea*, 71 Tex. 386, 9 S. W. 313.

¹⁵⁰ See cases cited under note 1; *Sweat v. Boston, etc. R. Co.*, 156 Mass. 284, 31 N. E. 296 [platform]; *Fuller v. Jewett*, 80 N. Y. 46.

¹⁵¹ *Ohio, etc. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687; *Williams v. St. Louis, etc. R. Co.*, 119 Mo. 316, 24 S. W. 782; *Colfax Coal Co. v. Johnson*, 52 Ill. App. 383; *Illinois Cent. R. Co. v. Harris*, 53 Id. 592; *Chicago, etc. R. Co. v. Dixon*, 49 Id. 292. The master is not liable at all for want of repairs, if he is not chargeable with notice of their need (*Howd v. Mississippi, etc. R. Co.*, 50 Miss. 178). In Ohio, by statute, a railroad company is chargeable with knowledge of defects in its cars, locomotives, and machinery (Act, April 2, 1890, § 2), to overcome which it must show that, in fact, it did not have such knowledge, and that it used due diligence to ascertain and remedy such defects (*Columbus, etc. R. Co. v. Erick*, 51 Ohio St. 146, 37 N. E. 128).

¹⁵² *Schultz v. Rohe*, 149 N. Y. 132, 43 N. E. 420.

¹⁵³ It is not necessary that the master have actual knowledge of the defect, but it is sufficient to show that he could have discovered the defect by the exercise of reasonable care and diligence (*Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Daniels v. Union Pac. R. Co.*, 152 U. S. 684, 14 S. Ct. 756, aff'g 6 Utah, 357, 23 Pac. 762; *Texas, etc. Ry. Co. v. Barrett*, 14 C. C. A. 373, 67 Fed. 214; *Babcock v. Old Colony R. Co.*, 150 Mass. 467, 23 N. E. 325 [obstructions near track]; *Mooney v. Connecticut Lumber Co.*, 154 Mass. 407, 28 N. E. 352 [machinery known to start of itself]; *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812 [defect in machine known]; *Bailey v. Rome, etc. R. Co.*, 139 N. Y. 302, 34 N. E. 918 [defect in brake visible only by inspection under car, question for jury]; *Bird v. Long Is. R. Co.*, 11 N. Y. App. Div. 134, 42 N. Y. Supp. 888 [defect in station platform not obvious]; *Bennett v. Standard Glass Co.*, 158 Pa. St. 120, 27 Atl. 874; *Norfolk, etc. R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367 [car couplings]; *Richmond, etc. R. Co. v. Burnett*, 88 Va. 538, 14 S. E.

danger incident thereupon. He is entitled to reasonable time, after notice of a defect, within which to make re-

372 [brake]; Lake Erie, etc. R. Co. v. McHenry, 10 Ind. App. 525, 37 N. E. 186 [engine]; Monmouth Min. Co. v. Erling, 148 Ill. 521, 36 N. E. 117 [nut missing two weeks]; Cowan v. Chicago, etc. R. Co., 80 Wis. 284, 50 N. W. 180 [brake-rod]; Paine v. Eastern R. Co., 91 Wis. 340, 64 N. W. 1005 [appliance worn out]; Kennedy v. Chicago, etc. R. Co., 57 Minn. 227, 58 N. W. 878 [jack-screw not inspected]; Sheedy v. Chicago, etc. R. Co., 55 Minn. 357, 57 N. W. 60 [brake]; Coontz v. Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661; Gutridge v. Missouri Pac. R. Co., 105 Mo. 520, 16 S. W. 943 [defect not apparent to the eye]; Southw. Tel. Co. v. Woughter, 56 Ark. 206, 19 S. W. 575 [telegraph pole]; St. Louis, etc. R. Co. v. Higgins, 53 Ark. 458, 14 S. W. 653 [caboose]; Gulf, etc. R. Co. v. Pettis, 69 Tex. 689, 7 S. W. 93 [rotten ties]; Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063 [brake-rod]; Galveston, etc. R. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066 [brake out of place]). Evidence of actual notice to officers of a corporation of the defective condition of a boiler is, of course, proper (Ballard v. Hitchcock Mfg. Co., 71 Hun, 582, 24 N. Y. Supp. 1101). For cases of actual notice, see Glossen v. Gehman, 147 Pa. St. 619, 23 Atl. 843 [defendant personally knew]; Union Stock-Yards Co. v. Larson, 38 Neb. 492, 56 N. W. 1079 [superintendent knew]; Matise v. Consumers' Ice Co., 46 La. Ann. 1535, 16 So. 400 [engineer in charge knew]. The same rule applies to the continuance of negligent and dangerous methods of work for a long time (Doing v. N. Y., Ontario, etc. R. Co. 151 N. Y. 579). Norfolk, etc. Ry. Co. v. Ampey, 93 Va. 108, 25 S. E. 226 (1896); Stackpole v. Wray, 182 N. Y. 567, 75 N. E. 1134, aff'g 99 App. Div. 262, 90 N. Y. Supp. 1045 (1905); Clements v. Alabama, etc. Ry. Co., 127 Ala. 166, 28 So. 643 (1900); Roche v. Denver, etc. Ry. Co., 19 Col. App. 204, 73 Pac. 880 (1903) [unsafe condition of car loaded with logs when turned over to brakeman subsequently injured thereby]; Savannah, etc. Ry. Co. v. Pughsley, 113 Ga. 1012, 39 S. E. 473 (1901) [when plaintiff was injured by defective appliance known to master and employee using it, but not to plaintiff, the master is liable]; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185, rev'd, 218 Ill. 327, 75 N. E. 900 (1903); Johnson v. Gehbauer, 150 Ind. 271, 64 N. E. 588 (1902) [where an affirmative negligent act is done by the master, notice is involved in doing the act]; Atchison, etc. Ry. Co. v. Swarts, 58 Kans. 235, 48 Pac. 953 (1897) [defect in switch tracks in yard]; Chesapeake, etc. Ry. Co. v. Venable, 111 Ky. 41, 63 S. W. 35 (1901) [defect in road bed]; Collins v. Louisville, etc. Ry. Co., 27 Ky. L. Rep. 825, 86 S. W. 973 (1905); Burns v. Ruddock-Orleans, etc. Co., 114 La. 247, 38 So. 157 (1905); Hach v. St. Louis, etc. Ry. Co., 117 Mo. App. 11, 93 S. W. 825 (1906) [where death of engineer is due to a rotten tie the company will not be liable unless the presence of the tie was due to defective inspection]; Carrington v. Mueller, 65 N. J. Law, 244, 47 Atl. 564 (1900) [something in the nature of *scienter* must be shown]; Gal-

pairs; ¹⁵⁴ and if, during that period, or while he is repairing, an injury occurs to a servant, the question of a master's negligence depends upon his diligence under all the circumstances.¹⁵⁵ A distinction is sometimes made

veston, etc. Ry. Co. v. Smith, 93 S. W. 184, aff'd, 100 Tex. 267, 98 S. W. 240 (1906) [defective handrail on locomotive]; Stork v. Stoppler, etc. Co., 127 Wis. 318, 106 N. W. 841 (1906). The rule that the master is not liable for injuries resulting from the use of simple tools has no application where the master has actual knowledge of defect (*Antioch Coal Co. v. Rockey*, 169 Ind. 247, 82 N. E. 76 (1907) [blasting]; *O'Connor Co. v. Gillaspay*, 83 N. E. (Ind.) 738 (1908) [falling of elevator]; *Wiita v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169 (1908); *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45 (1907); *Anderson v. Milliken*, 123 App. Div. 614, 108 N. Y. Supp. 61 (1908) [defective scaffolding]; *Fleming v. Northern Tissue Paper Mills*, 114 N. W. (Wis.) 841 (1908), (notice to the master may be inferred from the fact that defect and danger were generally known to the workmen); *Patton v. Illinois, etc. Ry. Co.*, 179 Fed. 530 (1910), (breaking of a rung in ladder on the side of a car is no evidence that defendant knew of it in time to have it repaired before the accident, or that its condition ought to have been discovered by reasonable inspection); *Rowden v. Daniell*, 132 S. W. (Mo. App.) 23 (1910); *Caldon v. Merideth, etc. Lbr. Co.*, 78 Atl. (N. H.) 279 (1910); *American, etc. Foundry Co. v. Nachand*, 93 N. E. (Ind. App.) 1083 (1911), (if the tool becomes defective while in the hands of the servant injured, the master is not liable). See *Commonwealth Steel Co. v. McCash*, 184 Fed. 882, 107 C. C. A. 206 (1911).

¹⁵⁴ *Cleveland, etc. R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174. It has been held that a railroad company is under no obligation to its servants to repair track which becomes unsafe; but it must give them due and timely notice of the injury, with warning to keep off that portion of the track, and then may take whatever time it deems proper to make the repairs (*Henry v. Lake Shore, etc. R. Co.*, 49 Mich. 495; followed in *St. Louis, etc. R. Co. v. Morgart*, 45 Ark 318).

¹⁵⁵ *Murphy v. Crossan*, 98 Pa. St. 495 [question for jury]; *Kerrigan v. Chicago, etc. Ry. Co.*, 86 Minn. 407, 90 N. W. 976 (1902), (a fireman was injured in using a defective step on the engine for the use of employees in lighting and adjusting the headlight, while in the discharge of his duty; held, that the defendant had notice step was defective and unfit for use in ample time to have enabled it to repair the same before the accident); *Fenderson v. Atlantic City Ry. Co.*, 56 N. J. L. 708, 31 Atl. 767 (1894), (the plaintiff, a brakeman, was injured by defective car coupler, held that the coupler having become suddenly out of repair without opportunity on the part of the company to discover or repair it, defendant was not liable); *Williams v. Anniston Elec. Co.*, 164 Ala. 84, 51 So. 385 (1909), (where the deceased was injured by coming in contact with the wire supplying the electric lamp which he had in his

between repairs generally and those ordinary repairs, which a machine rod or other implement requires from day to day: the latter being held to be not within the

hand, and would not have been injured by it but for the breaking of the globe, an instruction that if defendant had not had an opportunity of repairing the lamp after the same had been broken it would not be liable, held not erroneous); *Woodson v. Prescott, etc. Ry. Co.*, 91 Ark. 388, 121 S. W. 273 (1909), (where it is shown that there was a defect in the appliance which caused the injury, and that this defect was discoverable if it had been reasonably inspected, it was a question for the jury whether the defendant was guilty of negligence in failing to inspect and discover such defect); *Wickham v. Detroit, etc. Ry. Co.*, 160 Mich. 277, 125 N. W. 22 (1910), (where a loaded wheel-barrow had been left by one of the employees of the company too near the track and the street car conductor was injured while on the running board of his car by his foot striking the same, it appearing that the wheel-barrow had been so left for so short a time that the company had neither actual nor constructive notice of the obstruction, held that the master was not liable); *Howard v. Beldenville Lbr. Co.*, 129 Wis. 98, 108 N. W. 48 (1906), ("a reasonably safe working place having been furnished the servant, the absolute duty in that regard is satisfied. Then becomes active the secondary duty of exercising ordinary care to preserve for the servant the reasonably safe condition of his working place. In case of its becoming unsafe during the course of his employment, and the servant receiving the injury thereby before the master has knowledge of

the existence of the danger or has reasonable opportunity to obtain such knowledge, and reasonable opportunity to remedy the danger, he is not liable"); *Haskell, etc. Car Co. v. Prezezdiankowski*, 170 Ind. 1, 83 N. E. 626, 127 Am. St. Rep. 352, 14 L. R. A. (N. S.) 972 (1908), ("The danger to which appellee was exposed, and of which he complains, was transitory, existing only upon the single occasion when his injury was sustained, and due to no permanent defect or want of safety in appellant's appliance, plan and works, or the manner in which they were intended to be and were ordinarily used). The absolute obligation resting upon a master to use due care to provide and maintain a safe place for his workmen does not extend to all the passing risks that may arise from short lived causes"); (*Bedford, etc. Co. v. Bough*, 80 N. E. (Ind.) 529 (1908); *So. Ind. R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886 (1903); *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Meehan v. Cpiers Mfg. Co.*, 172 Mass. 375, 52 N. E. 518 (1903); *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. 183, 3 L. R. A. 320; *Barron v. Detroit, etc. Co.*, 91 Mich. 585, 52 N. W. 22; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Hulehan v. Green Bay, etc. R. Co.*, 68 Wis. 520, 32 N. W. 529; *Paine v. Eastern R. Co.*, 91 Wis. 340, 64 N. W. 1005; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Baldwin v. St. Louis, etc. Ry. Co.*, 68 Ia. 37, 25 N. W. 918; *Stapf v. Loewer, etc. Co.*, 1 App. Div. 405,

master's personal duty.¹⁵⁶ This is largely based upon the superior knowledge of the servants and the impossibility of the most careful master knowing when the repair is called for.

§ 194. To what extent the duty of inspection may be cast on the servant. — As a general rule the servant is not chargeable with the duty of making an inspection either of the place assigned him to work, the ways of the master over which he must pass in and about his work and in going to or returning from it, or the machinery, tools and appliances he uses in doing his work. The servant's duties may be such as charge him with the duty of inspecting or examining the instrumentality he works with. "For instance, an engineer might be presumed to be acquainted with the patent defects of the machinery which he constantly examined and operated * * * a brakeman might be charged with knowledge of the manifest deficiencies and dangers of the particular bolts, buffers or drawheads used by himself in coupling and uncoupling cars."¹⁵⁷ Subject to these qualifications the servant has the right to rely on the master's having performed his duty of inspection and is under no obligation to see that he has done so unless there are circumstances known to him that reasonably suggest the imprudence of such re-

37 App. Div. 1, 37 N. Y. Supp. 977, E. L. (2d ed.) 92, and cases cited in 38 N. Y. Supp. 42; *Park Hotel Co.* note 41.

v. Lockhart, 59 Ark. 465, 28 S. W. ¹⁵⁶ *McGee v. Boston Cordage Co.*, 23; *Wabash, etc. R. Co. v. Locke*, 112 139 Mass. 445, 1 N. E. 745 [hackling Ind. 404, 14 N. E. 391, 2 Am. St. pins supplied but not replaced]; Rep. 193; *St. Louis, etc. R. Co. v. Johnson v. Boston Towboat Co.*, 135 Irwin, 37 Kans. 701, 16 Pac. 146, 1 Mass. 209 [new ropes supplied but Am. St. Rep. 266; *Mickie v. Wood* not used]; approved and followed *Mowing, etc. Mach. Co.*, 77 Hun, in *Cregan v. Marston*, 126 N. Y. 559, 28 N. Y. Supp. 918; *Haskins* 568, 27 N. E. 952. See *Webber v. v. New York Cent. R. Co.*, ⁷⁹ Hun, Piper, 109 N. Y. 496, 17 N. E. 216. 159, 29 N. Y. Supp. 274; *Binns v.* ¹⁵⁷ *Houston & T. C. Ry. Co. v. Mc-* Richmond, etc. R. Co., 88 Va. 891, Namara, 59 Tex. 255 (1883). 14 S. E. 701. See 20 Am. & Eng.

liance,¹⁵⁸ or by special contract,¹⁵⁹ orders or general rules,¹⁶⁰ he has assumed the duty of inspection. The duty of inspection may be thus cast on the servant to the extent that he is competent to make it¹⁶¹ and the circumstances allow him an opportunity of doing so. In some jurisdictions this qualification of the general rule has been carried so far as practically to admit substantially of the master's shifting, in a measure at least, his responsibility in this regard upon the servant.¹⁶² But generally it has been held that the master cannot thus shift his liability.¹⁶³

§ 195. Limits of master's liabilities for instrumentalities. — The master is not required to use more than ordinary care and diligence (as already defined) for the protection of his servants,¹⁶⁴ even under circumstances which

¹⁵⁸ *James v. Emmett Mining Co.*, 55 Mich. 335, 21 N. W. 361 (1884); *Ill., etc. Ry. Co. v. Sanders*, 58 Ill. App. 117 (1894).

¹⁵⁹ *Pratt v. Lake Shore Ry. Co.*, 63 Hun, 616, 18 N. Y. Supp. 682.

¹⁶⁰ *LaCroy v. New York, etc. Ry. Co.*, 132 N. Y. 570, 30 N. E. 391 (1892); *Richmond, etc. Ry. Co. v. Dudley*, 90 Va. 304, 18 S. E. 274 (1894).

¹⁶¹ *Chicago, etc. Ry. Co. v. Merri-man*, 95 Ill. App. 628 (1900).

¹⁶² *Baddeley v. Granville*, 19 Q. B. Div. 423 (1887); *Fulton Bag & Cotton Mills v. Wilson*, 89 Ga. 38, 15 S. E. 322 (1892).

¹⁶³ *Ford v. Fitchburg Ry. Co.*, 110 Mass. 240, 14 Am. Rep. 598 (1872); *Bushway v. New York, etc. Ry. Co.*, 107 N. Y. 374, 14 N. E. 407 (1887); *Memphis, etc. Ry. Co. v. Graham*, 94 Ala. 545, 12 So. 283 (1891); *Missouri, etc. Ry. Co. v. Wood*, 35 S. W. (Tex. App.) 879 (1896); *Louisville, etc. Ry. Co. v. Orr*, 91 Ala. 546, 8 So. 360 (1900); and

see *Jolly v. Detroit, etc. Ry. Co.*, 93 Mich. 370, 53 N. W. 526 (1892); *Criswell v. Pittsburg, etc. Ry. Co.*, 30 W. Va. 798, 6 S. E. 31 (1888); *Willis v. Atlantic Ry. Co.*, 122 N. C. 905, 29 S. E. 941 (1898); *Adams v. Gulf, etc. Ry. Co.*, 101 Tex. 5, 102 S. W. 96 (1907).

¹⁶⁴ No more than ordinary care is required. The master is not to be held as warranting the absolute safety, under all circumstances, or the perfection in all parts of the machinery or apparatus provided for the use of servants (*Baltimore, etc. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491; *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212; *Fenderson v. Atlantic City R. Co.* [Ct. Errors], 56 N. J. Law, 708, 31 Atl. 767; *Sullivan v. N. Y., N. Haven, etc. R. Co.*, 62 Conn. 209, 25 Atl. 711; *Hart v. Naumburg*, 123 N. Y. 641, 25 N. E. 385 [elevator]; *Mancuso v. Cataract Construction Co.*, 87 Hun, 519, 34 N. Y. Supp. 273 [dynamite in place of work]; *Norfolk, etc. R. Co.*

would entitle a passenger or stranger to the use of great or extreme care.¹⁶⁵ He is not liable to a servant for defects of which he had no notice and which he could not discover by the use of ordinary care.¹⁶⁶ The master is not bound to provide the very best materials, implements

v. Jackson, 85 Va. 489, 8 S. E. 370; *Anniston Pipe Works v. Dickey*, 93 Ala. 418, 9 So. 720; *Park Hotel Co. v. Lockhart*, 59 Ark. 465, 28 S. W. 23; *Eddy v. Adams*, 18 S. W. (Tex.) 490; *Trinity Lumber Co. v. Denham*, 85 Tex. 56, 19 S. W. 1012; *Chicago, etc. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117; *Kansas City, etc. R. Co. v. Ryan*, 52 Kans. 637, 35 Pac. 292; *Williams v. St. Louis, etc. R. Co.*, 119 Mo. 316, 24 S. W. 782; *Fosburg v. Phillips Fuel Co.*, 93 Iowa, 54, 61 N. W. 400). Only reasonable care required (*Anderson v. Michigan Cent. R. Co.*, 107 Mich. 491, 65 N. W. 585; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496, 27 Pac. 371). Therefore, it is error to charge that, for the protection of employees in its shops, a railroad company is bound to have its machinery "safe so far as human skill and foresight can make it" (*East Tennessee, etc. R. Co. v. Aiken*, 89 Tenn. 245, 14 S. W. 1082); or that "it is the duty of the master to provide safe, sound and suitable appliances and instrumentalities for the use of the servant, and to provide generally for his safety in the course of the employment, and to use proper diligence to avoid exposing the servant to extraordinary risk" (*Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869).

¹⁶⁵ Although a railroad company is bound to use the highest degree of care to keep its track and machinery in safe condition for the protection of its passengers, it is error to

charge that it is bound to use the same degree of care for that purpose for the protection of its servants (*Chicago, etc. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117). The master discharges his duty by applying ordinary tests, and is not bound to employ experts or apply the highest tests (*Clyde v. Richmond, etc. R. Co.*, 65 Fed. 482). See note 174, *post*.

¹⁶⁶ Unless the alleged defect was or ought to have been known to the master, no recovery can be had (*DeGraff v. N. Y. Central, etc. R. Co.*, 76 N. Y. 125 [defective brake-chain]; *Feltham v. England*, L. R. 3 Q. B. 33 [defective tramway]; *Chicago, etc. R. Co. v. Platt*, 89 Ill. 141; *East St. Louis, etc. R. Co. v. Hightower*, 92 Id. 139; *Ballou v. Chicago, etc. R. Co.*, 54 Wis. 257; *Hobbs v. Stauer*, 62 Id. 108; *Atchison, etc. R. Co. v. Ledbetter*, 34 Kans. 326 [switchman injured by defective draw-bar]; *Baldwin v. St. Louis, etc. R. Co.*, 68 Iowa, 37, 25 N. W. 918 [fall of lumber pile, properly constructed originally, but weakened by the cutting of cross strips]; *Johnson v. Chesapeake, etc. R. Co.*, 36 W. Va. 73, 14 S. E. 432 [car coupling]; *Dunlap v. Richmond, etc. R. Co.*, 81 Ga. 136, 7 S. E. 283 [railroad track]; *Georgia R. Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049 [latent defect in hammer]; *Hooper v. Snead Iron Works (Ky.)*, 14 S. W. 542; *Louisville, etc. R. Co. v. Hinder (Ky.)*, 30 S. W. 399 [invisible defect]; *Sack v. Dolese*, 137

or accommodations which can be procured,¹⁶⁷ nor those

Ill. 129, 27 N. E. 62 [foreign car]; Doyle v. St. Paul, etc. R. Co., 42 Minn. 79, 43 N. W. 787 [railroad track]; Allen v. Union Pac. R. Co., 7 Utah, 239, 26 Pac. 297 [cars]; Moran v. Racine Wagon Co., 74 Hun, 454, 26 N. Y. Supp. 852 [elevator]). It must be shown that the master knew of the defect, or that it was of such a nature or had existed for such a time that defendant ought to have discovered it (Carruthers v. Chicago, etc. R. Co., 55 Kans. 600, 40 Pac. 915). The company is not chargeable with negligence unless it is shown that the defect in the track had existed long enough to be discovered by careful inspection, and had not been repaired (Kansas City, etc. R. Co. v. Webb, 97 Ala. 157, 11 So. 888). A brakeman cannot recover for injuries caused by a pile of ashes wrongfully dumped by a fireman and negligently left there by sectionmen, without proof of actual or constructive notice to the railroad company (Loranger v. Lake Shore, etc. R. Co., 104 Mich. 80, 62 N. W. 137). "That a railway company would not be liable to an employee engaged in running an engine for repairs to such place as might be necessary, if the employee knew of the defects which made repairs necessary, is certainly true; for in such case the employee would be held to have assumed the risks resulting from such defects; but when the employee is not chargeable with a knowledge of such defect, the question of negligence or no, in the use of the defective engine, is one to be determined by the jury as in other cases. * * * The rule that the master must exercise proper care to furnish safe machinery and appliances to perform the service in which the employee is engaged, extends to all classes of business, to the removal of a disabled engine from the roadway to a place for repairs, as well as to the operation of trains on the road, the degree of care required varying as the thing to be done be more or less hazardous; for the one, as the other; is the master's business, in reference to which he cannot with impunity be negligent. On the other hand, in this class of cases the same rules apply to employees as in other cases in reference to the degree of care incumbent on them" (Houston, etc. Ry. v. O'Hara, 64 Tex. 600 (1885). A railroad company will not be relieved from liability to a servant for negligence in sending him out with an engine known to be defective merely because it did not have time to repair after notice of the defect, and had no other engine in proper condition (Greene v. Minneapolis, etc. Ry., 31 Minn. 246, 17 N. W. 378, 47 Am. St. Rep. 785 (1884).

¹⁶⁷ Kern v. De Castro Ref'g Co., 125 N. Y. 50, 25 N. E. 1071 [elevator]; Bajus v. Syracuse, etc. R. Co., 103 N. Y. 312; Burke v. Witherbee, 98 Id. 562; Bertha Zinc Co. v. Martin, 93 Va. 791, 22 S. E. 869. Railroad companies are not "bound to procure the best" machinery and appliances (Lake Shore, etc. R. Co. v. McCormick, 74 Ind. 440; Umback v. Lake Shore, etc. R. Co., 83 Id. 191; Lyttle v. Chicago, etc. R. Co., 84 Mich. 289, 47 N. W. 571; Smith v. St. Louis, etc. R. Co., 69 Mo. 32); Brands v. St. Louis Car Co., 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 701 (1908); Shinnors v. Mullins, 136 Mo. App. 298, 117 S. W. 91 (1909); Wilcox v. Hebert, 118 S. W. (Ark.) 402

which are absolutely the most convenient or most safe.¹⁶⁸ His duty is sufficiently discharged by providing those which are reasonably safe and fit.¹⁶⁹ Still less is he bound

(1909); Coughlan v. Philadelphia, etc. Ry. Co., 67 Atl. (Del.) 148 (1907); Allen v. Electric Co., 131 Ill. App. 118; New Galt House v. Chapman, 124 Ky. 527, 99 S. W. 632 (1907); Podvin v. Pepperill Mfg. Co., 151 Me. 561, 72 Atl. 618 (1908); Wheaton v. Warner Ice Co., 151 Mich. 100, 114 N. W. 853 (1908); Monsen v. Crane, 99 Minn. 186, 108 N. W. 933 (1906); Chrismer v. Bell Tel. Co., 194 Mo. 189, 92 S. W. 378, 6 L. R. A. (N. S.) 492 (1906); Blust v. Pac., etc. Tel. Co., 48 Ore. 34, 84 Pac. 847 (1906); Merrigan v. Evans, 221 Pa. 1, 69 Atl. 1113 (1908); El Paso, etc. Ry. Co. v. Foth, 101 Tex. 133, 105 S. W. 322 (1907); Haines v. Spencer, 167 Fed. 266, 92 C. C. A. 658 (1907).

¹⁶⁸ Jones v. Granite Mills, 126 Mass. 84 [fire escape]; Payne v. Reese, 100 Pa. St. 301 [question held one for jury]; Cagney v. Hannibal, etc. R. Co., 69 Mo. 416 [shaping machine, without guard or fender]; Sappenfield v. Main St. R. Co., 91 Cal. 48, 27 Pac. 590; Pierce v. Atlanta Cotton Mills, 79 Ga. 782, 4 S. E. 381; Friel v. Citizens' R. Co., 115 Mo. 503, 22 S. W. 498; Nutt v. Southern Pac. R. Co., 25 Oreg. 291, 35 Pac. 653; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401; McGinnis v. Canada So. Bridge Co., 49 Mich. 466; Lake Shore, etc. R. Co. v. McCormick, 74 Ind. 440 [three unblocked "frog" cases]; Philadelphia, etc. R. Co. v. Keenan, 103 Pa. St. 124 [pushing-pole, used for shifting cars in making up trains, which lacked a handle]; Western, etc. R. Co. v. Bishop, 50 Ga. 465, and Burns v. Chicago, etc. R. Co., 69 Iowa, 450 [car coupling not of the most approved kind]; Wonder v. Baltimore, etc. R. Co., 32 Md. 411 [car brake having a hook instead of an eye-bolt, the point of the hook turned in wrong direction]. A master is not liable to a servant for injuries sustained through the use of machinery, merely on the ground of failing to discard a machine or a part of a machine, and supply its place with something safer (Sweeney v. Berlin, etc. Envelope Co., 101 N. Y. 520, 5 N. E. 358). It is not negligence *per se* to adopt a device for coupling cars, not before in use on road, without discarding those already in use, although the use of the two together may be more hazardous than the use of either alone (Pittsburgh, etc. R. Co. v. Henly, 48 Ohio St. 608, 29 N. E. 575). The use of cars of unequal height and mismatched couplings is not negligence *per se* (Norfolk, etc. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496). Only defect in a car was a slight straightening of one hook, not enough to allow the car to dump when fastened. Held, that a verdict for plaintiff was not justified (Soderman v. Kemp, 145 N. Y. 457, 40 N. E. 212).

¹⁶⁹ A master is not bound to furnish the best known appliances for the work, but only such as are reasonably fit and safe (Harley v. Buffalo Car Mfg. Co., 142 N. Y. 31, 36 N. E. 813; Stringham v. Hilton, 111 N. Y. 188, 18 N. E. 870 [elevator]; Benfield v. Vacuum Oil Co., 75 Hun, 209, 27 N. Y. Supp. 16 [no light provided near tank of explosive oil]). The master's duty does not

to furnish every new improvement or invention;¹⁷⁰ but he may wait, even where a question of safety is involved, until an alleged improvement has been tested and has come into somewhat general use.¹⁷¹ Only such appliances, safeguards and tests as are usual can be required.¹⁷² Materials, implements and appliances, so long as not dangerous generally, need not be better in quality or condition than is required by the purpose for which they are intended.¹⁷³ A master who purchases materials, etc., for

require him to provide machinery similar to that used in other establishments, though less dangerous than that used by him, but merely to furnish proper and suitable machinery, which is to be determined by its actual condition, and not by comparing it with machines used by other establishments for similar work (*Wood v. Heiges*, 83 Md. 257, 34 Atl. 872).

¹⁷⁰ *France v. Rome, etc. Co.*, 88 Hun, 318, 34 N. Y. Supp. 408 [hand brakes when air brakes were not general]; *Chicago, etc. R. Co. v. Armstrong*, 62 Ill. App. 228. See *Steinweg v. Erie R. Co.*, 43 N. Y. 123. In *Conway v. Illinois Cent. R. Co.*, 50 Iowa, 465, the company was held not liable to a brakeman for not using the crooked link which was a better appliance for coupling cars of different heights than the one actually in use. A company is not bound to change machinery and appliances which are safe, for a newer and yet safer appliance (*Bradley v. Nashville, etc. R. Co.*, 14 Lea (Tenn.), 374); and the jury must consider that the new invention, while guarding against one danger, might introduce new ones (*Chicago, etc. R. Co. v. Few*, 15 Bradwell, 125).

¹⁷¹ *Delaware Iron Works v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Norfolk*

& *W. R. Co. v. Jackson's Admr.*, 85 Va. 489, 8 S. E. 370.

¹⁷² *Augerstein v. Jones*, 139 Pa. St. 183, 21 Atl. 24 [emery stone]; *Mackin v. Alaska Refrigerator Co.*, 100 Mich. 276, 58 N. W. 999 [screen over planer]; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387 [wooden buildings at coal mine]; *Grant v. Union Pac. R. Co.*, 45 Fed. 673 [lights on switches]. The master has absolute discretion to select any method in general use, according to his own judgment (*Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910). Even as to these, there may be question (*Rooney v. Sewall, etc. Cordage Co.*, 161 Mass. 153, 36 N. E. 789). Defendant's liability could not be tested by comparing its appliances with the similar appliances of five other railroad companies (*Richmond, etc. R. Co. v. Weems*, 97 Ala. 270, 12 So. 186). A test impracticable and never employed cannot be left to the jury (*Atz v. Newark Lime Co.*, 59 N. J. Law, 41, 34 Atl. 980). Not bound to provide safest, newest and best (*Womble v. Merchants' Grocery Co.*, 135 N. C. 474, 47 S. E. 493 (1904); *Dwyer v. Shaw*, 22 R. I. 648, 50 Atl. 389 (1893); *Hoffman v. Amer. Foundry Co.*, 18 Wash. 287, 51 Pac. 385 (1897)).

¹⁷³ *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286. Thus a freight eleva-

the use of his servants is not required to apply to them such tests as are appropriate only to the process of manufacture.¹⁷⁴ The master performs his whole duty by using

tor need not be made safe for passengers (*Kern v. De Castro Sugar Co.*, 125 N. Y. 50, 25 N. E. 1071). Worn brakes are good enough, if they hold effectively (*Smith v. N. Y. Central R. Co.*, 118 N. Y. 645, 23 N. E. 990; *East Tennessee, etc. R. Co. v. Reynolds*, 93 Ga. 570, 20 S. E. 70 [cross ties]; *s. p.*, *Graham v. Chicago, St. Paul, etc. R. Co.*, 62 Fed. 896).

¹⁷⁴ A master is not bound to apply to iron girders, which he purchases from others, such tests as are usually applied in course of manufacture (*Carlson v. Phenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Roughan v. Boston, etc. Block Co.*, 161 Mass. 24, 36 N. E. 461; *Louisville, etc. R. Co. v. Campbell*, 97 Ala. 147, 12 So. 574 [brake rods]; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202 [shaft]; *Clyde v. Richmond, etc. R. Co.*, 65 Fed. 482; *Ballard v. Hitchcock Mfg. Co.*, 51 Hun, 188, 4 N. Y. Supp. 940 [boiler]; *s. p.*, *Prentice v. Wellsville*, 66 Hun, 634, 21 N. Y. Supp. 820 [explosives]; *Shea v. Wellington*, 163 Mass. 364, 40 N. E. 173 [explosives]). *Chicago, etc. Ry. Co. v. Healy*, 86 Fed. 245, 30 C. C. A. 11 (1898), (bridge timbers); *Dunn v. New York, etc. Co.*, 107 Fed. 666, 46 C. C. A. 546 (1901), (figure plate, which brakemen were authorized to use in the absence of a hand hold); *Westinghouse Elec., etc. Co. v. Heinlich*, 127 Fed. 92, 62 C. C. A. 92 (1901), (where a derrick chain was purchased from a reputable dealer, was apparently sound and had been in use for three months, held defendant was under no obligation to an employee to test its tensile strength); *Dyas v.*

Southern Pac. Co., 140 Cal. 296, 73 Pac. 972 (1903), (duty of inspection must be continuously discharged, the character of the business must be considered, and an instruction that anything "short of this would not be ordinary care," held proper); *Louisville, etc. Ry. Co. v. Bates*, 146 Ind. 564, 45 N. E. 146 (1896), (not required to resort to impracticable or unreasonable tests); *Covington Sawmill, etc. Co. v. Clark*, 116 Ky. 461, 76 S. W. 348 (1903), (saw used in sawing logs); *Baltimore Boot, etc. Co. v. Jamar*, 99 Md. 404, 49 Atl. 847, 86 Am. St. Rep. 428 (1901), (elevator); *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560 (1902), (knife bolted to a molding machine flying off, machine having been purchased from a reputable dealer, in use for some time and such an accident hitherto unknown, the master was not liable for failure to subject the bolts to some specific test); *Thompson v. Great Northern Ry. Co.*, 79 Minn. 291, 82 N. W. 637 (1900), (if observation discloses no defects railway company is under no obligation to test grab irons of a ladder on the side of a car by applying physical force); *Union Stock Yards Co. v. Goodwin*, 57 Nev. 138, 77 N. W. 357 (1898), (car brake); *Randolph v. New York, etc. Ry. Co.*, 69 N. J. L. 420, 55 Atl. 240 (1903), (such tests as are reasonably practicable); *McGrath v. Delaware, etc. Ry. Co.*, 69 N. J. L. 331, 55 Atl. 242 (1903), (such tests as are commonly in like service prudently conducted); *Egan v. Dry Dock, etc. Co.*, 12 App. Div. 556, 42 N. Y. Supp. 188

as much care in furnishing instrumentalities for the use of his servants as a man of ordinary prudence, in the same line of business, acting with a prudent regard to his own safety, would use in supplying similar things for himself, if he were doing the work.¹⁷⁵ He is not in fault without proof of notice of the defect;¹⁷⁶ nor, as to repairs and replacements, until he has had a reasonable time, after actual or constructive notice, to perform his duty.¹⁷⁷

(1896), (a boiler must be carefully inspected, by a competent inspector and at reasonable intervals); Swenson v. Metropolitan St. Ry. Co., 78 App. Div. 379, 80 N. Y. Supp. 281 (1903), (where the hammer test on the gear wheel of an elevator used for hoisting cars had not been applied for a year, held the company was liable); Young v. Mason, 96 App. Div. 305, 89 N. Y. Supp. 349 (1904), (where a carriage elevator had been recently put in good condition by competent mechanics, failure to have inspection made by an engineer is not competent evidence of negligence); Womble v. Merchant's Grocery Co., 135 N. C. 474, 47 S. E. 493 (1904); Southern, etc. Ry. Co. v. Sage, 98 Tex. 438, 84 S. W. 814 (1905), (inspection must be both carefully made and made by competent inspectors); Galveston, etc. Ry. Co. v. Davis, 27 Tex. App. 279, 65 S. W. 217 (1901), (if only the closest kind of inspection would have disclosed the defective condition of the stirrup and ladder attached, then reasonable diligence required such inspection); Gulf, etc. Ry. Co. v. Haden, 29 Tex. App. 280, 68 S. W. 580 (1902); Hover v. Chicago, etc. Ry. Co., 40 Tex. App. 280, 89 S. W. 1084 (1905), (the test of one car wheel out of 50, if all that is customary may be sufficient to relieve the mas-

ter); Carter v. McDermott, 29 App. (D. C.) 145, 10 L. R. A. (N. S.) 1103 (1907); Atioka Coal Min. Co. v. Miller, 104 S. W. 555 (1907); Klebe v. Parker Distl. Co., 207 Me. 480, 105 S. W. 1057, 13 L. R. A. (N. S.) 140 (1907); Fulton v. Grieb Rubber Co., 60 Atl. (N. J.) 37, aff'd, 68 Atl. 116 (1907); Sibbert v. Scotland Cotton Mills, 145 N. C. 308, 59 S. E. 79 (1907); Wilkinson v. Evans, 34 Pa. Super. Ct. 472 (1907); Kiley v. Rutland, 80 Vt. 536, 68 Atl. 713 (1908), (inadequate inspection of car ladder); Denker v. Wolff, 135 Mo. App. 340, 115 S. W. 1035 (1909), (rope, 19 years old, should have been tested before being used to raise and lower an employee while engaged in pointing a smokestack); Donaldson v. Brooklyn, etc. Ry. Co., 129 App. Div. 433, 114 N. Y. Supp. 11 (1908); DeBock v. Amer. Bridge Co., 131 App. Div. 480, 115 N. Y. Supp. 461 (1909). See § 193, and note 153, *ante*.

¹⁷⁵ Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Ford v. Lyons, 41 Hun, 512.

¹⁷⁶ See note 166, *supra*.

¹⁷⁷ Knowledge by a master of the defective condition of machinery does not make him liable for injuries resulting therefrom to one of his servants, unless he had a reasonable opportunity, after acquiring such

The master is not expected to stand over each servant every moment, to discover instantly a defect in good materials and tools, caused by their careless use.¹⁷⁸ Nor is he bound to keep such a close watch over the details of the work, as to enable him to repair every deterioration in instrumentalities of work, resulting from a servant's use thereof, as soon as it occurs.¹⁷⁹ He is not bound to keep the place of work constantly safe, when the servant's work, in its very nature, renders the place for the time unsafe,¹⁸⁰ nor when the very work which the servant

knowledge, to remedy the defect v. Willie, 114 S. W. (Tex. App.) (Seaboard Mfg. Co. v. Woodson, 94 186 (1908). Ala. 143, 10 So. 87, 11 So. 733). See ¹⁸⁰Gulf, etc. R. Co. v. Jackson, 12 Miller v. Chicago, etc. R. Co., 90 C. C. A. 507, 65 Fed. 48. Becoming Mich. 230, 51 N. W. 370. The cases unsafe by reason of the work (Pre v. in which masters have been ex- Standard Portland Cement Co., 9 empted from liability for places or Cal. App. 591, 100 Pac. 122 (1908); implements, suddenly made unsafe Slagle v. Village of Averyville, 139 by the fault of a co-servant, really Ill. App. 423 (1908); Wm. Grace depend upon this rule. Of such are Co. v. Gallagher, 140 Ill. App. 603 Fenderson v. Atlantic City R. Co. (1908); Ballard Co. v. Lee's Admr., [Ct. Errors], 56 N. J. Law, 708, 31 115 S. W. (Ky.) 732 (1909); Hena- Atl. 767; Filbert v. Delaware, etc. han v. Lyons, 201 Mass. 269, 87 N. Canal Co., 121 N. Y. 207, 23 N. E. E. 602 (1909); Rowden v. Schoen- 1104; Anthony v. Leeret, 105 N. Y. herr, etc. Co., 136 Mo. App. 376, 117 591, 12 N. E. 561 (trapdoor left S. W. 695 (1909); Chesapeake & O. open); Pawling v. Hoskins, 132 Pa. Ry. v. Hoffman, 63 S. E. (Va.) 432 St. 617, 19 Atl. 301 [same]. (1909); Northern Coal, etc. Co. v.

¹⁷⁸Jennings v. Iron Bay Co., 47 Allera, 46 Colo. 224, 104 Pac. 197 Minn. 111, 49 N. W. 685 [planks out (1909); Amer. Bridge Co. v. of position]; Donnelly v. Brown, 43 Valente, 73 Atl. (Del.) 400 (1909); Hun, 470 [ladder not secured]. Gunszfsky v. People's, etc. Co., 145

¹⁷⁹It is not the master's duty to Ill. App. 255; Tobler v. Pioneer, etc. repair defects arising in the daily Co., 52 So. (Ala.) 86 (1910); Dunn use of the appliance, for which v. Great Lakes, etc. Co., 126 N. W. proper and suitable materials are (Mich.) 833 (1910); Lang v. Bailes, supplied and which may easily be 125 N. W. (N. D.) 891 (1910); remedied by the workmen, and are Henry v. Hudson, 94 N. E. (N. Y.) not of a permanent character or 623 (1911), ("while the master is requiring the help of skilled me- liable for the conduct of his servants chanics (Cregan v. Marston, 126 N. in failing to maintain safe the place Y. 568, 27 N. E. 952 [rope breaking]; where the work is to be done, his Finan v. Sutch, 220 Pa. 379, 69 Atl. liability is much more limited for 817 (1908); Lone Star Brewing Co. defects in the prosecution of the

is employed to do is to make a dangerous place safe.¹⁸¹ A master who has provided an ample supply of proper appliances, ready at hand, is not necessarily responsible to a servant for the neglect of a fellow servant to use such appliances.¹⁸² The adjustment and adaptation of implements to the work in hand, according to its varying needs, are matters of detail; they belong to the sphere of servants, not of masters; and, therefore, a servant's negligence in these matters to the injury of a fellow servant is not presumably imputable to the master.¹⁸³

work"); *Neagle v. Syracuse*, 185 N. Y. 270, 77 N. E. 1064, 25 L. R. A. (N. S.) 321 (1907).

¹⁸¹ *Finlayson v. Utica Mining Co.*, 14 C. C. A. 492, 67 Fed. 507 [mining]; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771 [same]; *Clark v. Liston*, 54 Ill. App. 578 [tearing down building]; *Collins v. Crimmins*, 11 Misc. 24, 31 N. Y. Supp. 860 [digging trench]. See note 180, *ante*.

¹⁸² *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 30 N. E. 169 [defective coupling pin used when good ones at hand]; *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952 [rope]; *Prescott v. Ball Engine Co.*, 176 Pa. St. 459, 35 Atl. 224 [ropes]; *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216 [saw]; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36 N. E. 813 [ample supply, not enough used]. *s. p.*, *Kaare v. Troy Steel Co.*, 139 N. Y. 369, 34 N. E. 901 [torches on hand]; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157 [material for scaffold]; *Kehoe v. Allen*, 92 Mich. 464, 52 N. W. 740 [flasks for molds]; *Van Den Heuvel v. National Furnace Co.*, 84 Wis. 636, 54 N. W. 1016 [planks]; *Hefferen v. Northern Pacific R. Co.*, 45 Minn. 471, 48 N. W. 526 [tools]; *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785 [planks]; *Louisville, etc. R. Co.*

v. Petty, 67 Miss. 255, 7 So. 351 [sand in engine]; *Moran v. Brown*, 27 Mo. App. 487 [axe handle]; *Cleveland, etc. R. Co. v. Brown*, 20 C. C. A. 147, 73 Fed. 970; and see *Railroad Co. v. Keegan*, 160 U. S. 259, 16 S. Ct. 269; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 S. Ct. 843; *Railroad Co. v. Charless*, 162 U. S. 359, 16 S. Ct. 848. No action against a master for injuries caused by a defective tool will lie where the employee injured could have obtained a proper one at any time (*Allen v. Smith Iron Co.*, 160 Mass. 557, 36 N. E. 581). But where, in an action for injuries caused by the falling of a scaffold from the breaking of a ledger board, there is evidence that the wood provided by defendant for ledger boards was unsuitable, the question of whether defendant used due care in furnishing materials was for the jury, though there was evidence that the carpenters who built the scaffold were careless in selecting the piece of board which broke (*Twomey v. Swift*, 163 Mass. 273, 39 N. E. 1018).

¹⁸³ *Hudson v. Ocean S. S. Co.*, 110 N. Y. 625, 17 N. E. 342 [slipping skid]; *McGinty v. Athol Reservoir Co.*, 155 Mass. 183, 29 N. E. 510 [setting up derrick]; *St. Louis, etc.*

Thus the manner in which cars are loaded is a detail of servant's work; and the master is not held to as strict responsibility for the condition of the car, when loaded, as when not loaded.¹⁸⁴ An important distinction is taken between instrumentalities which the master undertakes to furnish for the servants' use and those which he employs the servants to furnish for themselves and their fellow servants in the same work. Negligence in making the former is the master's negligence,¹⁸⁵ but negligence about the latter is the negligence of a fellow servant.¹⁸⁶

R. Co. v. Needham, 11 C. C. A. 56, 63 Fed. 107 [operating switch]; Miller v. Southern Pac. R. Co., 20 Oreg. 285, 26 Pac. 70 [same]; Kenny v. Cunard Steamship Co., 55 N. Y. Super. Ct. 558 [tightening chain]; Eicheler v. St. Paul Furniture Co., 40 Minn. 263, 41 N. W. 975; [adjusting machinery]; Weeklund v. Southern Oregon Co., 20 Oreg. 591, 27 Pac. 260 [rollers in saw mill]; Lambert v. Mississippi Pulp Co., 72 Vt. 278, 47 Atl. 1085 (1900); Geohegan v. Atlas S. S. Co., 3 Misc. (N. Y.) 224, 22 N. Y. Supp. 749, aff'd, in 146 N. Y. 369, 40 N. E. 507 (1895); Wiskie v. Montello Granite Co., 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885 (1901).

¹⁸⁴ Ford v. Lake Shore, etc. R. Co., 117 N. Y. 638, 22 N. E. 946; Byrnes v. N. Y., Lake Erie, etc. R. Co., 113 N. Y. 251, 21 N. E. 50; Hanley v. Grand Trunk R. Co., 62 N. H. 274; Jarman v. Chicago, etc. R. Co., 98 Mich. 135, 57 N. W. 32; Dewey v. Detroit, etc. R. Co., 97 Mich. 329, 56 N. W. 756. But the failure of a railroad company to properly secure lumber loaded on a car for transportation, in consequence of which a trainman on another train is injured, is negligence for which the company is liable to the injured employee (Ryan v. N. Y. Central, etc.

R. Co., 88 Hun, 269, 34 N. Y. Supp. 665). Manner of placing loads on cars (Croll v. Atchison, etc. Ry. Co., 57 Kans. 548, 46 Pac. 972 (1896); George v. Clark, 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608 (1898); Gulf, etc. Ry. v. Wood, 63 S. W. (Tex. App.) 164 (1901); Devore v. St. Louis, etc. Ry. Co., 86 Mo. App. 429 (1900).

¹⁸⁵ Manning v. Hogan, 78 N. Y. 615; Grant v. Varney, 21 Colo. 329, 40 Pac. 771 [mine], and cases cited in note 24; Ingebregtsen v. Nord D. Lloyd S. S. Co. [Ct. Errors], 57 N. J. Law, 400, 31 Atl. 619; Cadden v. American Steel-Barge Co., 88 Wis. 409, 60 N. W. 800 [scaffold]; Sims v. Am. Steel-Barge Co., 56 Minn. 68, 57 N. W. 322.

¹⁸⁶ The rule that a master is bound to furnish safe appliances, and cannot escape liability for failure to do so by intrusting the duty to a servant, by whose negligence a fellow servant is injured, does not apply where several persons are employed to do certain work, and by the contract of employment, express or implied, they are to adjust the appliances by which the work is to be done (Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020 [trestle]; s. p., Jones v. St. Louis, etc. Packet

This is illustrated in the well-known series of "scaffold cases." If a servant is engaged to work upon a scaffold or platform, ready made, the master is held responsible for personal care to make it a safe place on which to work.¹⁸⁷ But if a number of associated servants are employed to make the scaffold or other standing place, as well as to use it when made, the master is no further responsible for negligence in its making than he is for negligence in work done upon it, when made.¹⁸⁸ The use of dangerous machinery is not necessarily negligence;¹⁸⁹ nor is the lack of guards or covers thereto, in the absence

Co., 43 Mo. App. 398; Weeklund v. Southern Oregon Co., 20 Ore. 591, 27 Pac. 260 [chute for saw-mill]). This distinction is approved in *Ingebretsen v. Nord D. Lloyd S. S. Co.*, *supra*; citing *Collyer v. Pennsylvania R. Co.*, 49 N. J. Law, 59, 6 Atl. 437.

¹⁸⁷ *Manning v. Hogan*, 78 N. Y. 615; *Arkerson v. Dennison*, 117 Mass. 407; *Sims v. Am. Steel-Barge Co.*, 56 Minn. 68, 57 N. W. 322; *Cadden v. American Steel-Barge Co.*, 88 Wis. 409, 60 N. W. 800. A master who employs men to work upon a scaffold, ready made, is responsible for defects in its (*McNamara v. McDonough*, 102 Cal. 575, 36 Pac. 941; *Bowen v. Chicago, etc. R. Co.*, 95 Mo. 277, 8 N. W. 230; *Solarz v. Manhattan R. Co.*, 31 Abb. N. C. 426, 8 Misc. 656, 29 N. Y. Supp. 1123; *Rice, etc. Malting Co. v. Paulsen*, 51 Ill. App. 123. *Chicago, etc. Ry. Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826 (1897); *Kansas City Car Co. v. Sawyer*, 53 Pac. (Kan. App.) 90 (1899); *Chambers v. Amer. Tin Plate Co.*, 129 Fed. 561, 64 C. C. A. 129 (1904); *contra*, *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15 (1886).

¹⁸⁸ *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742 [staging on vessel]; *Judson v. Olean*, 22 N. E. 555; s. c.,

without opinion, 116 N. Y. 655; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017 [decided by a bare majority]; followed in *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611 [scaffold]; *Noyes v. Wood*, 102 Cal. 389, 36 Pac. 766; *Beesley v. Wheeler Co.*, 103 Mich. 196, 61 N. W. 658; s. p., *Benn v. Null*, 65 Ia. 407, 21 N. W. 700; *Killea v. Foxon*, 125 Mass. 485; *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15; applied to roof of mine (*Petaja v. Aurora Mining Co.*, Mich., 64 N. W. 335, 66 Id. 951; *Consol. Min. Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610); to construction of frame work of wind-mill, when all given out as one job (*Peschel v. Chicago, etc. R. Co.*, 62 Wis. 338, 21 N. W. 269). *McKean v. Colorado Fuel Co.*, 18 Col. App. 285, 71 Pac. 425 (1903); *McCarthy v. Clafin*, 99 Me. 290, 59 Atl. 293 (1904); *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779 (1894); *Bresley v. Wheeler*, 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266 (1895); *Metzler v. McKensie*, 34 Wash. 470, 76 Pac. 114 (1904); *Phoenix Bridge Co. v. Castleberg*, 131 Fed. 175, 65 C. C. A. 481 (1904).

¹⁸⁹ *Lafflin v. Buffalo, etc. R. Co.*, 106 N. Y. 136, 12 N. E. 599.

of proof that such protection was reasonably practicable.¹⁹⁰ It has already been stated (§ 207e) that a servant, who knows or ought to know that the very things upon or with which he voluntarily agrees to work are defective or dangerous, assumes the risk. The neglect of his fellow servants to use proper care in using such things, so as to protect him from such risks, is not chargeable to the master.¹⁹¹ As in all other cases, the master's negligence involves no liability, if it is not a proximate cause of the injury.¹⁹²

§ 195a. Purchase of instrumentalities from reputable manufacturers. — Where the master furnishes machinery or appliances purchased from reputable manufacturers and suitable in design for the use to which they are to be applied by the servant, it is *prima facie* evidence that

¹⁹⁰ *McGuerty v. Hale*, 161 Mass. N. Y. App. Div. 70, 38 N. Y. Supp. 51, 36 N. E. 682; *Young v. Burlington Mattress Co.*, 79 Ia. 415, 44 N. W. 693; *Carroll v. Williston*, 44 Minn. 287, 46 N. W. 352; *French v. Aulls*, 72 Hun, 442, 25 N. Y. Supp. 188. A mill owner is not liable for injury to an employee in operating a saw, because of the absence of a guard; the machine, which was one of the best make, and in good condition, not being constructed with a view to having such guard (*Arizona Lumber Co. v. Mooney*, 4 Ariz. 366, 42 Pac. 952).

¹⁹¹ Where plaintiff was employed to aid in taking defective cars from trains, the neglect of the customary precaution of chaining or propping a defective draw-head in such a car, whereby plaintiff was injured, if not chargeable in some degree to plaintiff, was the neglect of his co-servants, and not that of the master (*Arnold v. Delaware, etc. Canal Co.*, 125 N. Y. 15, 25 N. E. 1064).

¹⁹² *Hope v. Fall Brook Coal Co.*, 3 Mills, 155 Mass. 200, 29 N. E. 516).

he has not been negligent in the discharge of his duty to his servant in this respect. And it has been held that where machinery, implements, etc., were so purchased and due care used in inspecting and putting them in operation, the employer is not liable.¹⁹³ Where the evidence showed the purchase through several years of explosives used by quarrymen from reputable manufacturers, who made frequent inspections in the course of construction and no defect had ever been discovered, and that they were as good as any made, held, that the principle requiring inspection or test by the purchaser had no application, the court saying that they "were not a part of the machinery or tools of the defendant. They were articles to be used in his business which were instantly consumed in use."¹⁹⁴

§ 196. Master's duty as to instrumentalities not his own property.—The duty of the master to inspect the materials, machinery, etc., used by his servants, in the course of his business, extends not only to those things which are his property or are directly furnished by him, but also equally to all things which it becomes the duty of his servants to use, in the course of their employment. Thus, where a railroad company requires its servants to

¹⁹³ Reynolds v. Merchants' Woolen Co., 168 Mass. 501, 47 N. E. 406 (1896); Slattey v. Walker, etc. Mfg. Co., 179 Mass. 307, 60 N. E. 782 (1901); Service v. Shoneman, 196 Pa. St. 63, 46 Atl. 292 (1900); Doyle v. White, 9 App. Div. (N. Y.) 521, 41 N. Y. Supp. 628, 75 N. Y. St. 628, aff'g 14 Misc. 417, 35 N. Y. Supp. 760, 70 N. Y. Ct. 417, aff'd, 159 N. Y. 548 (Mem.), 54 N. E. 1090 (1899).

¹⁹⁴ Kaye v. Rob Roy, etc. Co., 51 Hun, 519, 4 N. Y. Supp. 571; Shey v. Wellington, 163 Mass. 364, 40 N. E. 173 (1895); Fuller v. N. Y., etc. Ry. Co., 175 Mass. 424, 56 N. E. 754 (1900); Carlson v. Phoenix Bridge Co., 55 Hun, 485, 8 N. Y. Supp. 634 (1890); Powers v. N. Y., etc. Ry. Co., 60 Hun, 19, 14 N. Y. Supp. 408, aff'd, 128 N. Y. 659, 29 N. E. 148 (1891); Ballard v. Hitchcock Mfg. Co., 51 Hun, 188, 4 N. Y. Supp. 940 (1889); Clyde v. Richmond, etc. Ry. Co., 65 Fed. 482 (1894); Richmond, etc. Ry. Co. v. Elliott, 149 U. S. 266, 37 L. Ed. 728, 13 Sup. Ct. Rep. 837 (1893); Indianapolis, etc. Ry. Co. v. Jones, 9 Heisk (Tenn.) 27 (1871); Roughan v. Boston, etc. Co., 161 Mass. 24, 36 N. E. 461 (1894).

handle cars not belonging to it,¹⁹⁵ or to run trains over a track belonging to another company,¹⁹⁶ it is liable to them

¹⁹⁵ A railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train (Baltimore, etc. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491 [defective brake]; Goodrich v. N. Y. Central R. Co., 116 N. Y. 398, 22 N. E. 397; Spaulding v. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134; Elkins v. Pennsylvania R. Co., 171 Pa. St. 121, 33 Atl. 74; Mason v. Richmond, etc. R. Co., 111 N. C. 482, 16 S. E. 698; Joliet, etc. R. Co. v. Velie, 140 Ill. 59, 26 N. E. 1086; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212; International R. Co. v. Kernan, 78 Tex. 294, 14 S. W. 668; Bomar v. Louisiana, etc. R. Co., 42 La. Ann. 983, 1206, 8 So. 478, 9 So. 244; Mateer v. Missouri Pac. R. Co., 105 Mo. 320, 16 S. W. 839, 15 S. W. 970; Missouri Pac. R. Co. v. Barber, 44 Kans. 612, 24 Pac. 969 [foreign cars used on line]; Atchison, etc. R. Co. v. Penfold, 57 Kans. 148, 45 Pac. 574). See, also, Chicago, etc. R. Co. v. Avery, 109 Ill. 314. So, under Mass. Stat., 1887 (Bowers v. Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508). The rule is the same where, by statute, railroads are compelled to receive and transport cars, of a connecting road, without delay or discrimination, for they are not obliged to move such cars when not provided with the appliances which ordinary care requires (Dooner v. Delaware, etc. Canal Co., 164 Pa. St. 17, 30 Atl. 269; Louisville, etc. R. Co. v. Williams, 95 Ky. 199, 24 S. W. 1). So as to anything near enough to the place of work to make it dangerous (Little Rock, etc. R. Co. v. Cagle, 53 Ark. 347, 14 S. W. 89). But railroad companies have a right to presume that cars delivered to them by connecting lines are in proper condition (Richmond, etc. R. Co. v. Dudley, 90 Va. 304, 18 S. E. 274). And masters are not liable for injuries caused by defects in foreign cars of which they are justifiably ignorant (McMullen v. Carnegie Bros. & Co., 158 Pa. St. 518, 27 Atl. 1043). A railroad company is not responsible to its switchman for injuries caused by defects in a foreign car, if it has warned him of its defects (Atchison, etc. R. Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793). As to defective loading of foreign cars, compare Dewey v. Detroit, etc. R. Co. (Mich) 52 N. W. 942 [company liable]; Mexican Cent. R. Co. v. Shean (Tex.), 18 S. W. 151 [not liable]. Foreign cars (Budge v. Morgan's, etc. Ry., etc. Co., 108 La. 349, 32 So. 535 (1902); New York, etc. Ry. Co. v. Hamlin, 170 Ind. 20, 83 N. E. 343 (1908); Campbell v. Railway Trans. Co., 95 Minn. 375, 104 N. W. 547 (1906); Wills v. Atchison, etc. Ry. Co., 133 Mo. App. 625, 113 S. W. 713 (1909); Galveston, etc. Ry. Co. v. Parish, 93 S. W. (Tex. App.) 682 (1906); Gulf, etc. Ry. Co. v. Sliger, 100 S. W. (Tex. App.) 957 (1907); Missouri, etc. Ry. Co. v. Harris, 45 Tex. App. 542, 101 S. W. 506 (1907); Texas, etc. Ry. Co. v. Conways, 98 S. W. (Tex. App.) 1070 (1907).

¹⁹⁶ Stetler v. Chicago, etc. R. Co., 46 Wis. 497; s. c., again, 49 Wis. 609. Arkadelphia, Lbr. Co. v. Smith, 78 Ark. 505, 95 S. W. 800 (1906); Brady v. Chicago, etc. Ry. Co., 114

for such defects in these things as could be discovered by ordinary care in inspection. But the mere fact of such "foreign" materials being different from those used by the master is not necessarily a "defect," especially in the case of a railroad company receiving from another company cars of a pattern different from its own.¹⁹⁷ If such differences are a cause of danger, servants unfamiliar with them are entitled to warning.¹⁹⁸ But where a servant, without authority, uses the property of a stranger, even in good faith, for the benefit of his master, he does so entirely at his own risk.¹⁹⁹

§ 197. Illustrations of liability for instrumentalities.—Thus, the master has been held liable for injuries suffered by his servants from defects in ropes,²⁰⁰ ladders,²⁰¹ derricks,²⁰² shafts of a

Fed. 100, 92 C. C. A. 48, 57 L. R. A. 712 (1902).

¹⁹⁷ A railroad company is not guilty of negligence in receiving into its yards and passing over its lines cars different from those owned by itself (Kohn v. McNulta, 147 U. S. 238, 13 St. Ct. 298 [unusual "bumpers"]); especially where the receipt of freight cars is compulsory by law (Thomas v. Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980).

¹⁹⁸ Reynolds v. Boston & Me. R. Co., 64 Vt. 66, 24 Atl. 134.

¹⁹⁹ An employee of a telegraph company, who, in climbing a pole belonging to another company, to get wires out of the way, was injured by reason of defects in the pole, could not recover from his employer (Dixon v. Western Union Tel. Co. [C. C.], 68 Fed. 630).

²⁰⁰ Baker v. Allegheny, etc. R. Co., 95 Pa. St. 211 [rotten, though apparently sound, rope on derrick]; Warden v. Old Colony R. Co., 137 Mass. 204 [worn-out rope]; Perry v.

Ricketts, 55 Ill. 234 [insecure rope used for lowering into coal mine]; Lund v. Hersey Lumber Co., 41 Fed. 202. Ropes (Bort v. Quadt, 96 Pac. (Cal. App.) 815 (1908)).

²⁰¹ Burns v. Ocean S. S. Co., 84 Ga. 709, 11 S. E. 493 [missing step]; Denning v. Gould, 157 Mass. 563, 32 N. E. 862 [ladders tied together]; Williams v. Clough, 3 Hurlst. & N. 258; Reber v. Tower, 11 Mo. App. 199; The Truro, 31 Fed. 158. Ladders (Gulf, etc. Ry. Co. v. Adams, 121 S. W. (Tex. App.) 976 (1909); Seredinski v. Balaban, 120 N. Y. Supp. 122, 136 App. Div. 20; Allison v. Steiver, 81 Kans. 713, 106 Pac. 996 (1910); Newby v. Swift & Co., 141 Ill. App. 305 (1908)).

²⁰² Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Holden v. Fitchburg R. Co., 128 Mass. 268 [derrick left standing in dangerous position]. Derricks (Porter v. Amer. Bridge Co., 111 N. Y. Supp. 119, 127 App. Div. 1 (1908); Watson v. New York, etc. Ry. Co., 111 N. Y. Supp. 277,

mine,²⁰³ buildings,²⁰⁴ platforms,²⁰⁵ locomotives,²⁰⁶ cars,²⁰⁷

127 App. Div. 134 (1908); Converse into barge]; Hobbs v. Stauer, 62 Bridge Co. v. Grizzle, 109 S. W. Wis. 108, 22 N. W. 153. A scaffold, (Tenn.) 290 (1908). however, is an *appliance* not a *place*

²⁰³ Mellors v. Shaw, 1 Best & S. of work (Butler v. Townsend, 126 437; Brydon v. Stewart, 2 Macq. H. N. Y. 105, 26 N. E. 1017). The master may, therefore, have it built by L. 30. See, also, Buzzell v. Laconia Mfg. Co., 48 Me. 113; Pantzar v. a contractor of good reput, and is Tilly, etc. Mining Co., 99 N. Y. 368. then not bound to inspect it (Id.) Shafts of mine (Brunson v. South- Or if the making of the scaffold is western Devel. Co., 7 Ind. Ter. 209, part of the servant's work, jointly 104 S. W. 593 (1907); Ala., etc. Co. with others, the master is not liable v. Hammond, 47 So. (Ala.) 248 for their negligent use of materials (1908); E. Smith & Son v. Garri- furnished by him [Kimmer v. Weber, son, 32 Ky. L. Rep. 1278, 108 S. W. 151 N. Y. 417, 45 N. E. 860]. Plat- 293 (1908); Black Diamond, etc. forms (Kelly v. Battle, etc. Co., 116 Co. v. Price, 33 Ky. L. Rep. 334, 108 N. Y. Supp. 736, 122 App. Div. 185 S. W. 345 (1908); Moseley's Admr. (1907); Hoveland v. National v. Black Diamond, etc. Co., 33 Ky. Blower Works, 114 N. W. (Wis.) L. Rep. 110, 109 S. W. 306 (1908); 795 (1908); Donohue v. C. H. Buck & Co., 197 Mass. 550, 83 N. E. 1090 Norton Coal Co. v. Murphy, 108 Va. (1908); Vaisbord v. Nashua Mfg. 528, 62 S. E. 268 (1908). Co., 74 N. H. 470, 69 Atl. 520 (1908); O'Donnell v. John H. Parker Co., 109 N. Y. Supp. 875, 125 App. Div. 475 (1908); Bower v. Holbrook *et al.*, 110 N. Y. Supp. 164, 125 App. Div. 684 (1908); Trally v. Williams, 111 N. Y. Supp. 114, 127 App. Div. 126 (1908); Murch Bros., etc. Co. v. Hayes, 114 S. W. (Ark.) 697 (1908); Schneider v. American Bridge Co., 31 App. (D. C.) 420 (1908); Dunleavy v. Sullivan, 85 N. E. (Mass.) 866 (1908); Cheatham v. Hogan, 50 Wash. 465, 97 Pac. 499 (1908).

²⁰⁴ Thus where, in consequence of the want of proper support to a privy, of which defendant was aware, it gave way, defendant was held liable (Ryan v. Fowler, 24 N. Y. 410). See, also, Horner v. Nicholson, 56 Mo. 220 [careless use of old and defective walls in remodeling building]. Buildings (F. J. McCain Co. v. Kingsley, 126 Ill. App. 165 1906); Amer. Tobacco Co. v. Adams 125 S. W. (Ky.) 1067 (1910).

²⁰⁵ Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Arkerson v. Denison, 117 Mass. 407; Behm v. Armour, 58 Wis. 1, 15 N. W. 806 [elevated platform for shoveling coal

²⁰⁶ Hough v. Texas, etc. R. Co., 100 U. S. 213 [insecurely fastened steam

²⁰⁷ O'Neill v. St. Louis, etc. R. Co., 430 [handle of hand car]; Anderson v. Minnesota, etc. R. Co., 39 3 McCrary, 423 [freight-car]; Palmer Minn. 523, 41 N. W. 104 [same]. v. Denver, etc. R. Co., Id. 635 [caboose car]; Chicago, etc. R. Co. v. The ends of freight cars should be Jackson, 55 Ill. 492; Toledo, etc. R. furnished with such handles, lad- Co. v. Ingraham, 77 Id. 309; Siela ders, or safeguards as are in com- v. Hannibal, etc. R. Co., 82 Mo. mon, ordinary use (Dooner v. Dela-

car-buffers,²⁰⁸ brakes,²⁰⁹ couplings,²¹⁰ railroad tracks,²¹¹

ware, etc. Canal Co., 164 Pa. St. 17, 30 Atl. 269; *Settle v. St. Louis, etc. R. Co.*, 127 Mo. 336, 30 S. W. 125 [bent handle]]. No sand-box on trolley car (*Van Dyke v. Atlantic Ave. R. Co.*, 67 Fed. 296). Where a brakeman was injured by falling from some machinery loaded in an open car over which he had to pass, held, that the jury were justified in finding that the company was negligent in not providing foot-boards over the car (*Hosie v. Chicago, etc. R. Co.*, 75 Ia. 683, 37 N. W. 963). Cars (*Chamberlain v. Southern Ry. Co.*, 48 So. Ala. 703 (1909); *Hegman v. Jersey City, etc. Ry. Co.*, 71 Atl. 1123 (1909); *St. Louis, etc. Ry. Co. v. York*, 92 Ark. 554, 123 S. W. 376 (1909).

whistle on locomotive]; *Stevenson v. Jewett*, 16 Hun, 210 [broken stay-bolts and corroded outside sheet of boiler]; *Crutchfield v. Richmond, etc. R. Co.*, 76 N. C. 320 [defective locomotive and road-bed]. Where a fireman was injured by explosion of a boiler, the dangerous condition of which had often been reported to the master, the master was held liable (*Keegan v. Western R. Co.*, 8 N. Y. 175; s. p., *Cayzer v. Taylor*, 10 Gray, 274; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. 124). In a similar case, employer was not excused by the facts that there was no personal negligence on his part, that proper instructions had been given for thorough repair, and that the fault lay with mechanics directed to make the repairs (*Fuller v. Jewett*, 80 N. Y. 46). Locomotives (*Barschow v. Lake Shore, etc. Ry. Co.*, 147 Mich. 226, 110 N. W. 1057 (1907); *Jones v. Yazoo, etc. Ry. Co.*, 43 So. (Miss.) 813 (1907); *El Paso, etc. Ry. Co. v. Foth*, 100 S. W. (Tex. App.) 171, 105 S. W. (Sup. Ct.) 322 (1907); *Crow v. Northern Pac. Ry. Co.*, 88 Pac. (Wash.) 1022 (1907); *Mo., etc. Ry. Co. v. Wise*, 106 S. W. (Tex. App.) 465, 109 S. W. (Sup. Ct.) 112 (1908); *Bissell v. Greenleaf, etc. Co.*, 152 N. C. 123, 67 S. E. 259 (1910).

²⁰⁸ *Cowles v. Richmond, etc. R. Co.*, 84 N. C. 309; *Ellis v. N. Y., Lake Erie, etc. R. Co.*, 95 N. Y. 546.

²⁰⁹ *Baltimore, etc. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491; *Lilly v. N. Y. Central R. Co.*, 107 N. Y. 566, 14 N. E. 503; *Chicago, etc. R. Co. v. Taylor*, 69 Ill. 461; *Johnson v. Richmond, etc. R. Co.*, 81 N. C. 453; *Henry v. Wabash W. R. Co.*, 109 Mo. 488, 19 S. W. 239; *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372, 43 Pac. 81 [brake-staff bent].

²¹⁰ *Gravelle v. Minneapolis, etc. R. Co.*, 11 Fed. 569; *Toledo, etc. R. Co. v. Fredericks*, 71 Ill. 294. Defective

²¹¹ *Fredenburg v. Northern Central R. Co.*, 114 N. Y. 582, 21 N. E. 1049 [trench in track where cars were coupled in dark]; *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27 [tracks too close to each other]; *Killian v. Augusta, etc. R. Co.*, 78 Ga. 749, 3 S. E. 621 [track]; *Brooke v. Chicago, etc. R. Co.*, 81 Ia. 504, 47 N. W. 74 [defective track];

drawheads or drawbars (*Luco v. N. Y. Central R. Co.*, 87 Hun, 612, 34 N. Y. Supp. 277; *Bowers v. Connecticut River R. Co.*, 162 Mass. 312, 38 N. E. 508; *Rodney v. St. Louis, etc. R. Co.*, 127 Mo. 676, 28 S. W. 887). Where a railroad uses cars with drawheads of different heights, it is a question for the jury whether, in failing to furnish crooked links suitable to the coupling of such cars, it was in fault (*Bennett v. Greenwich, etc. R. Co.*, 84 Hun, 216, 32 N. Y. Supp. 457; s. p., *Denver, etc. R. Co. v. Simpson*, 16 Colo. 55, 26 Pac. 339). Couplings (*United States v. Nevada, etc. Ry. Co.*, 167 Fed. 695 (1908); *Siegel v. New York, etc. Ry. Co.*, 178 Fed. 873 (1910)).

Knapp v. Sioux City R. Co., 65 Ia. 91; *Meloy v. Chicago, etc. R. Co.*, 77 Id. 743, 42 N. W. 563 [civil engineer recovered for defects in new track he was laying]; *St. Louis, etc. R. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *Swadley v. Missouri Pac. R. Co.*, 118 Mo. 268, 24 S. W. 140; *Burdick v. Missouri Pac. R. Co.*, 123 Mo. 221, 27 S. W. 453 [road-bed]; *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598 [ditch across track]; s. p., *Gulf, etc. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513; *Madden v. Minneapolis, etc. R. Co.*, 32 Minn. 303, 20 N. W. 317 [defective road-bed]; *Brickman v. South Car. R. Co.*, 8 S. C. 173 [defective trestle over culvert]. So as to lack of drains to carry off water (*Stoher v. St. Louis, etc. R. Co.*, 105 Mo., 192, 16 S. W. 591 [track sinking under flood]; *Balhoff v. Mich. Cent. R. Co.*, 106 Mich. 606, 65 N. W. 592 [ice on track]; *McPherson v. St. Louis, etc. R. Co.*, 97 Mo. 253, 10 S. W. 846). Where a railroad company erects a cattle guard at a point which its employees are constantly compelled to cross in switching cars, the guard must be made reasonably safe for that purpose; it is not enough that it be made sufficient and safe to turn stock (*Ford v. Chicago, etc. R. Co.*, 91 Ia. 179, 59 N. W. 5). A railroad company owes no duty to a brakeman to ballast storage or switch tracks so as to prevent his foot being caught between the ties (*Finnell v. Delaware, etc. R. Co.*, 129 N. Y. 669, 29 N. E. 825; s. p., *Rosenbaum v. St. Paul & D. R. Co.*, 38 Minn. 173, 36 N. W. 447). Companies have been held responsible to servants for tracks insecurely fastened (*Suter v. Park, etc. Lumber Co.*, 90 Wis. 118, 62 N. W. 927); railroad switches left unfastened without lock (*Birmingham R. Co. v. Allen*, 99 Ala. 359, 13 So. 8); sand washed on the tracks by heavy rain, an hour before the accident (*Kansas City, etc. R. Co. v. Kirksey*, 60 Fed. 999, 9 C. C. A. 321); old accumulation of snow on tracks, provided injury was caused thereby (see *McClarney v. Chicago, etc. R. Co.*, 80 Wis. 277, 49 N. W. 963); but compare, as to similar accumulations of coal or coke, *Cincinnati, etc. R. Co. v. Mealer*, 6 U. S. App. 86, 50 Fed. 725, 1 C. C. A. 633. Whether a railroad company, in removing snow from the track, by piling it within a few feet of the track, acted with ordinary care for the safety of employees, is a question for the jury (*Lawson v. Truesdale*, 60 Minn. 410, 62 N. W. 546). For insufficiency of evidence in an icy track case, see *Orttel v. Chicago, etc. R. Co.*, 89 Wis. 127, 61 N. W. 289; *Texas, etc. R. Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463 [defective spring in switch].

machinery,²¹² and elevators,²¹³ of which the master was

The court properly charged that, if defendant's roadbed and track were not in a reasonably safe condition for the passage of trains at the place of the accident on account of rotten ties, or failure to properly ballast the roadbed, or on account of the inside rail of the curve being higher than the outside rail; and defendant knew, or by the exercise of ordinary care might have known, of the condition of the ties, roadbed and track before the accident; and if defendant provided for use in the train a caboose with a defective brake, and placed in the train a car so heavily loaded that it would not adjust itself to the track in passing over the same; and by reason of any or all of these conditions, if they were found to exist, plaintiff was injured without his fault, defendant was liable (*Gorham v. Kansas City, etc. R. Co.*, 113 Mo. 408, 20 S. W. 1060). Engineer does not assume risks caused by faulty construction and maintenance of the roadbed and track, even though liability to accidents thereby was increased because the road was built in proximity to mountain ranges (*Union Pac. R. Co. v. O'Brien*, 4 U. S. App. 221, 1 C. C. A. 354, 49 Fed. 538, *aff'd*, 161 U. S. 451). Railroad tracks and roadbeds (*Bookman v. Shipper, etc. Co.*, 152 Fed. 686, 81 C. C. A. 612 (1907); *Tillson v. Maine Cent. Ry. Co.*, 102 Me. 463, 67 Atl. 407 (1907); *Cincinnati, etc. Ry. Co. v. Zachary's Admr.*, 32 Ky. L. Rep. 678, 106 S. W. 842 (1908); *Hach v. St. Louis, etc. Ry. Co.*, 208 Miss. 581, 106 S. W. 525 (1907); *Southern Ry. Co. v. Newton's Admr.*, 60 S. E. (Va.) 625 (1908); *St. Louis, etc. Ry. Co. v. Mangan*, 112 S. W. (Ark.) 168 (1908); *Barrow v. B. R. Lewis Lbr. Co.*, 14 Idaho,

698, 95 Pac. 682 (1908); *Chicago, etc. Ry. Co. v. Dinius*, 170 Ind. 222, 84 N. E. 9 (1908); *Gordan v. Chicago, etc. Ry. Co.*, 123 N. W. (Ia.) 762 (1909).

²¹² *Wilson v. Willimantic Co.*, 50 Conn. 433 [shafting]; *Atchison, etc. R. Co. v. McKee*, 37 Kans. 592, 15 Pac. 484; *O'Donnell v. East River Gas Co.*, 91 Hun, 184, 36 N. Y. Supp. 288 [pipe not cleaned]; *Quaid v. Cornwall*, 13 Bush, 601 [defective machinery in factory, putting out employee's eye]; *McGatriek v. Wason*, 4 Ohio St. 566; *Schall v. Cole*, 107 Pa. St. 1 [wooden rim attached to iron pulley, in order to increase velocity of planing machine]. Master is not responsible for an injury to an employee arising from defects in machinery, if the proximate cause of the injury is carelessness of the engineer in managing the defective machine; the engineer and injured employee being fellow servants (*Philadelphia Iron, etc. Co. v. Davis*, 111 Pa. St. 397, 4 Atl. 513). Machinery (*Hertel v. Safety Folding Bed Co.*, 149 Mich. 223, 112 N. W. 712 (1907); *Kane v. Babcock*, 67 Atl. (N. J.) 1014 (1907); *Whitworth v. South, etc. Co.*, 121 La. 894, 46 So. 912 (1908); *St. Jean v. Lip-pitt Wollen Co.*, 69 Atl. (R. I.) 604 (1908); *P. E. Schow & Bros. v. McCloskey*, 109 S. W. (Tex. App.) 386, 113 S. W. (Sup. Ct.) 739 (1908).

²¹³ *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Corcoran v. Holbrook*, 59 N. Y. 517; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424; *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. 367; *Thompson v. Johnston Co.*, 86 Wis. 576, 57 N. W. 298. Elevators (*Gobeil v. Ponemah Mills*, 69 Atl. (R. I.) 684 (1908); *Kentucky Wagon Mfg. Co. v. Duganics*, 113

aware or which he could have ascertained by careful inspection, even though he did not know of them. And the master has been absolved from liability, where the only ground of complaint was that appliances were furnished which required special care and skill for their use, as, for example, cars with "double deadwoods," though received on a line where they were not already in use.²¹⁴ Until recently, the use of unblocked frogs was not regarded as sufficient evidence of negligence to go to a jury without affirmative proof that blocking was necessary to safety and had come into general use among careful employers,²¹⁵ and that blocking would not increase the danger to servants, rather than diminish it.²¹⁶ Whether this rule is fully maintained or not, in view of the widely extended use of blocked frogs, yet the use of such frogs cannot be required, where the evidence leaves these questions in doubt.²¹⁷ Masters have been held responsible for allowing dangerous accumulations of ashes, snow or ice on places where servants had to work.²¹⁸

S. W. (Ky.) 128 (1908); *Cunningham v. Frey*, 225 Pa. 456, 74 Atl. 345 (1909).

²¹⁴ *Kohn v. McNulta*, 147 U. S. 238, 13 S. Ct. 298; *Northern Pac. R. Co. v. Blake*, 11 C. C. A. 93, 63 Fed. 45; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212; *Baldwin v. Chicago, etc. R. Co.*, 50 Ia. 680.

²¹⁵ *McGinnis v. Canada Br. Co.*, 49 Mich. 466, 13 N. W. 819; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401; *Chicago, etc. R. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55 [three judges dissenting].

²¹⁶ *McGinnis v. Canada Br. Co.*, 23 N. Y. Supp. 420. *supra*. Unblocked switches, if negligent, is so obvious a defect that employee whose work requires him to use the track cannot recover for injury so caused, in the absence of statutory requirement (*Choctaw, etc. Ry. Co. v. Thompson*, 100 S. W. (Ark.) 83 (1907); *York v. St. Louis, etc. Ry. Co.*, 86 Ark. 244, 110 S. W. 803 (1908); *Donegan v. Ry. Co.*, 165 Fed. 869, 91 C. C. A. 555 (1909); *Clegg v. Ry. Co.*, 10 Ont. 709.

²¹⁷ *Southern Pac. R. Co. v. Seley*, 152 U. S. 145, 14 S. Ct. 530, rev'g *Seley v. Southern Pac. R. Co.*, 6 Utah, 319, 23 Pac. 751; s. p., *Spencer v. N. Y. Central R. Co.*, 67 Hun, 196, 22 N. Y. Supp. 100; but see *contra*, *Lake Erie, etc. R. Co. v. Craig*, 19 C. C. A. 631, 73 Fed. 642; *Meek v. N. Y. Central R. Co.*, 69 Hun, 488, 23 N. Y. Supp. 420.

²¹⁸ Thus, servants have been allowed to recover for corrosion of iron roof from accumulation of ashes and dirt from defendant's furnace (*Engstrom v. Ashland Iron Co.*, 87 Wis. 166, 58 N. W. 241); fall of a shed, from accumulation of snow,

§ 198. **Low bridges.** — Owing to the hasty and careless manner in which most railroads in America are originally constructed, bridges are very generally built over railroads at as little height as can possibly be managed, in order to save the cost of lowering the track or of gradually raising the highway at each end of the bridge. Still worse, the roofs of bridges are made low to save a few dollars, in timber or metal. These bridges remain unaltered, while the height of freight cars is steadily increased, in order to make each car available for more freight. For the sake of avoiding the expense of a better brake system, the old method of brakes on the top of the cars is continued; and a small number of brakemen are employed upon such trains, who are necessarily required to be upon the roofs of the cars while in motion. Thus it has come to be an ordinary occurrence, even upon some of the best railroads, for bridges, over the track, or the covers of bridges, to be so low that no freight brakeman can pass under them, while in the discharge of his regular duties, without imminent peril to his life. He must stoop or be killed. The maintenance of such bridges, or similar overhead obstructions, has been repeatedly adjudged to be ample ground for a verdict of negligence,²¹⁹ and in

etc. (*Johnson v. First Nat. Bank*, 79 Wis. 414, 48 N. W. 712); an icy path (*Murray v. Knight*, 156 Mass. 518, 31 N. E. 646); icy stairs (*Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366).

²¹⁹ A railroad company which knowingly maintains a bridge over the tracks so low that brakemen cannot, with reasonable safety, perform their duty on top of the cars, is liable to a brakeman who, having no knowledge of its dangerous character, is struck by the bridge while in the performance of such duty (*Baltimore, etc. R. Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Louisville, etc. R. Co. v. Wright*, 115 Ind. 378, 16 N. E.

145, 17 N. E. 584; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15 [passing at night]; *Chicago, etc. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381). The maintenance of a bridge over a railroad track so low as to make it unsafe for brakemen is *prima facie* negligence (*Atchison, etc. R. Co. v. Rowan*, 55 Kans. 270, 39 Pac. 1010; *St. Louis, etc. R. Co. v. Irwin*, 37 Kans. 701, 16 Pac. 146). The law only requires that such bridges shall be of such height that the employees can perform their duties with reasonable safety (*Cleveland, etc. R. Co. v. Walter*, 147 Ill. 60, 35 N. E. 529; *Texas, etc. R. Co. v. Moore*, 8 Tex. Civ. App. 289, 27

some cases, gross negligence,²²⁰ although in two courts it has been held that their existence may be justified by public convenience for highways and other excuses, which all resolve themselves into one — *proper bridges might cost too much!*²²¹ The maintenance of bridges or roads less than seven feet clear of the cars, on railroads operated by brakemen who are peremptorily required to walk along the roofs of those cars, is in itself a crime, and ought to be punished as such.²²² It is not an act of mere negligence; it is a willful wrong. We do not overlook the difficulties arising from the necessity for numerous bridges and the great cost of making them as high as they should be. But these difficulties form no excuse for such reckless disregard for human life. The bridges or roofs should be raised; or the cars should be lowered; or a new system of brakes should be introduced. Of course, these criticisms apply only to cases in which railroad servants are required by their duties to be on the roofs of moving cars. Where no such duty exists, a railroad may, with perfect propriety, be covered with bridges not more than a few inches above the cars.²²³

S. W. 962). Louisville, etc. Ry. Co. v. Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; Cleveland, etc. Ry. Co. v. Walter, 147 Ill. 60, 35 N. E. 529, aff'g 45 Ill. App. 642 (1893); Hardy v. Boston, etc. Ry. Co., 63 N. H. 523, 41 Atl. 179 (1897); Gulf, etc. Ry. Co. v. Knox, 25 Tex. App. 450, 61 S. W. 969 (1901); Baltimore, etc. Ry. Co. v. McOsker, 44 Ind. App. 255, 88 N. E. 950 (1909); Chesapeake, etc. Ry. Co. v. Rowsey's Admr., 108 Va. 632, 62 S. E. 363 (1908); Daily v. New York, etc. Ry. Co., 167 Fed. 592, (1909); West v. Chicago, etc. Ry. Co., 179 Fed. 801, 103 C. C. A. 293 (1910).

²²⁰ Cincinnati, etc. R. Co. v. Sampson, 97 Ky. 65, 30 S. W. 12.

Whether a railway company which persists in maintaining for many years a bridge over its tracks so low as to be dangerous to brakemen standing on top of cars, is guilty of gross negligence, is a question for the jury (Atchison, etc. R. Co. v. Love, 57 Kans. 36, 45 Pac. 59). *Contra*, Louisville, etc. R. Co. v. Banks, 104 Ala. 508, 16 So. 547 [not willful or wanton negligence]; Louisville, etc. R. Co. v. Hall, 87 Ala. 708, 6 So. 277.

²²¹ Louisville, etc. R. Co. v. Hall, 87 Ala. 708, 6 So. 277; Baylor v. Delaware, etc. R. Co., 40 N. J. Law, 23. ²²² In Canada, the erection or maintenance of such bridges is strictly prohibited (Railway Consolidation Act, 1879).

²²³ In Gibson v. Erie R. Co., 63

§ 198a. **Low bridges; contributory fault.** — The main difficulty in low bridge cases arises on the questions of assumed risk and contributory negligence. All agree that a servant who, with full knowledge of the existence of such an obstruction, refuses to stoop, or who, knowing that he is so near to it that he ought to look out for it, recklessly takes his chances without looking, is guilty of contributory negligence, barring his recovery.²²⁴ But in Pennsylvania, Vermont and Iowa, the courts have held that, by remaining in the service, with knowledge of the existence of such bridges, servants assume all the risks thereof;²²⁵ while in Maryland, Virginia, Alabama, Missouri, and the lower courts of New Jersey, it has been held that a servant, who knows in a general way of the existence of such dangerous bridges, cannot recover for injuries suffered from collision with them, when necessarily exposed thereto by the discharge of his duties, and even when acting in such haste that he did not have time to make his usual calculation of the precise number of

N. Y. 449, rev'g s. c., 5 Hun, 31, the injured party was a conductor, whose duties did not call him to expose himself to such risks; at all events, the court so assumed. Moreover, the obstruction was not a bridge, but a station roof projecting. So in Pittsburgh, etc. R. Co. v. Sentmeyer, 92 Pt. St. 276, the injured brakeman was not called by any duty to be on the roof of the car. Where the lessor railroad company constructs its bridges of sufficient height to permit the operation of ordinary cars through them, but the lessee company receives into its train a car of unusual height, failing to give notice thereof to its employees, and one of them is killed on that account, the lessor is not liable (Texas, etc. R. Co. v. Moore [Tex. Civ. App.], 27 S. W. 962).

²²⁴ This was the test applied in Cin-

cinnati, etc. R. Co. v. Sampson, 65 Ky. 97, 30 S. W. 12, where the company was held liable; and Derby v. Kentucky R. Co. [Ky.], 4 S. W. 303, where it was held not liable, because the bridges were high enough to admit all its own cars safely, and the injured person knowingly took a higher foreign car in the train.

²²⁵ In Carbine v. Bennington, etc. R. Co., 61 Vt. 348, 17 Atl. 491; Brossman v. Lehigh Val. R. Co., 113 Pa. St. 490, 6 Atl. 226; and Wells v. Burlington, etc. R. Co., 56 Ia. 520, 9 N. W. 364, it was held that brakemen, by simply continuing in service, with knowledge of such bridges, and without complaint, assumed all the risks thereof. To same effect, Goff v. Norfolk, etc. R. Co., 36 Fed. 299.

inches which stood between him and death.²²⁶ Decisions more shocking to the moral sense are scarcely conceivable.²²⁷ In other cases contributory negligence has been clearly proved.²²⁸

§ 199. Low bridge cases limited. — In New York, Georgia, Indiana, Illinois, Kentucky, Kansas and some of the Federal courts, it is held that a railway servant does not assume all risks from low bridges by simply continuing in service after notice of their existence, but may be excused by a jury for forgetting the existence or proximity of a low bridge, even in the daytime and much

²²⁶ *Baylor v. Delaware, etc. R. Co.*, 40 N. J. Law, 23; *Baltimore, etc. R. Co. v. Strickler*, 51 Md. 47; *Rains v. St. Louis, etc. R. Co.*, 71 Mo. 164; *Devitt v. Pacific, etc. R. Co.*, 50 Id. 303; *Clark v. Richmond, etc. R. Co.*, 78 Va. 709; reaffirmed in particularly bad case (*Chesapeake, etc. R. Co. v. Hafner*, 90 Va. 621, 19 S. E. 166), where the brakeman *did* stoop, but mistakenly believed that he had stooped long enough, and raised his head too soon. *Louisville, etc. Ry. Co. v. Cooley's Admr.*, 20 Ky. L. Rep. 1372, 49 S. W. 339 (1899), (negligence to maintain a bridge so low that a brakeman standing upon the top of the car cannot pass under in safety); *Louisville, etc. Ry. Co. v. Tucker*, 23 Ky. L. Rep. 1926, 65 S. W. 453 (1901); *Gusman v. Caffery, etc. Ry. Co.*, 49 La. Ann. 1264, 22 So. 742 (1897); *Gulf, etc. Ry. Co. v. Knox*, 25 Tex. App. 450, 61 S. W. 969 (1901), (low bridge, not protected by tell-tales or whip lashes, is negligence); *Whitehead v. Wisconsin, etc. Ry. Co.*, 103 Minn. 13, 114 N. W. 254, 114 N. W. 467 (1907); *Harrison v. New York, etc. Ry. Co.*, 127 App. Div. 804, 111 N. Y. Supp. 812, 195 N. Y. 86, 87 N. E. 802 (1909); *West v. Chicago,*

etc. Ry. Co., 179 Fed. 801, 103 C. A. 293 (1910), (it is negligence to maintain a bridge so low that it could not be avoided by reasonable care); *Koller v. Chicago, etc. Ry. Co.*, 129 N. W. (Minn.) 220 (1911). Railroad company is not liable if bridge is safe when servant is careful (*Schlaff v. Louisville, etc. Ry. Co.*, 100 Ala. 377, 14 So. 105 (1893)).
²²⁷ In *Baltimore, etc. R. Co. v. Rowan* (104 Ind. 88, 3 N. E. 627), the severe language of Mr. Beach (Contr. Neg., § 363), in condemnation of these rulings, is quoted with approval.

²²⁸ The center of the bridge was high enough to allow deceased to stand in the center of a car or at the brakes, but it sloped on the sides, so as to be but two or three feet above the outer edges of the car. Deceased had passed under the bridge almost daily for four months, and the accident happened at mid-day. His proper place was at the brakes or on the center of the car, but at the time of the accident deceased was sitting on the edge of the car. Held, that he was guilty of contributory negligence (*Schlaff v. Louisville, etc. R. Co.*, 100 Ala. 377, 14 So. 105).

more at night.²²⁹ It is conceded in Alabama that a bridge so low that brakemen could not escape danger by stooping is a nuisance,²³⁰ and that different rules apply. It is also conceded in New Jersey, that contributory negligence is not to be imputed, as matter of law, where a mere beam or bar of a bridge proves to be lower than a brakeman has reason to expect.²³¹ Statutes in some States (*e. g.*, New York, Massachusetts and Georgia) require "tell-tales" to be placed as warnings of low bridges.²³² Brakemen have a right to assume that such "tell-tales" will be placed and kept in such order as to give timely warning, and are not in fault for relying thereon.²³³ But if they know that a particular tell-tale

²²⁹ A brakeman on top of a moving train, with his face towards the rear, intent on the discharge of his duty at a place where there is danger that the train may break in two, is not, as matter of law, chargeable with contributory negligence because he fails to take notice that the train is approaching a low bridge (*Wallace v. Central Vermont R. Co.*, 138 N. Y. 302, 33 N. E. 1069; *rev'g s. c.*, 63 Hun, 632, and overruling all the cases usually cited from New York). In *Williams v. Delaware, etc. R. Co.* (116 N. Y. 628, 22 N. E. 1117), the plaintiff proved his own negligence and *gave no excuse for it*. Held, by a bare majority, nonsuit proper. Doubt in *Wallace v. Central Vt. R. Co.*, *supra*. The question of contributory negligence is for the jury (*Stirk v. Central Railroad Co.*, 79 Ga. 495, 5 S. E. 105; *Atchison, etc. R. Co. v. Rowan*, 55 Kans. 270, 39 Pac. 1010; *Northern Pac. R. Co. v. Mortenson*, 63 Fed. 530, 11 C. C. A. 335; *Chicago, etc. R. Co. v. Matthews*, 48 Ill. App. 361 [dark night; no warning]). The law does not require of a brakeman that he should absolutely know all of the defects of

construction, and all the obstructions there may be along the line of the railway, nor that he should neglect the performance of his duties as a brakeman to be on the constant lookout for such obstructions and defects, which may be dangerous (*Chicago, etc. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381).

²³⁰ *Louisville, etc. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863. So held, *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Chicago, etc. R. Co. v. Gregory*, 58 Ill. 272; *Chicago, etc. R. Co. v. Russell*, 91 Ill. 298.

²³¹ *N. Y., Susquehanna, etc. R. Co. v. Marion*, 57 N. J. Law, 94, 30 Atl. 316.

²³² *N. Y.*, Stat. 1884, ch. 439, § 2. A railroad company whose tracks cross those of another company by a low bridge is not required to maintain tell-tales to warn trainmen on the under road of the danger (*Neff v. N. Y. Central R. Co.*, 80 Hun, 394, 30 N. Y. Supp. 323).

²³³ The fact that a tell-tale is so near a bridge that a brakeman, facing the rear of the train, after pass-

is out of order they must use due care to watch for the bridge.²³⁴

§ 200. [Omitted.]

§ 201. Other dangerous projections. — The projection of buildings,²³⁵ posts,²³⁶ cattle-guards,²³⁷ tell-tales,²³⁸ and the like, over a railroad track, or even near it,²³⁹ so as to

ing under the tell-tale without being touched thereby, could not see it in time to avoid the injury, is evidence of negligence sufficient to go to the jury, since the statute requires suitable warning signals (Wallace v. Central Vermont R. Co., 138 N. Y. 302, 33 N. E. 1060; Maher v. Boston & A. R. Co., 158 Mass. 36, 32 N. E. 950 [tell-tales missing]; Savannah, etc. R. Co. v. Day, 91 Ga. 676, 17 S. E. 959 [tell-tale out of order; broad daylight]).

²³⁴ Fitzgerald v. N. Y. Central R. Co., 59 Hun, 125, 12 N. Y. Supp. 932. The principle was, however, wrongly applied in that case.

²³⁵ Flanders v. Chicago, etc. R. Co., 51 Minn. 193, 53 N. W. 544 [section house].

²³⁶ Texas, etc. R. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942 [scaffold]; Nance v. Newport News, etc. R. Co. (Ky.), 17 S. W. 570 [projecting beam]; Ft. Worth, etc. R. Co. v. Graves (Tex. Civ. App.), 21 S. W. 606 [supports of bridge]; Johnson v. St. Paul, etc. R. Co., 43 Minn. 53, 44 N. W. 884 [signal post four feet from cars]. *Contra*, Lovejoy v. Boston, etc. R. Co., 125 Mass. 79; wrongly decided. The distance between a signal post and the ladder on the outside of a car was but one foot. A brakeman on his first trip, did not know that there were erections so near, and was not informed of the danger. They were, in fact,

exceptional. Held, that the danger was not obviously incident to the employment (Scanlon v. Boston & A. R. Co., 147 Mass. 484, 18 N. E. 209). In Hefrich v. Ogden R. Co. (7 Utah, 186, 26 Pac. 295), the plaintiff's intestate was clearly negligent.

²³⁷ Murphy v. Wabash R. Co., 115 Mo. 111, 21 S. W. 862 [danger unknown]. The fact that all the company's cattle-guard fences are constructed in the same way will not warrant the court in disturbing the jury's findings (Id.). Where a brake was so defective as to require reaching beyond the line of the cars, and a brakeman was struck, while so doing, by a cattle-guard of which he had no notice, he may recover, though he had assumed the risk as to the brakes (Missouri Pac. R. Co. v. Somers, 78 Tex. 439, 14 S. W. 779).

²³⁸ A "tell-tale," dangerous for brakemen upon cars of a great height, which have come into use for special purposes, is not a risk incident to a brakeman's employment (Darling v. N. Y., Providence, etc. R. Co., 17 R. I. 708, 24 Atl. 462).

²³⁹ Where it is customary for brakemen in the performance of their duties to ascend and descend cars by side ladders, while the train is in motion, the company is bound to maintain its roadway free from projections which endanger them while so doing (Georgia Pac. R. Co. v.

be dangerous to servants in the performance of their duties, is usually deemed negligence;^{239a} and servants

Davis, 92 Ala. 300, 9 So. 252). Where the jury found that "the shed was so close to the track as to render the place unnecessarily dangerous to employees in performing their duties at that place," company held liable (*Kelleher v. Milwaukee, etc. R. Co.*, 80 Wis. 584, 50 N. W. 942). Company liable for a switch-stand so near its track that an arm projecting therefrom was only seven and one-half inches from the gangway step of a passing engine; it being shown that it stood considerably closer to the track than other switch-stands in the same yard, and was never used (*Colf v. Chicago, etc. R. Co.*, 87 Wis. 273, 58 N. W. 408).

^{239a} *Choctaw, etc. Ry. Co. v. McDade*, 112 Fed. 888, 50 C. C. A. 591, 191 U. S. 64, 48 L. Ed. 96 (1903), (iron spout to water tank in unnecessarily dangerous proximity to track); *Kenney v. Meddough*, 118 Fed. 209, 55 C. C. A. 115 (1902), (no duty owing to fireman to place light on mail crane); *Wood v. Louisville, etc. Ry. Co.*, 88 Fed. 44 (1898), (company is liable for placing cattle-guard so near the track that a switchman in using the ladder on the side of the car will come in contact with it); *Denver, etc. Ry. Co. v. Burchard*, 35 Colo. 539, 86 Pac. 749 (1906), (placing mail crane within 10 inches of passing cab of locomotive is not negligence *per se*); *Chicago, etc. Ry. Co. v. Stevens*, 91 Ill. App. 171, 189 Ill. 226, 59 N. E. 577 (1901), (dangerous proximity of attachment to coal chute); *Illinois Term. Ry. Co. v. Thompson*, 210 Ill. 226, 71 N. E. 328, aff'g, 112 Ill. App. 463 (1904), (telegraph pole in yard between switch tracks); South-

side Elev. Co. v. Nesvig, 214 Ill. 463, 73 N. E. 749 (1905); *Mobile, etc. Ry. Co. v. Vallowe*, 124 Ill. 124, 73 N. E. 416, aff'g, 115 Ill. App. 621 (1905), (post to support coal chute necessarily placed dangerously near the track not negligence as to one duly warned); *Mallott v. Laufman*, 89 Ill. App. 178 (1900), (permitting a mail crane to remain out of order and sag dangerously near passing train); *New York, etc. Ry. Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651 (1896), (maintenance of such structures is not negligence as to employees, unless dangerous to those using ordinary care); *Keist v. Chicago, etc. Ry. Co.*, 110 Ia. 32, 81 N. W. 181 (1899), (negligence to maintain stock pens so near passing cars as to endanger safety of employees using ladders at the side of the cars); *Southern Kans. Ry. Co. v. Michaels*, 57 Kans. 474, 46 Pac. 938 (1896), (switch-stand); *Withee v. Somerset Trac. Co.*, 98 Me. 61, 56 Atl. 204 (1903), (inclining trolley supporting pole, nearer than the average, not before noticed by street car conductor injured thereby while using the running board in collecting fares); *Pickesville, etc. Ry. Co. v. State*, 88 Md. 563, 42 Atl. 214 (1898), (misplaced wire pole); *Fearns v. New York, etc. Ry. Co.*, 186 Mass. 529, 72 N. E. 68 (1904), (if erected for proper purposes, at reasonable distance from the track and allowed to become unsafe by neglect, the company is not liable for injuries thus caused); *Benthin v. New York, etc. Ry. Co.*, 24 App. Div. 303, 48 N. Y. Supp. 503 (1897), (allowing telegraph pole to be placed in unnecessarily dangerous proxim-

are not, as matter of law, necessarily charged with the assumption of all risks arising therefrom, merely because they have notice thereof.^{239b} The question, within the usual limits, is for the jury. There is a marked difference between obstructions *not removed* by the master and those *made* by him.²⁴⁰ And a clear distinction is to be drawn between bridges and similar structures over the main track, placed low for the sake of mere economy, and coverings over side tracks, made low for some useful purpose, which could not be answered by any less dan-

ity to track); Galveston, etc. Ry. Co. (1908); Dailey v. New York, etc. Ry. v. Brown, 33 Tex. App. 589, 77 S. Co., 167 Fed. 592 (1909); Wyckoff v. W. 832 (1903), (maintaining post in unnecessarily dangerous proximity to track); Morrisett v. Canadian, etc. Ry. Co., 74 Vt. 232, 52 Atl. 520 (1902), (switch so near the track as to strike one using ladder on the cars); Chesapeake, etc. Ry. Co. v. Cowley, 166 Fed. 283, 92 C. C. A. 201 (1908), (maintaining a structure likely to strike one riding on top of the cars is negligence *per se*); Baltimore, etc. Ry. Co. v. Dickey, 87 N. E. (Ind. App.) 1047 (1909), (maintaining fences, cattle guards, etc., at station grounds where there are side tracks unnecessarily increasing the danger to trainmen); Harrison v. New York, etc. Ry. Co., 127 App. Div. 804, 111 N. Y. Supp. 812, modified, 195 N. Y. 86, 87 N. E. 802 (1909), (low bridges are not made illegal by Act of 1884, page 515, chapter 439); Smith v. Spokane, etc. Ry. Co., 52 Wash. 350, 100 Pac. 747 (1909); Northern, etc. Ry. Co. v. Mansell, 138 Ala. 548, 36 So. 459 (1903); Doyle v. Toledo, etc. Ry. Co., 127 Mich. 94, 86 N. W. 524, 89 Am. L. Rep. 456, 54 L. R. A. 461 (1901); Bradley v. Central Vermont Ry. Co., 196 Mass. 360, 82 N. E. 44 (1907); Clay v. Chicago, etc. Ry. Co., 104 Minn. 1, 115 N. W. 949 (1908); Dailey v. New York, etc. Ry. Co., 167 Fed. 592 (1909); Wyckoff v. Pajaro Valley, etc. Ry. Co., 103 Pac. (Cal. App.) 1100 (1909); Fort Worth, etc. Ry. Co. v. Anderson, 118 S. W. (Tex. App.) 1113 (1909); Louisville, etc. Ry. Co. v. Hahn's Admr., 122 S. W. (Ky.) 142 (1909); New York, etc. Ry. Co. v. Dailey, 179 Fed. 289, 102 C. C. A. 660 (1910); Heilig v. Southern Ry. Co., 152 N. C. 469, 67 S. E. 1009 (1910); Siglin v. Chicago, etc. Ry. Co., 130 N. W. (Ia.) 1057 (1911).

^{239b} Where an experienced employee has knowledge or notice of such obstructions he has been very generally held to have assumed the risk (Nugent v. Brooklyn, etc. Ry. Co., 64 App. Div. 351, 72 N. Y. Supp. 67; Ladd v. Brockton St. Ry. Co., 180 Mass. 454, 62 N. E. 730 (1901); McLeod v. New York, etc. Ry. Co., 191 Mass. 389, 77 N. E. 715 (1906); Phelps v. Chicago, etc. Ry. Co., 122 Mich. 171, 81 N. W. 101 (1899)).

²⁴⁰ Where a brakeman knows the danger arising from a tree projecting over the track, which though dangerous, can be avoided by ordinary care, if he continues in the employment without protest or promise of removal, he assumes the risk (Woodell v. West Va. Imp. Co., 38 W. Va. 23, 17 S. E. 386).

gerous structure. Thus the spout of a grain elevator or a covering to protect grain from rain while being poured into the cars would stand on a different footing, if on a side track, where the train would naturally not move at full speed, and where the exceptional character of the work would notify brakemen of peculiar dangers.²⁴¹ And so does every structure, *necessarily* near the track or projecting over it, such as a crane.²⁴²

§ 202. Master's duty to prescribe and enforce rules.* —

A master who employs servants in a dangerous and complicated business is personally bound to prescribe rules sufficient for its orderly and safe management,²⁴³ and to

²⁴¹ So held, as to a brakeman injured by failing to "think" of an awning used to protect grain, *necessarily* low, and projecting from the side of an elevator, over a side track, on which he was engaged (Clark v. St. Paul, etc. R. Co., 28 Minn. 128).

²⁴² Sisco v. Lehigh, etc. R. Co., 145 N. Y. 296, 39 N. E. 958; Wolf v. East Tennessee, etc. R. Co., 88 Ga. 210, 14 S. E. 199; s. p., Fisk v. Fitchburg R. Co., 158 Mass. 238, 33 N. E. 510 [awning]. In Scidmore v. Milwaukee, etc. R. Co., 89 Wis. 188, 61 N. W. 765, a brakeman injured by a post *necessarily* near track known to him, was not allowed to recover.

*See 43 L. R. A. 306.

²⁴³ Slater v. Jewett, 85 N. Y. 61; Besel v. N. Y. Central R. Co., 70 Id. 171; Sheehan v. Same, 91 Id. 332; Dana v. Same, 92 Id. 639; Luebke v. Chicago, etc. R. Co., 59 Wis. 127; Ford v. Lake Shore, etc. R. Co., 124 N. Y. 493, 26 N. E. 1101 [no rule requiring lumber loaded on flat cars to be secured]; Irvine v. Flint, etc. R. Co., 89 Mich. 416, 50 N. W. 1008 [loading cars]; Byrnes v. N. Y., Lake Erie, etc. R. Co., 71 Hun, 209, 24 N. Y. Supp. 517 [loaded cars];

Lake Shore & M. S. Ry. Co. v. Murphy, 50 Ohio St. 135, 33 N. E. 403 [signals for approaching trains]; Reagan v. St. Louis, etc. R. Co., 93 Mo. 348, 6 S. W. 371 [signals for moving cars]; Redington v. N. Y., Ontario R. Co., 84 Hun, 231, 32 N. Y. Supp. 535 [cars standing on grade]; Eastwood v. Retsof Min. Co., 86 Hun, 91, 34 N. Y. Supp. 196 [dangerous salt bin]; Hartvig v. N. P. Lumber Co., 19 Oreg. 522, 25 Pac. 358 [lumber chute]; International, etc. R. Co. v. Hall, 78 Tex. 657, 15 S. W. 108; Hannibal, etc. R. Co. v. Fox, 31 Tex. 586; Chamberlain v. Southern Ry. Co., 48 So. (Ala.) 703 (1909); Atlantic Coast Line Ry. Co. v. Mallard, 54 Fla. 143, 44 So. 366 (1907); Austin v. Central of Georgia Ry. Co., 3 Ga. App. 775, 61 S. E. 998 (1907); Chesapeake, etc. Ry. Co. v. Barnes' Admr., 117 S. W. (Ky.) 261 (1909); Cristanelli v. Saginaw Min. Co., 154 Mich. 423, 117 N. W. 910 (1908); Fitzgerald v. International, etc. Co., 104 Minn. 138, 116 N. W. 475 (1908); Gaska v. American Car, etc. Co., 127 Mo. App. 169, 105 S. W. 3 (1907); Yongue v. St. Louis, etc. Ry. Co.,

keep his servants informed of these rules, so far as may be needful for their guidance.²⁴⁴ Thus, a railroad company is bound to regulate, by published rules, the time and manner of running its trains so as to avoid collisions, and to enable all its servants to know when a train may be expected, and thus to avoid danger.²⁴⁵ And a jury

133 Mo. App. 141, 112 S. W. 985 (1908); Gorman v. Odell Mfg. Co., 71 Atl. (N. H.) 215 (1908); Pelow v. Oil Well Supply Co., 194 N. Y. 64, 86 N. E. 812 (1909); St. Louis, etc. Ry. Co. v. Ames, 94 S. W. (Tex. App.) 1112 (1906); Stone v. Union Pacific Ry. Co., 100 Pac. (Utah) 362 (1909); Davis' Admr. v. Brooklyn, etc. Ry. Co., 71 Atl. (Vt.) 724 (1909); Jackson v. Wheeling, etc. Ry. Co., 65 W. Va. 415, 64 S. E. 450 (1909); Polaski v. Pittsburgh, etc. Dock Co., 134 Wis. 259, 114 N. W. 437, 14 L. R. A. (N. S.) 952 (1908).

²⁴⁴ Abel v. Delaware, etc. Canal Co., 103 N. Y. 581, 9 N. E. 325; La Croy v. N. Y., Lake Erie, etc. R. Co., 57 Hun, 67, 10 N. Y. Supp. 382; Louisville, etc. R. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3. If a rule has been prescribed, and a foreman omits to warn a workman under him of its existence, it is for the jury, not the court, to say whether the master took sufficient precautions (Avilla v. Nash, 117 Mass. 318 [employee injured while on goods elevator]; distinguishing Durgin v. Munson, 9 Allen, 396).

²⁴⁵ Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514; Bradley v. N. Y. Central, etc. R. Co., 62 N. Y. 99 [workmen removing snow from tracks]; Chicago, etc. R. Co. v. Taylor, 69 Ill. 461 [rules for making "flying switches"]; Cooper v. Central R. Co., 44 Iowa, 134 [rules forbidding excessive speed of locomotive running backwards]; Haynes

v. East Tennessee R. Co., 3 Coldw. 222. See Baltimore, etc. R. Co. v. Whittington, 30 Gratt. 805. In the railway service, the distribution of printed copies of time tables and rules among the employees to be affected or the posting of them at conspicuous places is ordinarily sufficient promulgation of general rules and regulations, see preceding note. Galveston, etc. Ry. Co. v. Gormley, 91 Tex. 393, 43 S. W. 897, 66 Am. St. Rep. 849 (1897), ("where the proof shows that a railway company has made and promulgated rules and regulations for the government of its employees, it is not necessary that the evidence should show that the employee claiming to have been injured had knowledge of the existence of such rule, but in the absence of proof to the contrary he will be presumed to have knowledge of the rules and regulations established by the company"); Shenandoah Valley Ry. Co. v. Lucado, 86 Va. 390, 10 S. E. 422 (1889), ("these rules were in force, and had been for several years, when the accident occurred, although they had been formally promulgated by the receiver after his appointment. They are printed and copies of them had been duly furnished to section foreman. * * * The deceased had been in the employ of the company as a section hand for many months prior to the accident, and the presumption is that he was acquainted with the rule above quoted. At all

may find that it ought to have rules to protect men working underneath cars from the starting of such cars without due warning.²⁴⁶ The master is also bound to use ordinary care and diligence to *enforce* the rules which he has made, and disregard of such rules, with his acquiescence or neglect to enforce them, is tantamount to a suspension of the rules.²⁴⁷ A jury has no general right

events, the fair inference from the record is that he had reasonable opportunity to become acquainted with it, which, for the purposes of the present case, is the same thing"); *Morgan v. Hudson Riv., etc. Co.*, 133 N. Y. 670 ("even if it could be shown, after the accident, that it might have been prevented by adopting and enforcing some suitable rule, that would constitute no proper test of liability. The failure to adopt a rule is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions"); *Berrigan v. N. Y., etc. Ry. Co.*, 131 N. Y. 582, 30 N. E. 54 ("it is not reasonable to proceed on the assumption that every injury to an employee can be guarded against and prevented by making such rules"); *Burns v. Merchants, etc. Oil Co.*, 96 Tex. 573, 72 S. W. 758 (1903).

²⁴⁶ *Abel v. Delaware, etc. Canal Co.*, 103 N. Y. 581; s. c., again, 128 N. Y. 662, 28 N. E. 663; *Fordyce v. Briney*, 58 Ark. 206, 24 S. W. 250. What is sufficient in such cases (*Corcoran v. Delaware, etc. R. Co.*, 126 N. Y. 673, 27 N. E. 1022).

²⁴⁷ *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 S. Ct. 932; *Whitaker v. Delaware, etc. Canal Co.*, 126 N. Y. 544, 27 N. E. 1042; *St. Louis, etc. R. Co. v. Triplett*, 54

Ark. 289, 15 S. W. 831; see *Chicago, etc. R. Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332; *Strong v. Iowa Cent. R. Co.*, 94 Iowa, 380, 62 N. W. 799; *White v. Louisville, etc. R. Co.*, 72 Miss. 12, 16 So. 248. Rule against uncoupling cars while in motion, habitually disregarded, with knowledge of those whose duty it was to enforce it (*Cleveland, etc. Ry. Co. v. Ullom*, 20 Ohio Cir. Ct. Rep. 512 (1898); *Galveston, etc. Ry. Co. v. Slinkard*, 39 S. W. (Tex. App.) 961 (1897); *Wright v. Southern Pac. Co.*, 14 Utah, 383, 46 Pac. 374 (1896); *Tullis v. Lake Erie, etc. Ry. Co.*, 105 Fed. 554, 44 C. C. A. 597 (1901); *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 So. 856 (1906); *Binion v. Georgia, etc. Ry. Co.*, 115 Ga. 330, 41 S. E. 646 (1902); *Fluhrer v. Lake Shore, etc. Ry. Co.*, 121 Mich. 212, 80 N. W. 23 (1899); *Nichols v. Chicago, etc. Ry. Co.*, 125 Mich. 394, 84 N. W. 470 (1900); *Biles v. Seaboard, etc. Ry. Co.*, 139 N. C. 528, 52 S. E. 129 (1905); *St. Louis, etc. Ry. Co. v. Spivey*, 97 Tex. 143, 76 S. W. 748 (1903); *Chicago, etc. Ry. Co. v. Thompson*, 100 Tex. 185, 97 S. W. 459, 7 L. R. A. (N. S.) 191 (1906); *Konold v. Rio Grande, etc. Ry. Co.*, 21 Utah, 379, 60 Pac. 1021, 81 Am. St. Rep. 693 (1900); *Great Northern Ry. Co. v. McDermid*, 177 Fed. 105, 100 C. C. A. 525 (1910); *Cincinnati, etc. Ry. Co. v. Silvers*, 126 S. W. (Ky.) 120 (1910); *Willis v.*

to find that a rule should have been adopted without sufficient evidence that such rule was necessary and practicable;²⁴⁸ but it is not necessary that other masters should have adopted it under similar circumstances.²⁴⁹ The necessity²⁵⁰ or sufficiency²⁵¹ of a particular rule is a mixed question of law and fact. The reasonableness of a particular rule is generally a question of law.²⁵² To

Plymouth, etc. Tel. Co., 75 Atl. (N. Canal Co., 128 N. Y. 662, 28 N. E. H.) 877 (1910); Mills v. Atlantic, 663.

etc. Ry. Co., 85 S. C. 463, 67 N. E. ²⁵⁰ Abel v. Delaware, etc. Canal 565, 69 S. E. 97 (1910); Northern Co., 103 N. Y. 581; s. c., again, 128 Ry. Co. v. Key, 150 Ala. 641, 43 So. N. Y. 662, 28 N. E. 663 [no rule 794 (1907); Cleveland, etc. Ry. Co. protecting car repairers against motion of car]. Under guidance from v. Gossett, 87 N. E. (Ind.) 723 (1909); Chesapeake, etc. Ry. Co. v. the court, it is for the jury to decide Barnes' Admr., 117 S. W. (Ky.) 261 which, of several reasonable rules, (1909); Murphy v. Galveston, etc. should have been adopted (Id.). Ry. Co., 100 Tex. 490, 101 S. W. 439 ²⁵¹ It is proper to leave to the jury (1907), 9 L. R. A. (N. S.) 762, rev'g, the question whether a rule as to loading lumber on flat cars was sufficient, when faithfully followed, to give reasonable protection to employees (Ford v. Lake Shore, etc. R. Co., 124 N. Y. 498, 26 N. E. 1101). 96 S. W. (Tex. App.) 940; see 114 S. W. 443 (1908); Stone v. Union Pacific Ry. Co., 100 Pac. (Utah) 362 (1909); Lamoureux v. Fournier, 33 Canada (S. Ct.) 675; Burley v. Ry. Co., 10 Ont. (W. R.) 857; cp. Dixon ²⁵² Kansas, etc. R. Co. v. Hammond, 58 Ark. 324, 24 S. W. 723. v. Grand Trunk, etc. Ry. Co., 155 Mich. 169, 118 N. W. 946 (1908). Whether the reasonableness of a rule is, under all circumstances, a question for the court has been the subject of much conflict of opinion; for an interesting discussion of opposing views see opinion of the court, and dissenting opinion of Thayer, C. J., in Little Rock, etc. Ry. Co. v. Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349 (1898). The main argument in favor of the affirmative is the necessity for uniformity, which those opposing contend cannot be allowed to deprive one of his constitutional right to a trial upon the facts by a jury, as where there is a difference of opinion among railway experts (Nolan v. New York, etc. Ry. Co.,

²⁴⁸ Morgan v. Hudson Riv. Ore Co., 133 N. Y. 666, 31 N. E. 234 [ore kilns and car track]; Burke v. Syracuse, etc. R. Co., 69 Hun, 21, 23 N. Y. Supp. 458 [switch opened]. Failure to make rules is not negligence, where the practice actually in force renders a rule unnecessary (Kudik v. Lehigh Val. R. Co., 78 Hun, 492, 29 N. Y. Supp. 533).

²⁴⁹ Defendant held negligent in not making a rule to govern the shunting of cars although there was no evidence that other companies had such rules (Doing v. N. Y., Ontario, etc. R. Co., 151 N. Y. 579, rev'g, s. c., 73 Hun, 270, 26 N. Y. Supp. 405); s. p., Abel v. Delaware, etc.

enable a servant to recover, on the ground of the absence of a rule, he must prove its absence²⁵³ and necessity,²⁵⁴ and that its absence was proximate cause of his injury.²⁵⁵

§ 203. Master's duty to guard and warn against unusual risks.*—It is also the personal²⁵⁶ duty of the mas-

70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 (1898), (holding where defendant's rules made no provision for notice to trainmen of trains going in the same direction, as was the case with 90 per cent. of the railroads of the country, that no such rule was required by law); unreasonable rules (Louisville, etc. Ry. Co. v. Herndon's Admr., 126 Ky. 589, 104 S. W. 732 (1907); reasonableness, question of law (Bussey v. Charleston, etc. Ry. Co., 78 S. C. 352, 58 S. E. 1015 (1907)).

²⁵³ Rose v. Boston, etc. R. Co., 58 N. Y. 217.

²⁵⁴ See notes 248 and 249, *supra*. Rutledge v. Missouri Pac. R. Co., 123 Mo. 121, 24 S. W. 1053, *aff'd*, in 27 S. W. 327.

²⁵⁵ Berrigan v. N. Y., Lake Erie, etc. R. Co., 131 N. Y. 582, 30 N. E. 57; Warn v. N. Y. Central R. R. Co., 92 Hun, 91, 36 N. Y. Supp. 336 [defect in rules]; Peaslee v. Fitchburg R. Co., 152 Mass. 155, 25 N. E. 71; Rutledge v. Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38; Gibson v. Oregon Short Line, etc. R. Co., 23 Oreg. 493, 32 Pac. 295; Texas, etc. R. Co. v. Cumpston, 4 Tex. Civ. App. 25, 23 S. W. 47.

²⁵⁶ This is one of the non-transferable duties. See § 204, *post*, and many cases cited in the following notes. Illinois Steel Co. v. Ryska, 102 Ill. App. 347, *aff'd*, 200 Ill. 280, 65 N. E. 734 (1902); Stucke v.

Orleans Ry. Co., 50 La. Ann. 172, 23 So. 342 (1898); Lindsey v. Tioga Lbr. Co., 108 La. 468, 32 So. 464, 92 Am. St. Rep. 384 (1902); Welch v. Bath Iron Works, 98 Me. 361, 57 Atl. 88 (1903); Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814 (1903); Hough v. Grant's Pass Power Co., 41 Ore. 541, 69 Pac. 655 (1902); Levy v. Rosenblatt, 21 Pa. Super. Ct. 543 (1902); Jennings v. Edgefield Mfg. Co., 72 S. C. 411, 52 S. E. 113 (1905); Galveston, etc. Ry. Co. v. Manns, 37 Tex. App. 356, 84 S. W. 254 (1904); Hardy v. Chicago, etc. Ry. Co., 115 N. W. (Ia.) 8 (1908); Koener v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481 (1907); Bennett v. Concord, etc. Co., 68 Atl. (N. H.) 460 (1907); Savage v. Rhode Island Co., 28 R. I. 391, 67 Atl. 633 (1907); Fleming v. Northern Tissue Paper Mill, 114 N. W. (Wis.) 841 (1908); Rankel v. Buckstaff, etc. Co., 138 Wis. 442, 120 N. W. 269, 20 L. R. A. (N. S.) 1180 (1909); Stephen v. Duffy, 142 Ill. App. 219, *aff'd*, 86 N. E. 1082 (1909); Phoenix, etc. Co. v. Lemp, 121 S. W. 418 (1909); Ferrari v. Beaver Hill Coal Co., 102 Pac. (Ore.) 1016 (1909); Burns v. Vesta Coal Co., 223 Pa. 473, 72 Atl. 800 (1909); Houston, etc. Ry. Co. v. Malloy, 118 S. W. (Tex. App.) 721 (1909); Producers' Oil Co. v. Barnes, 120 S. W. (Tex. App.) 1023 (1909); Washington, etc. Ry.

*See 48 L. R. A. 69.

ter, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks which they could not reasonably anticipate;²⁵⁷ although he is not bound to guarantee them against such risks,²⁵⁸ nor to guard against an accident which is not at all likely to happen.²⁵⁹ The master must, therefore, give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they

Co. v. Cheshire, 109 Va. 741, 65 S. E. 27 (1909); Jackson v. Danaher Lbr. Co., 53 Wash. 596, 102 Pac. 416 (1909); Vianello v. Washington Iron Wks., 104 Pac. (Wash.) 784 (1909); Pigeon v. Fuller, 156 Cal. 691, 105 Pac. 976 (1910); Knickerbocker Ice Co. v. Smith, 91 N. E. (Ind. App.) 28 (1910); Hume v. Ft. Halifax, etc. Co., 75 Atl. (Me.) 300 (1909); Deschene v. Burgess, etc. Co., 75 N. H. 363, 74 Atl. 1050 (1909); Ramsey v. Raritan Copper Wks., 74 Atl. 437 (1909); Wood v. McCabe Co., 151 N. C. 457, 66 S. E. 433 (1909); Roberts v. Virginia, etc. Co., 84 S. C. 283, 66 S. E. 298 (1909); Standard Oil Co. v. Brown, 218 U. S. 78, 30 S. Ct. 669, aff'g, 31 App. (D. C.) 371 (1910); Florida, etc. Ry. Co. v. Lassiter, 52 So. (Fla.) 995 (1910); Hendrix v. Vale Royal Mfg. Co., 68 S. E. (Ga.) 483 (1910); Holland v. McRae, 68 S. E. 555 (1910); Oolitic Stone Co. v. Ridge, 91 N. E. (Ind.) 944 (1910); Hamm v. Bettendorf Axle Co., 125 N. W. (Ia.) 186 (1910); Citizens Tel. Co. v. Wakefield, 126 S. W. (Ky.) 127 (1910); Ruddy v. Blake Mfg. Co., 205 Mass. 172, 91 N. E. 310 (1910); Bageley v. Wonderland Co., 205 Mass. 238, 91 N. E. 317 (1910); Adams v. Grand Rapids, etc. Co., 160 Mich. 590, 125 N. W. 724, 27 L. R. A. (N. S.) 953 (1910).

²⁵⁷ McGovern v. Central Vt. R. Co.,

123 N. Y. 280, 25 N. E. 373 [grain bin, entered from bottom]; Baxter v. Roberts, 44 Cal. 187; Fairbanks v. Haentzche, 73 Ill. 236; Deweese v. Meramec Mining Co., 128 Mo. 423, 31 S. W. 110 [mine dangerous from falling stones]; McGonigle v. Canty, 80 Hun, 301, 30 N. Y. Supp. 320 [tree about to fall]; Palmer v. Michigan Central R. Co., 87 Mich. 281, 49 N. W. 613 [dangerous method of loading]. A master who places his servant in a position of unusual danger must adopt every reasonable precaution to avoid injury to him (Claybaugh v. Kansas City, etc. R. Co., 56 Mo. App. 630; Felice v. N. Y. Central R. Co., 14 N. Y. App. Div. 345 [men working in railroad tunnel]; Bernardi v. N. Y. Central R. Co., 78 Hun, 454, 29 N. Y. Supp. 230 [transportation of dynamite]). Cases of dynamite left in drill holes (Neveu v. Sears, 155 Mass. 303, 29 N. E. 472 [question for jury]; Houston v. Culver, 88 Ga. 34, 13 S. E. 953 [nonsuit]; Henderson v. Williams, 66 N. H. 405, 23 Atl. 365 [nonsuit proper].

²⁵⁸ Riley v. Baxendale, 6 Hurlst. & N. 446; Kearney Electric Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941.

²⁵⁹ Keats v. National Heeling Mach. Co., 65 Fed. 940, 13 C. C. A. 221; Sjogren v. Hall, 53 Mich. 274 [uncovered wheel in saw mill]; s. p., McKee v. Chicago, etc. R. Co., 83

should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business, in the natural and ordinary course of affairs; ²⁶⁰ though more than this is

Iowa, 616, 50 N. W. 209; Conkey Co. v. Larsen, 91 N. E. (Ind.) 163 (1910).

²⁶⁰ If laborers engaged in hazardous occupations, with which they are known to be unacquainted, and are not informed of the accompanying dangers by their employers, and they remain in ignorance of the dangers, and suffer in consequence, the employers are chargeable (*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464 [dynamite liable to heat]). An employer is bound to give notice of latent dangers among which the employee is required to work, and of which the employer has knowledge (*Salem Stone Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411; *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662; *Augusta Factory v. Hill*, 83 Ga. 709, 10 S. E. 450; *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636, 57 Fed. 915 [trestle weakened, without warning]; *Stackman v. Chicago*, etc. R. Co., 80 Wis. 428, 50 N. W. 404 [place of work too narrow; no warning; master liable]; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550 [no warning of dangerous earth bank]; *Andreson v. Ogden Union R. Co.*, 8 Utah, 128, 30 Pac. 305 [earth banks falling]). Where there are hazards incident to an occupation which the master knows, or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect (*Missouri Pac. R. v. Callbreath*, 66 Tex. 526, 1 S. W. 622 [dangerous car coupling]). It is the duty of a manufacturer of paris green to inform

laborers of its poisonous character, and the precautions necessary in its manufacture, not of its particular ingredients (*Fox v. Peninsular Lead Works*, 84 Mich. 676, 48 N. W. 203; *s. p.*, *Texas Mex. R. Co. v. Douglas*, 73 Tex. 325, 11 S. W. 333 [plumber should be informed of dangerous railroad ties]). Where the service involves peculiar, unusual perils, which the master understands, but the servant, from youth, inexperience or ignorance, may naturally fail to appreciate, the master may be chargeable with breach of duty if he orders or urges the servant to incur such dangers, even though the latter, from ignorance, etc., assents. The question is for the jury (*Atlas Engine Works v. Randall*, 100 Ind. 293; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Western Union Tel. Co. v. McMullen*, 58 N. J. Law, 155, 33 Atl. 384; *N. Y. Biscuit Co. v. Rouss*, 20 C. C. A. 555, 74 Fed. 608; *Archer-Foster Const. Co. v. Vaughn*, 79 Ark. 20, 94 S. W. 717 (1907); *St. Louis Ry. Co. v. Mize*, 70 Ark. 629, 95 S. W. 488 (1907); *Bone v. Ophir*, etc. Min. Co., 149 Cal. 293, 86 Pac. 685 (1906); *Reeve v. Colusa Gas, etc. Co.*, 152 Cal. 99, 92 Pac. 89 (1907); *Fisher v. Crosby Mfg. Co.*, 88 Conn. 252, 67 Atl. 943 (1907); *German-American Lbr. Co. v. Brock*, 55 Fla. 577, 46 So. 740 (1908); *Southern Cotton Oil Co. v. Skipper*, 125 Ga. 368, 54 S. E. 110 (1906); *Bowen v. Adams*, 129 Ga. 688, 59 S. E. 795 (1907); *Knox v. Amer. Rolling Mill*, 236 Ill. 437, 86 N. E. 90, 127 Am. St. Rep. 291 (1908); *Knickerbocker Ice Co. v. Gray*, 84 N. E. (Ind.) 341 (1908); *Hardy v.*

not required of him.²⁶¹ It makes no difference what is the nature of the peculiar peril, or whether it is or is not beyond the master's control.²⁶² And it is not enough for the master to use care and pains to give such notice. He must see that it is actually given.²⁶³ If, therefore, he fails to give such warning, in terms sufficiently clear to

- Chicago, etc. Ry. Co., 139 Ia. 314, 115 N. W. 8, 19 L. R. A. (N. S.) 997 (1908); Harney v. Chicago, etc. Ry. Co., 139 Ia. 359, 115 N. W. 886 (1908); Kerker v. Bettendorf, etc. Wheel Co., 118 N. W. (Ia.) 306 (1908); Andrieus' Admr. v. Pineville Coal Co., 121 Ky. 724, 90 S. W. 233, 28 Ky. L. Rep. 704 (1906); Ballard Ice Co. v. Lee's Admr., 115 S. W. (Ky.) 732 (1909); Foreman v. Eagle Rice Mill Co., 117 La. 227, 41 So. 555 (1906); Muscarelli v. Hodge Fence, etc. Co., 120 La. 335, 45 So. 268 (1907); State v. Baltimore Mfg. Co., 109 Md. 404, 72 Atl. 602 (1909); Donohue v. Buck, 197 Mass. 550, 83 N. E. 1090 (1908); Charron v. Union Carbide Co., 151 Mich. 687, 115 N. W. 718 (1908); Putz v. St. Paul Gas Light Co., 121 N. W. (Minn.) 1109 (1909); Reickert v. Packing Co., 136 Mo. App. 565, 118 S. W. 525 (1909); Bennett v. Woodworking, etc. Co., 74 N. H. 400, 68 Atl. 460 (1908); Godsoe v. Dodge Clothespin Co., 70 Atl. (N. H.) 215 (1909); Conelly v. Paul, etc. Const. Co., 192 N. Y. 182, 84 N. E. 807 (1908); Redman v. Norfolk, etc. Ry. Co., 150 N. C. 400, 64 S. E. 195 (1909); Elliff v. Oregon, etc. Ry. Co., 99 Pac. (Ore.) 76 (1909); Ferrari v. Beaver Hill Coal Co., 102 Pac. (Ore.) 1016 (1909); Wilson v. New York, etc. Ry. Co., 69 Atl. (R. I.) 364 (1908); Latimer v. General Elec. Co., 81 S. C. 374, 62 S. E. 438 (1908); Texas, etc. Ry. Co. v. Geiger, 118 S. W. (Tex. App.) 179 (1909); St. Louis, etc. Ry. Co. v. Marshall, 120 S. W. (Tex. App.) 1023 (1909); Producers' Oil Co. v. Barnes, 120 S. W. (Tex. App.) 1023 (1909); Norton Coal Co. v. Hank's Admr., 108 Va. 521, 62 S. E. 335 (1909); Baker v. Duwamish Mill Co., 43 Wash. 149, 86 Pac. 167 (1906); Jackson v. Danaher Lbr. Co., 102 Pac. (Wash.) 416 (1909); Rinkel v. Buckstaff, etc. Co., 138 Wis. 442, 120 N. W. 269 (1909); Chicago, etc. Ry. Co. v. Riley, 145 Fed. 137, 76 C. C. A. 107 (1906); International Paper Co. v. Robin, 167 Fed. 922 (1909); Coöperant Tel. Co. v. St. Clair, 168 Fed. 645 (1909); Lawson v. Elec. Light Co., 11 Ont. (W. R.) 72.
- ²⁶¹ Big Creek Stone Co. v. Wolf, 138 Ind. 496, 38 N. E. 52 [servant ought to have known defects]; Illinois Cent. R. Co. v. Neer, 26 Ill. App. 356 [no liability for well-known risk]; Muster v. Chicago, etc. R. Co., 61 Wis. 325, 21 N. W. 223 [mail bag thrown out].
- ²⁶² Baxter v. Roberts, 44 Cal. 187 [carpenter employed to tear down a fence, and shot by squatters while performing his duty]. But not so where master had not such notice (Kelly v. Shelby R. Co. (Ky.), 22 S. W. 445; Bagley v. Wonderland Co., 255 Mass. 238, 91 N. E. 317 (1910).
- ²⁶³ Wheeler v. Wason Mfg. Co., 135 Mass. 294 [plaintiff injured while operating a circular saw].

call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they suffer thereby without contributory negligence.²⁶⁴ Such notice must be timely — that is, given in sufficient time to enable the servant to profit by it.²⁶⁵ It is, therefore, the duty of the master to give adequate and timely warnings of changes in the situation, involving new dangers.²⁶⁶ Signals must be given of every approaching train or part of a train when it can be foreseen that employees will otherwise probably be exposed to unnecessary danger;²⁶⁷ or of the starting of a train,

²⁶⁴ *O'Connor v. Adams*, 120 Mass. 427; *Coombs v. New Bedford Cordage Co.*, 102 Id. 572 [minor's arm torn off by rapidly revolving cylinder]; *Parkhurst v. Johnson*, 50 Mich. 70 [inexperienced laborer fell into a lime kiln, not being warned of danger from removal of burned stone below]; *Ryan v. Tarbox*, 135 Mass. 207 [laborer tearing down an old building, set to work under a weak chimney, which fell on him]; *Louisiana, etc. Ry. Co. v. Fitzgerald*, 49 So. (Ala.) 860 (1909); *Vohs v. Shorthill*, 130 Ia. 538, 107 N. W. 417 (1906); *Stodden v. Anderson Mfg. Co.*, 138 Ia. 398, 116 N. W. 116, 16 L. R. A. (N. S.) 614 (1908); *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. 701 (1908); *Charrier v. Boston, etc. Ry. Co.*, 70 Atl. (N. H.) 1078 (1908); *Rhodovsky v. New Jersey Worsted, etc. Co.*, 76 N. J. L. 542, 70 Atl. 170 (1908); *Martin v. Niles, etc. Co.*, 214 Pa. 616, 64 Atl. 370 (1907); *Berley v. Western Union Tel. Co.*, 82 S. C. 360, 64 S. E. 157 (1909); *Galveston, etc. Ry. Co. v. Henefy*, 99 S. W. (Tex. App.) 884 (1907); *Tallahassee Falls Mfg. Co. v. Moore*, 48 So. (Ala.) 593 (1909); *Van de Bogart v. Marinette Paper Co.*, 127 Wis. 104, 106 N. W. 805 (1906); *Bryant Lbr. Co. v. Stastney*, 87 Ark. 321, 112 S. W. 740 (1908); *Brown v. Southern Ry. Co.*, 144 N. C. 634, 57 S. E. 397 (1907).

²⁶⁵ Thus, timely warning must be given of starting machinery at an unusual time (*Shumway v. Walworth Mfg. Co.*, 98 Mich. 411, 57 N. W. 251; *Huber v. Wilson*, 58 Hun, 603, 11 N. Y. Supp. 377; see *Crispin v. Babbitt*, 81 N. Y. 516). But not at the usual time in the absence of special reasons (*Balle v. Detroit Leather Co.*, 73 Mich. 158, 41 N. W. 216).

²⁶⁶ *Muller v. McKesson*, 73 N. Y. 195 [fierce dog let loose at night]; *Chicago, etc. R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117 [track out of order]; *Cheeney v. Ocean S. S. Co.*, 92 Ga. 726, 19 S. E. 33 [throwing cotton bales]; *Donahue v. Old Colony R. Co.*, 153 Mass. 356, 26 N. E. 868 [conductor's omission to notify brakeman that draw-bar is broken is negligence]; *Stevenson v. Ravenscroft*, 25 Neb. 678, 41 N. W. 652 [breaking off earth bank without warning]; *Mollie Gibson Mining Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850 [removal of earth support].

²⁶⁷ *Cincinnati, etc. R. Co. v. Barber* (Ky.), 31 S. W. 482 [signals of

while a servant is coupling cars²⁶⁸ or repairing a car,²⁶⁹ although, as the actual movement of trains is rarely within the possible personal knowledge of the master, his duty in that and similar matters may be discharged by proper rules and supervision,²⁷⁰ and hence liability defeated, in case of failure to comply with the rule, by the fellow-servant doctrine, in those jurisdictions where operatives of the train and switchmen and repairmen are held to be in the same common employment. But if a servant has sufficient actual notice of the peril to put him upon his guard, it is of no importance that such notice did not proceed from the master.²⁷¹ And the master is

late train omitted]; *Dixon v. Chicago, etc. R. Co.*, 109 Mo. 413, 19 S. W. 412 [engine coming around curve]; *Moran v. Eastern R. Co.*, 48 Minn. 46, 50 N. W. 930; *Sobieski v. St. Paul, etc. R. Co.*, 41 Minn. 169, 42 N. W. 863. Defendant owed workmen duty of active vigilance in giving proper signals of approach of trains, and they had the right to rely on the continued performance of this duty (*Erickson v. St. Paul, etc. R. Co.*, 41 Minn. 500, 43 N. W. 332; *Schulz v. Chicago, etc. R. Co.*, 57 Minn. 271, 59 N. W. 192; *Promer v. Milwaukee, etc. R. Co.*, 90 Wis. 215, 63 N. W. 90 [shunted car]; *East Tennessee, etc. R. Co. v. Bridges*, 92 Ga. 399, 17 S. E. 645 ["wild" engine, without warning]; *Miss. Cotton-Oil Mills Co. v. Ellis*, 72 Miss. 191, 17 So. 214; *Evansville, etc. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39; *Illinois Cent. R. Co. v. Gilbert*, 51 Ill. App. 404 [insufficient signal of train]; *Wild v. Oregon, etc. R. Co.*, 21 Oreg. 159, 27 Pac. 954). But the U. S. Supreme Court has recently held (three judges dissenting) that the negligence of the officer in charge of a train in failing to give warn-

ing as the train rapidly approached a hand car on the track was the fault of a fellow servant and not imputable to the master, where a section hand on the hand car was injured (*Northern Pac. R. Co. v. Charless*, 162 U. S. 359; rev'g, s. c., 51 Fed. 562, 2 C. C. A. 380, 7 U. S. App. 359). And where a switching engine is constantly moving to and fro in a railroad yard, there is no obligation to ring the bell or sound the whistle for the purpose of notifying employees who are familiar with the operation of the yard (*Aerkfetz v. Humphreys*, 145 U. S. 418, 12 S. Ct. 835). Master is liable for injuries resulting from his failure to provide for reasonable signals and warnings to servants in dangerous position (*Cincinnati, etc. Ry. Co. v. Hill's Admr.*, 28 Ky. L. Rep. 530, 89 S. W. 523 (1905)).

²⁶⁸ *Barnett v. Northeastern R. Co.*, 89 Ga. 399, 15 S. E. 492.

²⁶⁹ *Abel v. Delaware, etc. Canal Co.*, 103 N. Y. 581.

²⁷⁰ See § 202, *ante*.

²⁷¹ *Foley v. Chicago, etc. R. Co.*, 48 Mich. 622 [switchman killed while handling nitro-glycerine, he having a general acquaintance with its

not required to point out dangers which are readily discoverable by the servant himself by the use of ordinary care, with such knowledge, experience and judgment as the servant actually possesses, or as the master is justified in believing him to possess.²⁷² No notice, therefore, is usually required of dangers obvious to everyone.²⁷³

qualities]; *Rooney v. Sewall Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Truntle v. North Star Mills*, 57 Minn. 52, 58 N. W. 832; *Horan v. Gray, etc. Hardware Co.*, 48 So. (Ala.) 1029 (1909); *Pre v. Standard, etc. Cement Co.*, 9 Cal. App. 591, 100 Pac. 122 (1908); *Mitchell v. Mining Co.*, 37 Mont. 575, 97 Pac. 1033 (1908); *Brownwood Oil Mill Co. v. Stubblefield*, 115 S. W. (Tex. App.) 626 (1909); *Hanson v. Superior Mfg. Co.*, 136 Wis. 617, 118 N. W. 180 (1908).

²⁷² It is not necessary that a servant should be warned of every possible manner in which injury may occur to him, nor of risks that are as obvious to him as to the master; and where a mature and experienced man engages in a dangerous occupation, with the risks of which he is familiar, and is injured, not through defect in the appliances, but through the manner of their operation, incident to the business, he cannot recover against the master (*Mississippi Logging Co. v. Schneider*, 20 C. C. A. 390, 74 Fed. 195). To same effect, *Hazen v. West Superior Lumber Co.*, 91 Wis. 208, 64 N. W. 857 [projecting circular saws, unguarded; floor slippery; no instruction; dangers obvious]; *Nugent v. Kauffman Milling Co.*, 131 Mo. 241, 33 S. W. 428 [revolving cylinders; no instructions; age 20]; *Jones v. Roberts*, 57 Ill. App. 56 [steam mangle; girl 16; danger obvious; no warn-

ing]; *Jones v. Roberts*, 57 Ill. App. 56; *Richstain v. Washington Mills Co.*, 157 Mass. 538, 32 N. E. 908; *Fones v. Phillips*, 39 Ark. 17 [minor set to operate dangerous machinery]; *Arcade File Works v. Juteau*, 15 Ind. App. 460, 40 N. E. 818 [no notice of servant's inexperience]. A railroad company is not negligent in failing to inform one of its experienced engineers, who has run over its road for many years, and who was appointed to instruct an engineer on another engine in all the peculiarities of the road, that such engine is several inches wider than the one he had been accustomed to handle (*Bellows v. Pennsylvania, etc. Canal Co.*, 157 Pa. St. 51, 27 Atl. 685; *s. p.*, *Thain v. Old Colony R. Co.*, 161 Mass. 353, 37 N. E. 309 [post four feet from train]).

²⁷³ *Bohn v. Havemeyer*, 114 N. Y. 296, 21 N. E. 402 [sugar bin]; *Dela-ware Iron Works v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65 [circular saw]; *Stuart v. West End St. R. Co.*, 163 Mass. 391, 40 N. E. 180 [hay cutter]; *Foley v. Pettee Machine Works*, 149 Mass. 294, 21 N. E. 304 [experienced servant; uncovered gearing; no recovery]; *East Tennessee R. Co. v. Turvaville*, 97 Ala. 122, 12 So. 63; [car couplings]; *Louisville, etc. R. Co. v. Boland*, 96 Ala. 626, 11 So. 667 [same]; *Watts v. Hart*, 7 Wash. St. 178, 34 Pac. 423, 771. Where an unfenced railroad runs through pasture land, it is not the duty of the company to warn employees of the

§ 203a. **Duty of supervision.** — It is a universal American rule that the master is personally bound to maintain “such an oversight and supervision” of his servants and business,²⁷⁴ as will enable him to discover, within a reasonable time, the incompetency or habitual negligence of any servant,²⁷⁵ the defects of any place or appliance provided for work²⁷⁶ or the failure of his servants to conduct the business in pursuance of his rules.²⁷⁷ It is difficult to perceive upon what principle any distinction can be made between supervision for these purposes and general supervision for all other purposes — not as to minute details, but over the general work. Indeed, the requirement of rules and their enforcement (§ 202) has no basis, except on this assumption. Accordingly, the great weight of American authority, estimated either according to the number of judges or to their ability and freedom from bias, is decidedly in favor of holding masters, whether present or absent, to personal responsibility

danger of encountering cattle (Pat- 1942. In *Cullen v. Norton*, 126
ton v. Central Iowa R. Co., 73 Iowa, N. Y. 1, 26 N. E. 905, this point
306, 35 N. W. 149); Louisiana, etc. was overlooked, but not overruled.
Ry. Co. v. Miles, 82 Ark. 534, 103 The decision was made by a divided
S. W. 158, 11 L. R. A. (N. S.) 720 court, and reversed the decision of
(1907); *Mugford v. Atlantic*, etc. a large number of judges below (9
Co., 7 Cal. App. 672, 95 Pac. 674 N. Y. Supp. 174, 29 St. Rep. 700;
(1908); *Hardy v. Chicago*, etc. Ry. s. c., before, 52 Hun, 9; reargued,
Co., 139 Ia. 314, 115 N. W. 8, 19 24 St. Rep. 103).

L. R. A. (N. S.) 997 (1908); ²⁷⁵ *Whittaker v. Delaware*, etc.
Richards v. Michigan, etc. Steel Co., Canal Co., 126 N. Y. 544; *Gilman v.*
155 Mich. 668, 119 N. W. 1077 *Eastern R. Co.*, 10 Allen, 233. See
(1909); *Sabere v. Atha Co.*, 75 N. note 102, § 189, *ante*.

J. L. 307, 68 Atl. 103 (1907); ²⁷⁶ See § 194, *ante*, and cases cited;
Magone v. Portland Mfg. Co., 51 also *Durkin v. Sharp*, 88 N. Y. 225;
Ore. 21, 93 Pac. 450 (1908); *Atchison*, etc. R. Co. v. *M'Kee*, 37
Brownwood Oil Mill v. Stubblefield, Kans. 592, 15 Pac. 484; *Rogers v.*
115 S. W. (Tex. App.) 626 (1909); *Ludlow Mfg. Co.*, 144 Mass. 198, 11
Woelfen v. Lewiston, etc. Co., 49 N. E. 77; and Mass. cases there cited.
Wash. 405, 95 Pac. 493 (1908); See note 256, § 203, *ante*.

Morgan Construction Co. v. Frank, ²⁷⁷ *Whittaker v. Delaware*, etc.
158 Fed. 964, 86 C. C. A. 168 Canal Co., 126 N. Y. 544; *Wabash*
(1908). *R. Co. v. McDaniels*, 107 U. S. 454,
2 S. Ct. 932. See note, 247, § 202,
ante.

²⁷⁴ *Whittaker v. Delaware*, etc. Canal Co., 126 N. Y. 544, 27 N. E.

ity for such general supervision as a prudent master would give if personally present.²⁷⁸ If the master chooses to delegate this supervision to an agent, or if he undertakes work on so large a scale as to leave him no

²⁷⁸ *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094; *Criswell v. Pittsburgh, etc. R. Co.*, 30 W. Va. 798, 6 S. E. 31; *Cleveland, etc. R. Co. v. Keary*, 3 Ohio St. 201; *Taylor v. Evansville, etc. R. Co.*, 121 Ind. 124, 22 N. E. 876; *Engine Works v. Randall*, 100 Ind. 293; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; per *Cooley, C. J.*; *Hunn v. Mich. Cent. R. Co.*, 78 Mich. 513, 44 N. W. 502; *Chicago, etc. R. Co. v. Bayfield*, 37 Mich. 205; *Carlson v. North West. Tel. Co.*, 63 Minn. 428, 65 N. W. 914; *Miller v. Mo. Pacific R. Co.*, 109 Mo. 350, 19 S. W. 58, and cases there cited; *Chicago, etc. R. Co. v. Lundstrum*, 16 Neb. 254, 20 N. W. 198 [conductor's orders]; reaff'd, *Burlington, etc. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921 (conductor's omission to warn of danger); *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294; *Hannibal, etc. R. Co. v. Fox*, 31 Kans. 586, 3 Pac. 320 [foreman failing to warn of danger]; *Bloyd v. St. Louis, etc. R. Co.*, 58 Ark. 66, 22 S. W. 1089; per *Field, J.*; *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 11 N. E. 77. But the principle is not adhered to in Massachusetts, except under the statute of 1887. The duty does not extend so far as to require the master to see that every servant always remains at his post (*Parker v. N. Y. & New England R. Co.*, 18 R. I. 773, 30 Atl. 849). The duty of the master to furnish a competent superintendent where the work is complicated and dangerous, that is to say where ordinary prudence would require it, has not been the subject of much discussion in cases presenting the direct question, though where presented it has been uniformly maintained (*Trainor v. Philadelphia, etc. Ry. Co.*, 137 Pa. 148, 20 Atl. 632 [taking down a pole]; *Reynolds v. Banard*, 168 Mass. 226, 46 N. E. 703 (1898); [overloading staging with slate]; *Doyle v. Melendy*, 83 Vt. 239, 75 Atl. 881 (1910), ["the duty of providing necessary supervision for a complicated and dangerous service"]; *Hill v. Big Creek Lbr. Co.*, 108 La. 162, 32 So. 372, 58 L. R. A. 346 (1902) [master held liable for failure to exercise such reasonably constant supervision 'as would allow of his workmen becoming grossly and criminally negligent]. *Engelking v. City of Spokane*, 110 Pac. (Wash.) 25, 29 L. R. A. (N. S.) 481 (1911), holding that master must furnish a skilled superintendent over common laborers in constructing a raft moored above falls, and on which they are to work. The court said: "The workmen were directed to meet, not an ordinary, but an extraordinary condition, 1 *Labatt, Master & Servant*, 240; *Anderson v. Columbia Improvement Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840 (1905). It is true as viewed by learned counsel and by those versed in the laws of mechanics, the result might have been expected as a consequence of the violation of natural laws. But it is not to be expected that a common laborer will have knowledge of, or be bound by, natural laws, unless they are so obvious as to prompt the instinct of self-preservation in men

choice but to so delegate it, his responsibility stands upon the same footing, in this case, as in the other duties of supervision, upon which all authorities agree.

§ 204. Delegation of master's personal duties. — None of the duties which have been previously stated as devolving upon the master personally can be by him delegated to any agent so as to relieve him from personal responsibility.²⁷⁹ He may and often must delegate the

of ordinary prudence and understanding. The wonders of this age of invention come from the application of natural laws. The touch of genius, rather than the strength of reason, has unlocked their mysteries, so that even learned men would not be charged with a knowledge of them. Men are not bound to observe or act upon natural laws, unless they are within the range of common understanding" (*Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376 (1911); *Cook v. Chehalis River, etc. Co.*, 48 Wash. 619, 94 Pac. 189 (1908). *Labatt on Master and Servant*, page 541; *Thompson on Negligence*, § 3805.

²⁷⁹ *Booth v. Boston, etc. R. Co.*, 73 N. Y. 38, 40. It is the duty of the employer to select and retain servants who are fit and competent for the service, and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by this omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exempt him from such liability (*Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, 647; *s. p.*,

Ford v. Fitchburg R. Co., 110 Mass. 240; *Chicago, etc. R. Co. v. Jackson*, 55 Ill. 492). Almost the same language was used by *Church, C. J.*, *Flike v. Boston, etc. R. Co.*, 53 N. Y. 549. A remarkable distinction was made in *Malone v. Hathaway*, 64 N. Y. 5, 12, between corporations and individuals. It was held, that, where a principal was an individual, "and there is no evidence of a surrender of power and control to any subordinate, and he is present himself, superintending the establishment in person," he is not responsible for the negligence of a competent and proper foreman in failing to maintain the building in a secure and safe condition. *Church, C. J.*, and *Rapallo, J.*, dissented; and we entertain no doubt that their dissent was fully justified. *Fogarty v. Pac. Co.*, 151 Cal. 785, 91 Pac. 650 (1907); *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161 (1906); *Chicago, etc. Ry. Co. v. Barker*, 83 N. E. (Ind.) 369 (1908); *Lorts, etc. Mill Co. v. Weil*, 113 S. W. (Ky.) 474 (1908); *Bernheimer v. Bager*, 108 Md. 551, 70 Atl. 91 (1908); *Flynn v. Prince, etc. Co.*, 198 Mass. 244, 84 N. E. 321, 17 L. R. A. (N. S.) 68 (1908); *Ryan v. Iron Wks. Co.*, 200 Mass. 188, 86 N. E. 310 (1908); *Charron v. Union*

performance of such duties to subordinates; but he remains responsible to all his servants for the acts of these subordinates, in that particular capacity, to the same extent as if those acts were literally his own.²⁸⁰ This has been repeatedly adjudged, as to his duty in the selection and dismissal of servants,²⁸¹ in providing,²⁸² inspecting²⁸³ and repairing²⁸⁴ materials and appliances, in

Carbide Co., 151 Mich. 687, 115 N. W. 718 (1908); Bigum v. St. Paul Sash, etc. Co., 107 Minn. 567, 119 N. W. 481 (1909); Combs v. Roundtree Const. Co., 205 Mo. 367, 104 S. W. 77 (1907); Connolly v. Hall Const., etc. Co., 192 N. Y. 182, 84 N. E. 807 (1908); Laragay v. East Jersey Pipe Co., 72 Atl. N. J. L. 57 (1909); Galveston Ry. Co. v. Thompson, 116 S. W. (Tex. App.) 106 (1909); Westerlund v. Rothschild, 102 Pac. (Wash.) 765 (1909).

²⁸⁰ Cooper v. Pittsburgh, etc. R. Co., 24 West Va. 37.

²⁸¹ Mann v. Delaware, etc. Canal Co., 91 N. Y. 495 [incompetent flagman selected by conductor]; Laning v. N. Y. Central R. Co., 49 N. Y. 521; Walker v. Bolling, 22 Ala. 294 [ship owner responsible for captain's employment of incompetent engineer]. To the contrary, apparently, Norfolk, etc. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994.

²⁸² The obligation of the master "to provide and maintain in suitable condition the machinery and apparatus to be used by its employees" cannot be so delegated to an agent as to relieve the master from responsibility therefor to his servants (Hough v. Texas, etc. R. Co., 100 U. S. 213, 220; No. Pac. R.

Co. v. Poirier, 67 Fed. 881, 15 C. C. A. 52; Pullman Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Fuller v. Jewett, 80 N. Y. 46; Benzing v. Steinway, 101 N. Y. 547; Collyer v. Penna. R. Co., 49 N. J. Law, 59, 6 Atl. 437). The rule is the same under the California Code (Sanborn v. Madera, etc. R. Co., 70 Cal. 261, 11 Pac. 710). So as to supplying sufficient force of men (Flike v. Boston, etc. R. Co., 53 N. Y. 549). Agents who are charged with the duty of supplying safe machinery are not to be regarded as fellow servants of those who operate it. They are charged with a master's duties to his servants. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them (Ford v. Fitchburg R. Co., 110 Mass. 240; s. p., Kelly v. Erie Tel. Co., 34 Minn. 321; Cincinnati, etc. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287).

²⁸³ The operator of a railroad, to exempt him from liability to a servant for injury arising from a defective condition of the track, must show that it was, at proper intervals, carefully inspected by a competent inspector. Proof of the competency

²⁸⁴ The neglect of a servant to keep employed to operate such machinery. in order machinery, etc., is not the In the repair of machinery, the servant represents the master in the neglect of a fellow servant of the one

of the inspector, without proof of due inspection, is insufficient (*Durkin v. Sharp*, 88 N. Y. 225). *s. p.*, as to platform containing a defective plank (*Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449). To same effect, *Little Rock, etc. R. Co. v. Moseley*, 56 Fed. 1009, 6 C. C. A. 225 [coupling link]; *Cincinnati, etc. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287 [car brake]. The same rule applies to the inspection of foreign cars running on the road

(*International, etc. R. Co. v. Kernan*, 78 Tex. 294, 14 S. W. 668). Very strangely, the Ohio courts, which were the first to establish liberal rules in favor of servants, have greatly erred on this point, holding that a railroad company is not liable to a train hand for the failure of its car inspector to inspect (*Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318; citing *Columbus, etc. R. Co. v. Webb*, 12 Id. 475). This ruling is clearly wrong.

performance of his part of the contract, and his negligence in that respect is the negligence of the master (*Shanny v. Androscoggin Mills*, 66 Me. 420; cited and followed in *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, 651). To the same effect, *Sadowski v. Mich. Car. Co.*, 84 Mich. 100, 47 N. W. 598; *Roux v. Blodgett Co.*, 94 Mich. 607, 54 N. W. 492; *Bessex v. Chicago, etc. R. Co.*, 45 Wis. 477, 481; *Wedgwood v. Chicago, etc. R. Co.*, 41 Wis. 478; *Toledo, etc. R. Co. v. Conroy*, 68 Ill. 560; *Drymala v. Thompson*, 26 Minn. 40; *Flynn v. Kansas City, etc. R. Co.*, 78 Mo. 195; *Houston, etc. R. Co. v. Marcelles*, 59 Tex. 334). This duty of inspection and repair cannot be delegated so as to avoid the master's personal liability (*Bailey v. Rome, etc. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Richmond, etc. R. Co. v. Elliott*, 149 U. S. 266; *Louisville, etc. R. Co. v. Ward*, 61 Fed. 927, 18 U. S. App. 683; *Cooper v. Pittsburg, etc. R. Co.*, 24 West Va. 37; *Ford v. Fitchburg R. Co.*, 110 Mass. 249; *Moynihan v. Hills Mfg. Co.*, 146 Mass. 586, 16 N. E. 574; *Davis v. Central Vt. R. Co.*, 55 Vt. 84 [fireman killed by negligence of road master]; *Cook v. St. Paul, etc. R. Co.*, 34 Minn. 45 [negligent road

master]; *Atchison, etc. R. Co. v. Moore*, 31 Kans. 197 [same]; *Lawless v. Conn. River R. Co.*, 136 Mass. 1 [draw bar on switch engine too low]; *Mulvey v. R. I. Locomotive Works*, 14 R. I. 240 [breaking of elevator chain]; *Kirkpatrick v. N. Y. Central, etc. R. Co.*, 79 N. Y. 240 [explosion of weak boiler]). The decisions of the American courts, relatively few in number, that are not reconcilable with the doctrine of the text have been collected by Mr. Labatt in his scholarly work on Master and Servant and are presented in copious notes to §§ 618 and 619, under the titles of "theory that a master is never liable for negligence in regard to inspection and repairs, and, 'theory that the liability of the master depends on the subject of the inspection or repairs neglected.'" Referring to the view contended for in the class of cases first indicated, viz., that the master is only liable for the negligence of the agents by whom the instrumentalities were originally furnished, but that the negligence of the agents to whom he has deputed the function of seeing that they continue to satisfy the legal standard of safety, is the negligence of fellow servants, the learned writer says: "Such a

warning servants of special dangers,²⁸⁵ and in framing rules.²⁸⁶ Thus, a builder has been held liable to a hod carrier for the negligence of a foreman employed to put up a scaffold,²⁸⁷ or entrusted with the construction and rigging of a derrick,²⁸⁸ and a cotton manufacturing company for the negligence of a loom repairer.²⁸⁹ So, as to a mining company, in respect of the negligence of its superintendent, who failed to adopt precautions against injury to the miners by falling rock;²⁹⁰ and a factory

conception has the merit of simplicity, but is regarded by the writer for the reasons already explained, to be wholly illogical. The decisions which are either avowedly based on the distinction thus taken, or which can only be supported by considering it as impliedly adopted, are collected in the note below. It should be observed, however, that some of the American cases have been expressly overruled, while others have been greatly qualified by later rulings in the same jurisdiction, which reflect more or less strongly the influence of the theory that the duty of maintenance, no less than the duty of supply, is absolute. Wherever there has been a merely partial recognition of this theory, the situation is probably due to the fact that the courts have been unable to break away altogether from existing precedents, which date from a period at which the character of the negligent act had not yet assumed its present importance, as a differentiating agent." That the master may relieve himself from liability for maintenance of ways and appliances by the employment of competent inspectors seems still to be the law in Alabama and New Jersey (*Woodward Iron, etc. Co. v. Cook*, 124 Ala. 349, 27 So. 455 (1899); *Essex Co. v. Kelley*, 57 N. J. L. 100, 29 Atl. 427. But see

Nord Deutcher Lloyd S. S. Co. v. Ingebregsten, 57 N. J. L. 402, 31 Atl. 619. See also *Wonder v. Baltimore, etc. Ry. Co.*, 32 Md. 411, 3 Am. Rep. 143 and note, 51 L. R. A. 567; *Little Miami Ry. Co. v. Fitzpatrick*, 42 Ohio St. 318.

²⁸⁵ *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467 [verdict sustained where a miner was injured by explosion of giant powder; defendant having failed to explain its dangerous character]. Numerous examples may be found in the notes to § 203, *ante*.

²⁸⁶ See § 202, *ante*.

²⁸⁷ *Green v. Banta*, 48 N. Y. Super. Ct., 156 (aff'd, 97 N. Y. 627), where Sedgwick, C. J., says: "The master would be liable for the neglect of any workman, not called foreman, who was directed by the master to make the scaffold." See *Fort v. Whipple*, 11 Hun, 586 [workman injured by defects in scaffold constructed by defendant].

²⁸⁸ *Courtney v. Cornell*, 49 N. Y. Superior, 286.

²⁸⁹ *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262.

²⁹⁰ *Pantzar v. Tilly Foster Mining Co.*, 99 N. Y. 368, 2 N. E. 24. To the contrary, *Hall v. Johnson*, 9 Hurlst. & C. 589, of no authority in America.

owner, for the act of his foreman in supplying a defective platform.²⁹¹ Several English and American decisions are inconsistent with these principles; but they were all, or nearly all, decided without considering the distinction between the responsibility of a master for materials, and his responsibility for the use made of materials by fellow servants of the injured servant. All such decisions are of no authority, outside of the particular courts making them, and ought to be overruled even there.²⁹² We hold, further, that the power of absolute command cannot be delegated so as to relieve the master from liability for its misuse.²⁹³ But, in a few courts, this doctrine is not accepted.

§ 205. Illustrations of non-transferable duties. — Upon the principle just stated, many cases have been decided, especially with reference to corporations. Thus, it has been held that a corporation is responsible to its servants for the negligence of other servants, entrusted with the duty of providing a safe place in which to work,²⁹⁴ or of providing suitable tools, materials or other appli-

²⁹¹ *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449.

²⁹² Among the cases thus erroneously decided on this point are *Wonder v. Baltimore, etc. R. Co.*, 32 Md. 411; *Searle v. Lindsay*, 11 C. B. N. S. 429; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318; *Gibson v. Northern Central R. Co.*, 22 Hun, 289; *Kidwell v. Houston, etc. R. Co.*, 3 Woods C. C. 313 [all cases of negligent inspection of machinery]; *Collier v. Steinhardt*, 51 Cal. 116 [negligent selection of servant by agent delegated thereto]; *Mackin v. Boston & Alb. R. Co.*, 135 Mass. 201; *Smith v. Potter*, 46 Mich. 258 [neglect of car inspector to inspect defective cars received from other companies].

²⁹³ See §§ 226, 227, *post*. In *Miller*

v. Missouri Pac. R. Co., 109 Mo. 350, 19 S. W. 58, this section was cited as authority for holding that such power could not be thus delegated.

²⁹⁴ *Hannibal, etc. R. Co. v. Fox*, 31 Kans. 586, where the foreman or boss repairer ordered the plaintiff to go under a car to make repairs. While the plaintiff was under the car other cars were pushed along the track and injured the plaintiff. Held, that for the foreman's neglect to see that reasonable precautions were taken to protect plaintiff, the company was responsible (*Quincy Coal Co. v. Hood*, 77 Ill. 68 [superintendent of mining company having timely notice of dangerous condition of roof of mine]).

ances;²⁹⁵ as in the case of an agent entrusted with the selection of ropes,²⁹⁶ or of a section boss, who knowingly furnished a spike-driver with a defective maul;²⁹⁷ of the foreman of a gang employed in constructing a road, who was entrusted with the thawing of blasting powder, by whose negligence in doing which one of the men was injured;²⁹⁸ of a car inspector, through whose neglect to cause a defective ladder on a box car to be repaired a brakeman fell from the car;²⁹⁹ of a master mechanic, having exclusive management of motive power, in failing to make secure a steam whistle,³⁰⁰ and of a general superintendent and an overseer of repairs in a factory, by whose joint neglect to complete certain machinery before starting it, an employee was injured.³⁰¹ So railroad companies have been held responsible to their servants for the negligence of other servants entrusted with the duty

²⁹⁵ *Louisville, etc. Ry. Co. v. Lile*, Iowa, 595; *Condon v. Mo. Pacific R. Co.*, 78 Mo. 567; *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257 (1908); *Big Five Red. Co. v. Johnson*, 44 Colo. 236, 99 Pac. 63 (1908); *Olson v. Kelly Coal Co.*, 236 Ill. 502, 86 N. E. 88 (1908); *Antioch Coal Co. v. Rockey*, 169 Ind. 247, 82 N. E. 76 (1907); *Campbell, etc. Min. Co. v. Smith*, 115 S. W. (Ky.) 256 (1909); *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081 (1906).

²⁹⁶ *Galveston, etc. R. Co. v. Delahunty*, 53 Tex. 206 [roadmaster who furnished a worn rope]; *Indiana Car Co. v. Parker*, 100 Ind. 181 [superintendent allowed a rope used in operating a cut-off saw to become worn and unsafe from age and use].

²⁹⁷ *Guthrie v. Louisville, etc. R. Co.*, 11 Lea (Tenn.) 372.

²⁹⁸ *Gilmore v. Union Pacific R. Co.*, 18 Fed. 866; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869 [dynamite].

²⁹⁹ *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642; *Cooper v. Pittsburgh, etc. R. Co.*, 24 W. Va. 37; *Brann v. Chicago, etc. R. Co.*, 53

³⁰⁰ *Hough v. Railroad Company*, 100 U. S. 213.

³⁰¹ *Wilson v. Willimantic Linen Co.*, 50 Conn. 433. The negligence of defendant's foreman in failing to notice the defect in machinery when it came from the manufacturer, or in failing afterwards to discover the defect, is the negligence of a servant in the discharge of a duty which the master owes his other servants and not the negligence of a fellow servant (*Houston v. Brush*, 66 Vt. 331, 29 Atl. 380).

of inspecting materials and supplies or making repairs, as in the case of a division superintendent in respect of defects in a station house which he had discretionary power to repair;³⁰² of a superintendent of repairs who failed to make proper examination of a locomotive boiler, by defects in which a fireman was killed;³⁰³ of its inspectors of stakes used as guards on platform cars, by the breaking of one of which a brakeman was injured;³⁰⁴ of a car inspector, whose duty it was to inspect cars, failing to mark them for repairs, for want of which a man engaged in coupling cars was injured.³⁰⁵ So as to a road master, whose duty it was to keep the road in good repair, and through whose neglect a train was precipitated into a washout and a brakeman injured;³⁰⁶ and a section foreman, who, having taken up a rail in repairing the track, failed to put out any signal to warn approaching trains, whereby a train was thrown off and a brakeman's leg broken.³⁰⁷ So as to servants entrusted with the power of deciding what number of men was

³⁰² *Illinois Central R. Co. v. Welch*, 52 Ill. 183; *Houston, etc. R. Co. v. Oram*, 49 Tex. 341 [brakeman while ascending a side ladder on a car in motion, injured by projecting framework of a water tank].

³⁰³ *Stevenson v. Jewett*, 16 Hun, 210.

³⁰⁴ *Bushby v. N. Y., Lake Erie R. Co.*, 37 Hun, 104, *aff'd*, 107 N. Y. 374.

³⁰⁵ *Tierney v. Minneapolis, etc. R. Co.*, 33 Minn. 311, where *Vanderburgh, J.*, distinguishes between servants or agents whose duties relate to the maintenance of safe instrumentalities and those who superintend the use of them (comparing *Drymala v. Thompson*, 26 Minn. 40, and *Brown v. Winona, etc. R. Co.*, 27 Id. 162). The same distinction is taken in *Marvin v. Miller*, 25 Hun, 163.

[LAW OF NEG. VOL. I — 34]

³⁰⁶ *Atchison, etc. R. Co. v. Moore*, 31 Kans. 197; *Houston, etc. R. Co. v. Dunham*, 49 Tex. 181; *s. p.*, *New Orleans, etc. R. Co. v. Hughes*, 49 Miss. 258; and see *Hall v. Pacific R. Co.*, 74 Mo. 298, following *Lewis v. St. Louis, etc. R. Co.*, 59 Id. 495. In *Bessex v. Chicago, etc. R. Co.*, 45 Wis. 477, the neglect of yardmaster to keep the track free from obstructions, whereby plaintiff was injured through the falling of a pile of boards, was held to be the negligence of defendant. Followed in *Hulehan v. Green Bay, etc. R. Co.*, 58 Wis. 319 [loose blocks of firewood left scattered along track, over which brakeman stumbled while coupling cars].

³⁰⁷ *Drymala v. Thompson*, 26 Minn. 40. Compare *Walsh v. St. Paul, etc. R. Co.*, 27 Minn. 367.

necessary for a particular task.³⁰⁸ So with regard to servants having absolute control over the starting or delaying of trains.³⁰⁹ The decisions as to the liability of railroad companies to their servants for the neglect of engineers to give the ordinary signals of approaching trains are simply irreconcilable.³¹⁰ It is sufficient to say that in the cases enumerated in this section the fellow-servant doctrine does not apply.

§ 206. What is sufficient notice to master.—Masters are charged with notice, not only of what they know, but also of what they ought to know,³¹¹ that is, of every fact which they would have known had they used ordinary care and diligence in performing their duties.³¹² And

³⁰⁸ *Flike v. Boston, etc. R. Co.*, 53 N. Y. 549; *Booth v. Boston, etc. R. Co.*, 73 Id. 38; in which cases defendant's agent sent out a freight train with only two brakeman aboard when there should have been three, which was the usual number.

³⁰⁹ *Darrigan v. N. Y. & New England R. Co.*, 52 Conn. 285 [train dispatcher, through whose negligence in sending out two irregular trains in opposite directions a collision occurred, which injured an engineer]; *Hankins v. N. Y., Lake Erie, etc. R. Co.*, 92 N. Y. 639, rev'g 23 Hun, 473 [same]; *Dana v. N. Y. Central R. Co.*, 92 N. Y. 639; rev'g, 23 Hun, 473 [telegraph operator, through whom the movements of trains were regulated, by whose omission to send proper dispatches, a collision occurred, in which an engineer was killed].

³¹⁰ In Georgia, Kentucky, Mississippi, Indiana, Illinois, Missouri, Minnesota, Oregon, the railroad company is held responsible. (See cases cited under § 203). In the U. S. Supreme Court, the contrary rule was recently established (*Northern*

Pac. R. Co. v. Charless, 162 U. S. 359).

³¹¹ *Ocean S. S. Co. v. Matthews*, 86 Ga. 418, 12 S. E. 632 [defect in appliances]; *Standard Mfg. Co.'s appeal*, 130 Pa. St. 446, 18 Atl. 637.

³¹² *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 14 S. Ct. 756; *Johnson v. First Nat. Bank*, 79 Wis. 414, 48 N. W. 712; *St. Louis, etc. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895 [latent defect, which should have been discovered]; *Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 48 N. W. 679 [same]. The facts that a defective car was attached to a train, with nothing to show that it differed from the other cars, and that it became necessary to use it in such a manner as resulted in injury, are *prima facie* evidence of negligence of the railroad company, without proof that it had notice of the defect (*Guthrie v. Maine Cent. R. Co.*, 81 Me. 572, 18 Atl. 295). See *Griffin v. Boston & Alb. R. Co.*, 148 Mass. 143, 19 N. E. 166 [defective coupling link], and §§ 191, 194, *ante*, and many cases there cited. *Momence Stone Co. v. Turrell*, 205 Ill. 505, 68 N. E.

while the general rule which, in favor of a stranger, holds the principal to be affected with notice of any fact coming to the knowledge of any of his agents, under such circumstances as to make it the duty of that agent to communicate the fact to his principal, does not apply to its full extent in favor of a servant,³¹³ yet, where a master has delegated to any of his servants the duty of receiving notice of certain facts,³¹⁴ or has placed in their

1078, aff'g 106 Ill. App. 160 (1903), (where but a short time before the accident a car had fallen on the track owing to defects therein, the master owed the duty to plaintiff subsequently injured in the same manner, to have had the track repaired, and will be conclusively affected with notice of its defective condition); *King v. Chicago, etc. Ry. Co.*, 108 Ia. 748, 78 N. W. 837 (1899), (the master is affected with notice of the rotten condition of the floor of a car); *Gray v. Commutator Co.*, 85 Minn. 463, 89 N. W. 322 (1901); *Glasscock v. Swofford Dry Goods Co.*, 106 Mo. App. 657, 80 S. W. 364, 74 S. W. 1039 (1904); *Newton v. Vulcan Iron Wks.*, 199 Pa. St. 646, 69 Atl. 339 (1901); *Morris v. Bowers*, 105 Tenn. 59, 58 S. W. 328 (1900); *O'Connor Co. v. Gillaspy*, 170 Ind. 428, 83 N. E. 738 (1908); *Kerker v. Bettendorf Wheel Co.*, 141 Ia. 118 N. W. 306 (1908); *Every v. Rains*, 84 Kans. 560, 115 Pac. 114 (1910); *Hugo, etc. Co. v. Paiz*, 128 S. W. (Tex. App.) 912 (1910); *Williams v. Sleepy Hollow Min. Co.*, 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170 (1906), (master must exercise higher grade of care in providing safe place for the servant to work where the place is underground and the means of escape in case of danger slight. Such place must not only be safe from dangers that are patent, but also those that are latent, and as well from those

extraneous matters that menace safety as from dangers that are inherent, and evidence is admissible where there is a lack of ladders and other means of escape to show that the master knew, or in the exercise of ordinary care should have known, of the danger of the mine becoming flooded). *Fleming v. Northern Tissue Paper Mills*, 135 Wis. 157, 114 N. W. 841, 15 L. R. A. (N. S.) 701 (1908); *Dailey v. New York, etc. Ry. Co.*, 167 Fed. 592 (1909).

³¹³ Knowledge of a defect, in materials, etc., on the part of a fellow servant, of precisely the same grade as the one who is injured by such defect (*e. g.*, a brakeman), is not imputable to the master (*Smoot v. Mobile, etc. R. Co.*, 67 Ala. 13; *Union Pac. R. Co. v. Springsteen*, 41 Kans. 724, 21 Pac. 774; *Indiana, etc. R. Co. v. Snyder* (Ind.), 32 N. E. 1129 [latent defect in handle, known only to carpenter making it, not notice]). But notice to a telegraph operator of a railroad of defect in a bridge is sufficient notice to the company (*Hall v. Galveston, etc. R. Co.*, 39 Fed. 18).

³¹⁴ A railroad company is bound, by notice of the defective condition of a switch engine, given to a foreman in its repair shop, to whom, by the company's rules, the same should have been reported (*Brabbitts v. Chicago, etc. R. Co.*, 38 Wis. 287). Where a railroad company makes no

hands the power of taking action with respect to such notice, or has left such matters under their charge or control, notice of such facts to such servants is equivalent to notice to the master.³¹⁵ Thus, a master is charged

provision for inspection of locomotives except by engineers, it is a question for the jury whether the engineer does not occupy such relation to the company that notice to him is notice to the company (*McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597).

³¹⁵ Notice to head engineer, who has charge of all the machinery and elevators in a building, that an elevator chain was too light for its work, is notice to the owner (*Delaney v. Hilton*, 50 N. Y. Super. 341). Notice to foreman of railroad roundhouse of the dangerous condition of an engine belonging to that house, held notice to the company (*Chicago, etc. R. Co. v. Run*, 104 Ill. 641). So, as to notice given to a railroad superintendent of a defect in its track (*Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389); or in a car-coupler (*Bowers v. Union Pac. R. Co.*, 4 Utah, 215, 7 Pac. 251). *Ray v. Diamond Steel Co.*, 2 Pennw. (Del.) 525, 47 Atl. 1017 (1901), (notice of defects in machinery given to foreman in charge of the work in which it is used is notice to the master, and his promise to repair is promise of the master); *Atchison, etc. Ry. Co. v. Midgett*, 1 Kans. App. 138, 40 Pac. 995 (1895). ("Foreman in charge of the work who hired Midgett and other employees and directed them about their work, stood in place of the company, as its representative, and his knowledge and neglect bind the company"). *Anderson v. Elder*, 105 La. 672, 30 So. 120 (1902), (notice to the foreman of a gang loading a ship of a dangerous defect

in the appliance used, and failure to remedy it, notwithstanding there was opportunity to do so, will render the master liable; although not personally present he is so in legal contemplation as regards management and discipline and what is ordinarily necessary to the safety of the employees); *East Tenn., etc. Ry. Co. v. Wright*, 100 Tenn. 56, 42 S. W. 1065 (1898), (knowledge of conductor of recklessness of the engineer is notice to the company); *Galveston, etc. Ry. Co. v. Slinkard*, 17 Tex. App. 585, 44 S. W. 35 (1898), (knowledge of division superintendent of habitual disregard of rule against uncoupling cars while in motion); *Mattise v. Consumers' Ice Co.*, 46 La. Ann. 1535, 16 So. 400, 49 Am. St. Rep. 356 (1895), (engineer in charge of machinery); *Elledge v. National, etc. Ry. Co.*, 100 Cal. 282, 34 Pac. 720, 38 Am. St. Rep. 290 (1893), (knowledge of foreman imputable to company); *Riverton Coal Co. v. Shepperd*, 207 Ill. 395, 69 N. E. 921, aff'g 111 Ill. App. 294 (1904), (fire boss neglecting measures of safety ordered by State examiner); *Ft. Wayne v. Christie*, 159 Ind. 172, 59 N. E. 385 (1901), (knowledge of city's superintendent of danger from the caving of banks in the progress of the work); *Eicholz v. Niagara Falls, etc. Co.*, 174 N. Y. 519, 66 N. E. 1107, aff'g 68 N. Y. App. Div. 441, 73 N. Y. Supp. 842 (1903); *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 61 N. E. 143, 87 Am. St. Rep. 547, 55 L. R. A. 99 (1901), (mining boss putting a miner in charge of the work which it is his duty to superintendent renders the

with notice of the incompetency of a servant, when received by any agent who has the power of dismissing

company liable for the neglect of in the roof of a shaft of a mine, to such miner); *Wysocki v. Wisconsin, etc. Co.*, 121 Wis. 96, 98 N. W. 950 (1904), (knowledge of one having authority to direct employees in their work that a horse was vicious, is knowledge of the master); *Texas, etc. Ry. Co. v. Barrett*, 166 U. S. 617, 17 S. Ct. 707, 41 L. Ed. 1136, aff'g 67 Fed. 214, 14 C. C. A. 373 (1897), (a railway company is not bound to "supply the best and safest and newest of such mechanical appliances, but is bound to use all reasonable care and prudence in providing machinery reasonably safe and suitable for use and in keeping the same in repair; * * * by ordinary care is meant such as a prudent man would use under the same circumstances; it must be measured by the character and risk of such business; and where such persons, whose duty it is to repair the appliances of the business, know, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is liable for their neglect"); *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257 (1908), (foreman when discharging duties the law imposes on the principal becomes a vice-principal, and notice to him is notice to the company); *Olsen v. Kelly Coal Co.*, 236 Ill. 502, 86 N. E. 88 (1908), (mine manager); *Antioch Coal Co. v. Rockey*, 169 Ind. 247, 82 N. E. 76 (1907), (mine boss); *Cudahy Packing Co. v. Hays*, 74 Kans. 124, 85 Pac. 811 (1906), (defective appliance known to foreman in charge of the department); *Campbell, etc. Min. Co. v. Smith's Admr.*, 115 S. W. (Ky.) 256 (1909), (those employed to take down slate in the roof of a shaft of a mine, to make it safe, represent the master, knowledge of defects is notice); *Starnes v. Pine Woods Lbr. Co.*, 122 La. 284, 47 So. 607 (1908), (defect in appliance known to assistant foreman is notice to employer); *Lammi v. Milford, etc. Quarries*, 196 Mass. 336, 82 N. E. 26 (1907), (safety of premises being under control of a superintendent chargeable with conditions open to observation which might have been known by the exercise of reasonable care, his neglect will be that of the company); *Wiita v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169 (1908), (notice to mine captain of previous accidents from defective fuse is notice to the company, notwithstanding the superintendent alone controlled the purchase and supply of fuse for the mine); *Burkard v. Leschen, etc. Rope Co.*, 217 Mo. 460, 117 S. W. 35 (1909), (unsafe place to work, notice to foreman); *Hill v. Nelson Coal Co.*, 40 Mont. 1, 104 Pac. 876 (1909), (vice-principal); *Henry v. Omaha Packing Co.*, 81 Nev. 237, 115 N. W. 777 (1908), (knowledge of the agent though acquired while not acting in that capacity is imputable to the master); *Burch v. Southern Pac. Co.*, 104 Pac. (Nev.) 225 (1909), (one authorized to employ is also empowered to promise to repair defective machinery, and notice to such a one is notice to the company); *Colgate Co. v. Hurst*, 25 Okla. 588, 107 Pac. 657 (1910), (general superintendent of mine); *Rogers v. Portland Lbr. Co.*, 54 Ore. 387, 102 Pac. 601, 103 Pac. 514 (1910), (knowledge of foreman that machinery was liable to start auto-

that servant,³¹⁶ or even of suspending him;³¹⁷ and with notice of defects in instrumentalities, received by any agent charged with the supply, inspection or repair of such instrumentalities.³¹⁸ Notice to any one who is a vice-principal (within the definition hereafter given) is sufficient notice to the master.³¹⁹ If a master does not provide any convenient means of receiving notice personally or through an easily accessible vice-principal, he neglects his personal duty of supervision and inspection, and notice to any agent who ought to communicate it, may be sufficient.³²⁰

matically was knowledge of defendant); *Vickers v. Kanawha Ry. Co.*, 64 W. Va., 474, 63 S. E. 367 (1910), (the unassignable duty of a railway company to provide a reasonably safe place for its servants to work extends to the entire track over which he is required to pass, and the fact that it is intrusted to an independent contractor will not absolve the company from liability); *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081 (1906), (a general manager is a vice-principal)

³¹⁶ Notice to the master-mechanic whose province it was to employ and discharge engineers and firemen, of the practice of engineers to violate an order of the company, by placing their engines in the hands of firemen, is notice to the company (*Ohio, etc. R. Co. v. Collarn*, 73 Ind. 261).

³¹⁷ It is sufficient that notice of incompetency should be given to officers who supervise such employee's work, and are given authority to suspend him temporarily from his position, for incompetency of the kind in question (*Baltimore, etc. R. Co. v. Henthorne*, 19 C. C. A. 623, 73 Fed. 634).

³¹⁸ *Worden v. Humeston, etc. R. Co.*, 76 Ia. 310, 41 N. W. 26; *Chicago, etc. R. Co. v. Blevins*, 46 Kans. 370,

26 Pac. 687 [foreman providing defective tool]; *Sangamon Coal Co. v. Wiggerhaus*, 122 Ill. 279, 13 N. E. 648. Notice of defects in appliances, to one whose duty it is to have repairs made, whatever the grade of his employment, is notice to the company (*Chapman v. Southern Pac. Co.*, 12 Utah, 30, 41 Pac. 551).

³¹⁹ *Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389; *Johnson v. First Nat. Bank*, 79 Wis. 414, 48 N. W. 712 [superintendent of building walk]; *Lyttle v. Chicago, etc. R. Co.*, 84 Mich. 289, 47 N. W. 571 [notice to yardmaster of defects in engine]. Those in charge of the men who were using a hand car had actual knowledge of defects. Held, that their knowledge was notice to the company (*Atchison, etc. R. Co. v. Napole*, 55 Kans. 401, 40 Pac. 669). Where notice was given to the superintendent of a street railway company of a defect, but the company neglected to remedy the defect, and after a change in superintendents, a servant was injured thereby, the company could not plead want of notice of the defect, though its then superintendent had not been notified thereof (*Bland v. Shreveport R. Co.*, 48 La. Ann. 1057, 20 So. 284).

³²⁰ Notice to a conductor of a de-

§ 207. **Contributory negligence.** — All the rules as to contributory negligence are, of course, applicable to the claims of servants against their masters; and many cases of that kind have already been cited in Chapter VI. Some further illustrations of the application of these rules may be given here, as contributory negligence is naturally very frequent among injured servants.³²¹ Constant familiarity with danger always breeds indifference and often produces recklessness. The servant cannot recover if his injury was proximately due to his own fault in taking unnecessary risks,³²² as by needlessly go-

fective "hand-hold" or "foot-rest" was notice to defendant, and his promise to have the defect repaired soon was sufficient, though not himself authorized to make the repairs (Louisville, etc. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326).

³²¹ Pearson Lbr. Co. v. Hart, 144 Ala. 239, 39 So. 566 (1905); Walker v. St. Louis, etc. Sawmill Co., 76 Ark. 436, 88 S. W. 988 (1905); Larsen v. Leonardt, 8 Cal. App. 226, 96 Pac. 395 (1908); Gorman Lbr. Co. v. Brock, 55 Fla. 577, 46 So. 740 (1908); Southern Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110 (1906); Dickson v. Swift Co., 238 Ill. 62, 87 N. E. 59 (1909); Miller v. White, etc. Monument Co., 118 N. W. (Ia.) 518 (1908); Cincinnati, etc. Ry. Co. v. Fortner, 113 S. W. (Ky.) 847 (1908); Rickman v. Lee Lbr. Co., 122 La. 909, 48 So. 320 (1908); Whiffen v. Stone, 197 Mass. 579, 83 N. E. 989 (1908); Schulte v. Pfau-der Co., 150 Mich. 427, 113 N. W. 1120 (1907); Allen v. Wisconsin Ry., 107 Minn. 5, 119 N. W. 423 (1909); Fulwider v. Trenton, etc. Gas Co., 216 Mo. 582, 116 S. W. 508 (1909); Hubler v. Johnson, etc. Co., 74 Neb. 840, 105 N. W. 247 (1905); Harrison v. New York, etc. Ry. Co., 195 N. Y. 86, 87 N. E. 802 (1909);

Avery v. West Lbr. Co., 146 N. C. 592, 60 S. E. 646 (1908); Best v. Staple Co., 218 Pa. 202, 67 Atl. 205 (1907); International, etc. Co. v. Brice, 100 Tex. 203, 97 S. W. 461 (1906); Stone v. Union, etc. Co., 100 Pac. (Utah) 362 (1909); Smith v. Norfolk Traction Co., 63 S. E. (Va.) 1005 (1909); Johnson v. Coates Logging Co., 50 Wash. 679, 97 Pac. 801 (1909); Gray v. Northern, etc. Ry. Co., 121 N. W. (Wis.) 142 (1909); St. Louis, etc. Ry. Co. v. Conway, 156 Fed. 234 (1907); American, etc. Smelting Co. v. McGee, 157 Fed. 69, 94 C. C. A. 573 (1907); Williams Cooperage Co. v. Headrick, 159 Fed. 680, 86 C. C. A. 548 (1908); Baltimore, etc. Ry. Co. v. Kangas, 162 Fed. 143, 89 C. C. A. 167 (1908).
³²² Lothrop v. Fitchburg R. Co., 150 Mass. 423, 23 N. E. 227; Piper v. Cambria Iron Co., 78 Md. 249, 27 Atl. 939; Carroll v. East Tennessee, V. & G. Ry. Co., 82 Ga. 452, 10 S. E. 163 [fireman traveling with sleeping engineer]; Illinois, etc. R. Co. v. Patterson, 69 Ill. 650; s. c., again, 93 Ill. 290; Memphis, etc. R. Co. v. Thomas, 51 Miss. 637 [driving train too fast over track known to be dangerous]; Welch v. Brainard, 108 Mich. 38, 65 N. W. 667 [doing work in a needlessly dangerous manner];

ing or remaining in a dangerous place,³²³ needlessly or

- Way v. Chicago, etc. R. Co., 76 Ia. 393, 41 N. W. 51 [dispensing with needed assistance]; Gowen v. Harley, 6 C. C. A. 190, 56 Fed. 973. While the cars were still moving, decedent began to climb down the side of the car, and was crushed between the car and a post which stood close to the track. Decedent was an experienced railroad man, and was familiar with the surroundings of defendant's tracks. It did not appear that any rule of defendant required decedent to descend from a moving train at that place. Held, that decedent assumed the risk in descending from car, and plaintiff could not recover (Pennington v. Detroit, etc. R. Co., 90 Mich. 505, 51 N. W. 634). In an action against a railway company for the death of an employee, evidence that deceased was habitually careless and reckless in the performance of his duty is admissible (Peoria, etc. R. Co. v. Puckett, 52 Ill. App. 222). Where plaintiff was not acting under the orders of his employer, but on his own responsibility, knowing the danger, he could not recover damages for his injuries (Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124). Alabama, etc. Ry. Co. v. McWhorter, 156 Ala. 269, 47 So. 84 (1908); Warren Vehicle Co. v. Siggs, 120 S. W. (Ark.) 412 (1909); Southern Ry. v. Salmon, 65 S. E. (Ga.) 70 (1909); Chicago, etc. Ry. v. Cobler, 87 N. E. (Ind.) 981 (1909); Rogers v. Covington, etc. Ry. Co., 102 S. W. (Ky.) 336, 31 Ky. L. 374 (1907); Rickman v. Lee Lbr. Co., 122 La. 909, 48 So. 320 (1909); State v. Linton, etc. Mfg. Co., 109 Md. 404, 77 Atl. 602 (1909); O'Toole v. New England Gas, etc. Co., 201 Mass. 126, 87 N. E. 608 (1909); Syneszewski v. Schmidt, 152 Mich. 438, 116 N. W. 1107 (1908); Elmgren v. Chicago, etc. Ry. Co., 102 Minn. 41, 112 N. W. 1067 (1907); Thornberry v. Old Judge Min. Co., 126 Mo. App. 660, 105 S. W. 659 (1907); Sledge v. Weldon Lbr. Co., 140 N. C. 459, 53 S. E. 295 (1906); Gunderson v. Roebling Constr. Co., 194 N. Y. 529, 86 N. E. 807 (1909); Savage v. Rhode Island Co., 28 R. I. 391, 67 Atl. 633 (1907); St. Louis, etc. Ry. Co. v. Finley, 118 S. W. (Tenn.) 692 (1909); Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423 (1908); Norfolk, etc. Ry. Co. v. Belcher's Admr., 107 Va. 340, 58 S. W. 579 (1907); Priddy v. Black, etc. Min. Co., 64 W. Va. 242, 61 S. E. 163 (1908).
- ³²³ Bunt v. Sierra Min. Co., 138 U. S. 483, 11 S. Ct. 464 [miner removing prop and sitting under dangerous roof]; Victor Coal Co. v. Muir, 20 Colo. 320, 38 Pac. 378 [miner continuing work without propping mine]; Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725 [same]; Lord v. Pueblo Smelting & Refining Co., 12 Colo. 390, 21 Pac. 148 [passing between cars two feet apart]; Whitmore v. Boston & M. R. Co., 150 Mass. 477, 23 N. E. 220 [going between cars]; Columbus, etc. R. Co. v. Bridges, 86 Ala. 448, 5 So. 864 [crossing dangerous trestle]; Haggerty v. Chicago, etc. R. Co., 90 Ia. 405, 57 N. W. 896 [climbing down side of car]; Southern Pac. Co. v. Johnson, 12 C. C. A. 479, 64 Fed. 951 [going outside of locomotive while running fast]. A conductor of a material train who, unnecessarily and contrary to custom, climbed on top of a shanty car forming part of the train, to signal the engineer, and was thrown therefrom on account of the car being

carelessly using dangerous appliances,³²⁴ needlessly using materials, implements or structures for purposes, or in a manner to which they are obviously not adapted,³²⁵

derailed through the falling of the coupling apparatus, was guilty of contributory negligence (Georgia, etc. R. Co. v. Hallman, 97 Ga. 317, 23 S. E. 73 [conductor climbing on top of car, without necessity or custom]; Werk v. Illinois Steel Co., 154 Ill. 427, 40 N. E. 442 [standing on rail, close to wheel of car]; Coops v. Lake Shore, etc. R. Co., 33 N. W. 541 [creeping under train]; Kinney v. Corbin, 132 Pa. St. 341, 19 Atl. 141 [going under hanging stone]; Kilroy v. Foss, 161 Mass. 138, 36 N. E. 746 [going under hanging stones]; Goff v. Chippewa River, etc. R. Co., 86 Wis. 237, 56 N. W. 465; Yearsley v. Sunset Telephone Co., 110 Cal. 236, 42 Pac. 638 [climbing tree to string wires]). To stand in close proximity to a railroad train passing at the rate of thirty or forty miles an hour is contributory negligence (Illinois Cent. R. Co. v. Stassen, 56 Ill. App. 221).

³²⁴ Cunningham v. Merrimac Paper Co., 163 Mass. 89, 39 N. E. 774 [lifting heavy door]; Diehl v. Lehigh Iron Co. (Pa.), 21 Atl. 430 [dynamite]; Acme Coal Min. Co. v. McIver, 5 Colo. App. 267, 38 Pac. 596 [elevator liable to start]; Massie v. Peel Coal Co., 41 W. Va. 629, 24 S. E. 644 [coal miner, who tested slate roof of mine by tapping it with his pick near place known to him to be dangerous]; Kansas, etc. Ry. Co. v. Henrie, 87 Ark. 443, 112 S. W. 967 (1908); Sutton v. Des Moines Bakery Co., 135 Ia. 390, 112 N. W. 836 (1907); Roberts v. Sanitas Food Co., 142 Mich. 589, 106 N. W. 68 (1905); Schulte v. Pfaudler, 150 Mich. 427, 113 N. W. 1120 (1907); Woelffen v.

Lewiston, etc. Co., 49 Wash. 405, 95 Pac. 493 (1908); Solt v. Canney, 162 Fed. 660, 89 C. C. A. 452 (1908); McCabe, etc. Const. Co. v. Wilson, 209 U. S. 275, 28 S. Ct. 558, 52 L. Ed. 788 (1908).

³²⁵ An employee cannot recover for injuries from defective appliances while using them, without necessity, in a manner and for a purpose not intended, where the defects would not render such appliances unfit to be used as intended (Jayne v. Sebevaing Coal Co., 108 Mich. 242, 65 N. W. 971); Galvin v. Old Colony R. Co., 162 Mass. 533, 39 N. E. 186 [narrow passage, not meant for travel]; Jennings v. Tacoma R. Co., 7 Wash. St. 275, 34 Pac. 937 [same]; Cluny v. Cornell Mills, 160 Mass. 218, 35 N. E. 772 [guard to saw]; Felch v. Allen, 98 Mass. 572; Houston, etc. R. Co. v. Meyers, 55 Tex. 110 [brakeman using end of switch-chain in place of coupling-link]; Groff v. Duluth Imperial Mill Co., 58 Minn. 333, 59 N. W. 1049 [setting ladder on loose barrels]; Richardson v. Carbon Hill Coal Co., 6 Wash. St. 52, 32 Pac. 1012 [walking in railroad tunnel]; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481). But where an appliance suitable for the purpose for which it is designed is used for another for which it is unfitted, the master may become liable for injuries caused by such diversion, where that practice has grown into a custom (Miller v. Union Pac. R. Co., 17 Fed. 67; Crebarry v. National Transit Co., 28 N. Y. Supp. 291, 77 Hun, 74 [leaning against lath]); Harper v. Ill. Cent. Ry. Co., 115 S. W. (Ky.) 198 (1909); Agresta

needlessly coupling cars in motion,³²⁶ or needlessly trying to step on a moving railroad train.³²⁷ He cannot recover

- v. Stevenson, 112 App. Div. 367, 98 N. Y. Supp. 594; Finan v. Sutch, 220 Pa. 378, 69 Atl. 817 (1908); Quick v. Millfort Mill Co., 78 S. C. 472, 59 S. E. 365 (1907); Fewell v. Southern Ry. Co., 105 Va. 1, 52 S. E. 689 (1906); Kellier v. English Co., 6 Ont. (W. R.) 334; Chicago, etc. Ry. Co. v. Hamilton, 42 Ind. App. 512, 85 N. E. 1044 (1908); Mulholland v. Ideal Mfg. Co., 149 Mich. 126, 112 N. W. 483 (1907); Kelley v. Lawrence, 105 Mo. 75, 92 S. W. 1158 (1906); Standard Distilling, etc. Co. v. Harris, 75 Neb. 480, 106 N. W. 582 (1906); Salisbury v. Press Publishing Co., 76 Neb. 849, 108 N. W. 136 (1906); Amer. Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041 (1906); Wash. Mills v. Cox, 157 Fed. 634, 85 C. C. A. 154 (1907); Union Pac. Ry. v. Brady, 161 Fed. 719 (1908).
- ³²⁶ Finnell v. Delaware, etc. R. Co., 129 N. Y. 669, 29 N. E. 825; Kennedy v. Lake Superior, etc. R. Co., 87 Wis. 28, 57 N. W. 976; Long v. Coronado R. Co., 96 Cal. 269, 31 Pac. 170; Muldowney v. Illinois Central R. Co., 39 Ia. 615 [brakeman warned]; Williams v. Central R. Co., 43 Id. 396; Peoria, D. & E. R. Co. v. Puckett, 52 Ill. App. 222; Towner v. Missouri Pac. R. Co., 52 Mo. App. 648 [needlessly coupling cars going 6 miles an hour]. McManus v. Oregon Short Line Ry. Co., 118 Mo. App. 152, 94 S. W. 743; s. c., 207 U. S. 583, 28 S. Ct. 260, 52 L. Ed. 351 (1907), (needlessly going between cars to uncouple them when provided with a lever); Morriss v. Duluth, etc. Ry. Co., 108 Fed. 747, 47 C. C. A. 661 (1901); Gilbert v. Chicago, etc. Ry. Co., 123 Fed. 832 (1903), (cutting out car); Gilbert v. Burlington, etc. Ry. Co., 128 Fed. 529, 63 C. C. A. 27 (1904); Southern Ry. Co. v. Arnold, 114 Ala. 183, 21 So. 954 (1897); Shorter v. Southern Ry. Co., 121 Ala. 158, 25 So. 853 (1899), (guiding coupling link by hand when provided with coupling stick); McDonald v. Alabama, etc. Ry. Co., 123 Ala. 227, 26 So. 165 (1899); Huggins v. Southern Ry. Co., 148 Ala. 153, 41 So. 856 (1906); Whalin v. Illinois, etc. Ry. Co., 112 Ill. App. 428 (1904); Carrier v. Union Pac. Ry. Co., 61 Kan. 447, 59 Pac. 1075 (1900); Caldwell v. Missouri, etc. Ry. Co., 181 Mo. 455, 80 S. W. 867 (1904); Reninger v. New York, etc. Ry. Co., 162 N. Y. 595, 57 N. E. 1123; s. c., 11 App. Div. 565, 42 N. Y. Supp. 813 (1900); Elmore v. Seaboard, etc. Ry. Co., 132 N. C. 865, 44 S. E. 620 (1903); Allen v. New York, etc. Ry. Co., 174 Fed. 779, 98 C. C. A. 253 (1909); St. Louis, etc. Ry. Co. v. Davis, 124 S. W. (Ark.) 754 (1910); Strange v. Wrightsville, etc. Ry. Co., 133 Ga. 730, 66 S. E. 774 (1910); Toledo, etc. Ry. Co. v. Gordon, 177 Fed. 152, 100 C. C. A. 572 (1910); Wight v. Michigan, etc. Ry. Co., 126 N. W. (Mich.) 414 (1910).
- ³²⁷ Wilson v. Michigan Cent. R. Co., 94 Mich. 20, 53 N. W. 797; Novock v. Michigan Cent. R. Co., 63 Mich. 121, 29 N. W. 525; Louisville, etc. N. R. Co. v. Wallace, 90 Tenn. 531, 15 S. W. 921 [speed ten miles an hour; inexcusable]; Richmond, etc. R. Co. v. Bivins, 103 Ala. 142, 15 So. 515; St. Louis, etc. R. Co. v. Bloyd, 60 Ark. 637, 31 S. W. 457; Union Pac. R. Co. v. Estes, 37 Kans. 715, 16 Pac. 131.

for injuries caused by his own negligence, in using without order to do so appliances which he knows to be dangerously defective or out of repair,³²⁸ or using dangerous machinery in a perilous manner,³²⁹ or in failing to heed warnings or signals;³³⁰ in failing to give such warning to

³²⁸ *Schulz v. Rohe*, 149 N. Y. 132, 43 N. E. 420, rev'g 8 Misc. 683, 28 N. Y. Supp. 1147; *McQuigan v. Delaware, etc. R. Co.*, 122 N. Y. 618, 26 N. E. 13. Where deceased was in charge of defendant's coal cars, and in the use of a car, the trap of which had, to his knowledge, been broken two weeks before he was killed by fall-through the trap, while cars in proper condition were available to him for use, and he had been directed to send cars with broken traps to the shop for repair; held, that it was error to submit the case to the jury (*Shields v. N. Y. Central R. Co.*, 133 N. Y. 557, 30 N. E. 596).

³²⁹ *Odell v. N. Y. Central R. Co.*, 120 N. Y. 323, 24 N. E. 478 [placing hand on dangerous saw]; *Gaffney v. Inman Mfg. Co.*, 18 R. I. 781, 31 Atl. 6 [putting hand in machine while in motion]; *Hartwig v. Bay State Shoe Co.*, 118 N. Y. 664, 23 N. E. 24 [adjusting machinery in motion]; *Larson v. St. Paul, etc. R. Co.*, 43 Minn. 488, 45 N. W. 1096 [turning cogwheels by hand]; *Salem Stone Co. v. O'Brien*, 12 Ind. App. 217, 40 N. E. 430 [resting foot on cogwheels]; *Wilson v. Steel-Edge Stamping Co.*, 163 Mass. 315, 39 N. E. 1039 [bad method using machinery]; *McCallum v. McCallum*, 58 Minn. 288, 59 N. W. 1019; *Jones v. Sutherland*, 91 Wis. 587, 65 N. W. 496.

³³⁰ *St. Louis, etc. R. Co. v. Schumacher*, 152 U. S. 77, 14 S. Ct. 479 [several warnings]; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 S. Ct. 530 [warned, yet persisted]; *Moeller*

v. Brewster, 131 N. Y. 606, 30 N. E. 124 [warning against hammering radiator]; *Ward v. Chesapeake, etc. R. Co.*, 39 W. Va. 46, 19 S. E. 389 [failure to see signal]; *Vreeland v. Chicago, etc. R. Co. (Ia.)*, 60 N. W. 542 [heard warning, but thought no danger]; *Degnan v. Jordan*, 164 Mass. 84, 41 N. E. 117; *Lendberg v. Brotherton Iron Min. Co.*, 97 Mich. 443, 56 N. W. 846; *Devine v. Savannah, etc. R. Co.*, 89 Ga. 541, 15 S. E. 781; *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522; *Noll v. Phil. & Reading R. Co.*, 163 Pa. St. 504, 30 Atl. 157 [mistaken belief that danger had passed]. *Alabama Coal, etc. Co. v. Hammond*, 156 Ala. 253, 47 So. 248 (1908); *Pre v. Standard, etc. Cement Co.*, 9 Cal. App. 591, 100 Pac. 122 (1909); *Morelli v. Noera Mfg. Co.*, 81 Conn. 447, 71 Atl. 353 (1909); *Jemnienski v. Loddell Car Wheel Co.*, 5 Pennw. (Del.) 485, 63 Atl. 935 (1905); *Hilman Land, etc. Co. v. Littlejohn*, 90 S. W. 1053, 28 Ky. L. Rep. 983 (1908); *Elmgren v. Ry. Co.*, 102 Minn. 41, 112 N. W. 1067, 12 L. R. A. (N. S.) 754 (1906); *Illinois Cent. Ry. Co. v. Emerson*, 88 Miss. 598, 40 So. 818 (1906); *Coonce v. Nat. Biscuit Co.*, 115 Mo. App. 629, 92 S. W. 352 (1906); *Waggoner v. Sneed*, 118 S. W. (Tex. App.) 547 (1909); *New York, etc. Ry. Co. v. Wilson*, 64 S. E. (Va.) 1060 (1909); *Imhoof v. Northwestern Lbr. Co.*, 43 Wash. 387, 86 Pac. 650 (1906); *Jackson v. Wheeling, etc. Ry. Co.*, 65 W. Va. 415, 64 S. E. 450 (1906); *Kirkpatrick v. St. Louis, etc. Ry. Co.*,

others as is necessary for his own protection;³³¹ in failing to use the safeguards which the master has provided,³³² or to take proper precautions against known dangers,³³³ or in omitting to look and listen for approach-

159 Fed. 855, 87 C. C. A. 35 (1908); *Ruddick v. Railway Co.*, 11 Ont. (W. R.) 130.

³³¹ *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362, 26 Atl. 315; *Thoman v. Chicago & N. W. R. Co.* (Ia.), 60 N. W. 612; *Richmond, etc. R. Co. v. De Butts*, 90 Va. 405, 18 S. E. 837; *St. Louis Brick Co. v. Kenyon*, 57 Ill. App. 640; *Stevens v. San Francisco, etc. R. Co.*, 100 Cal. 554, 35 Pac. 165 [near machinery, without notifying engineer]; *Louisville, etc. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714 [conductor failing to signal]; *Crane v. Chicago, etc. R. Co.*, 93 Wis. 487, 67 N. W. 1132 [going under engine, without notifying engineer]; *Lumpkin v. Southern R. Co.*, 99 Ga. 111, 24 S. E. 963 [watchman climbing on car without giving notice]. A car repairer, who had been engaged for three years in that work, went under the last car of a train, with the knowledge that a caboose was to be attached to the rear of the car, without putting out a flag or other signal to give warning of his being under the car, is guilty of negligence (*Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 S. Ct. 338; *Illinois Cent. R. Co. v. Winslow*, 56 Ill. App. 462).

³³² *Junior v. Missouri Electric Co.*, 127 Mo. 79, 29 S. W. 988 [handling wires without gloves]; *Kaare v. Troy Steel Co.*, 139 N. Y. 369, 34 N. E. 901 [not using lights].

³³³ *McQuigan v. Delaware, etc. R. Co.*, 122 N. Y. 618, 26 N. E. 13, 759 [stepping on man-hole cover known to be loose]; *Evansville, etc. R. Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901;

Illinois Cent. R. Co. v. Bowles, 71 Miss. 1003, 15 So. 138 [going between disabled cars]; *Bedford R. Co. v. Brown*, 142 Ind. 659, 42 N. E. 359 [not looking to see if timbers were in place]. *Nihill v. New York, etc. Ry. Co.*, 167 Mass. 52, 44 N. E. 1075 (1896), (one employed to inspect and couple cars going between them without giving notice to the foreman); *Montague v. Chicago, etc. Ry. Co.*, 82 Fed. 787, 27 C. C. A. 180 (1897); *Whitcomb v. McNulty*, 105 Fed. 863, 45 C. C. A. 90 (1901), (engineer going under engine to make repairs); *Alabama, etc. Ry. Co. v. Roach*, 116 Ala. 360, 23 So. 52 (1897); *Norfolk, etc. Ry. Co. v. Graham*, 96 Va. 430, 31 S. E. 604 (1898); *Seldombridge v. Chesapeake, etc. Ry. Co.*, 46 W. Va. 569, 33 S. E. 293 (1899); *Hulien v. Chicago, etc. Ry. Co.*, 107 Wis. 122, 82 N. W. 710 (1900); *Elgin, etc. Ry. Co. v. Herath*, 230 Ill. 109, 82 N. E. 610; rev'g 126 Ill. App. 416 (1907); *Soccoroso v. Philadelphia, etc. Ry. Co.*, 170 Fed. 722 (1909), (track laborer walking between the rails); *Gleason v. Suskin*, 110 Md. 137, 72 Atl. 1034 (1909), (an experienced forewoman going between shafting in a factory); *Santore v. New York, etc. Ry. Co.*, 203 Mass. 437, 89 N. E. 619 (1909), (a servant is not justified in relying wholly on signals which ought to be given by approaching train, he must make a reasonable use of his senses); *Magliani v. Minnesota, etc. Ry. Co.*, 108 Minn. 148, 121 N. W. 635 (1909), (employees passing leisurely through railway yard, have not the

ing trains on a railroad,³³⁴ or to notice which way a train was moving,³³⁵ or to get out of the way of a train,³³⁶ or to look for defects or dangers in the place of work or appliances, which were obvious or which he ought to have foreseen were probable.³³⁷ A servant cannot recover for

same right to rely on signals being given as when they are at work); *St. Louis, etc. Ry. Co. v. Finley*, 118 S. W. (Tenn.) 692 (1909), (brakeman going forward to flag a train must look and listen continuously); *Virginia Iron, etc. Co. v. Munsey*, 110 Va. 156, 65 S. E. 478 (1909), as against dangers known to him or which might have been known by ordinary care, a servant must provide for his own safety); *Raines v. Great Northern, etc. Ry. Co.*, 53 Wash. 570, 102 Pac. 431 (1909), (an engineer where train has taken the siding to allow another to pass, cannot recover for injury received from train passing on the main track received while standing too near when cleaning his engine); *McPherson v. Great Northern Ry. Co.*, 149 Wis. 473, 122 N. W. 1022 (1909); *Louisville, etc. Ry. Co. v. Holland*, 51 So. (Ala.) 365 (1909); *Wickham's Admr. v. Louisville, etc. Ry. Co.*, 122 S. W. (Ky.) 154 (1909); *Louisville, etc. Ry. Co. v. Lumpkin*, 124 S. W. (Ky.) 318 (1910); *Degonia v. St. Louis, etc. Ry. Co.*, 224 Mo. 564, 123 S. W. 807 (1909); *Van Dyke v. Missouri, etc. Ry. Co.*, 130 S. W. 1 (1910); *Dowell v. Chicago, etc. Ry. Co.*, 83 Kans. 562, 112 Pac. 136 (1910); *Hammer v. Great Northern Ry. Co.*, 129 N. W. (Minn.) 219 (1911); *Illinois, etc. Ry. Co. v. Comfort*, 53 So. (Miss.) 422 (1910); *Regan v. Boston, etc. Ry. Co.*, 208 Mass. 520, 94 N. E. 691 (1911).

³³⁴ *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 S. Ct. 835; *Elliot v. Chicago, etc. R. Co.*, 150 U. S. 245,

14 S. Ct. 85 [no excuse that attention was suddenly called away]; *Lynch v. Boston & A. R. Co.*, 159 Mass. 536, 34 N. E. 1072; *Clark v. N. Y., Lake Erie, etc. R. Co.*, 80 Hun, 320, 30 N. Y. Supp. 126; *Loring v. Kansas City, etc. R. Co.*, 128 Mo. 349, 31 S. W. 6; *Church v. Chicago, etc. R. Co.*, 119 Mo. 203, 23 S. W. 1056; *Rawlston v. East Tennessee, etc. R. Co.*, 94 Ga. 536, 20 S. E. 123; *Keefe v. Chicago, etc. R. Co.*, 92 Ia. 182, 60 N. W. 503; *Schaible v. Lake Shore, etc. R. Co.*, 97 Mich. 318, 56 N. W. 565 [shunted train]; *Wilber v. Wisconsin Cent. Co.*, 86 Wis. 535, 57 N. W. 356 [shunted car]; *Nelling v. Chicago, etc. R. Co.*, 98 Iowa, 554, 63 N. W. 568, 67 N. W. 404, 4 Am. & Eng. Ry. Cas. (N. S.) 539 [extra train]; *Kenna v. Central Pac. R. Co.*, 101 Cal. 26, 35 Pac. 332; *Van Dyke v. Missouri, etc. Ry. Co.*, *supra*; *Dowell v. Chicago, etc. Ry. Co.*, *supra*; *Saccoroso v. Philadelphia, etc. Ry. Co.*, *supra*; *Santor v. New York, etc. Ry. Co.*, *supra*. But see *Baccelli v. Delaware Ry. Co.*, 138 App. Div. 623, 122 N. Y. Supp. 849 (1910), (holding that where it is the foreman's duty to give notice of approaching train a section hand could rely on his doing so if train was approaching from the opposite direction).

³³⁵ *Magee v. Chicago, etc. R. Co.*, 89 Ia. 752, 56 N. W. 681.

³³⁶ *Cooney v. Great Northern R. Co.*, 9 Wash. St. 292, 37 Pac. 438.

³³⁷ *Conway v. Furst* [Ct. Errors] 57 N. J. Law, 645, 32 Atl. 380 [unfinished building]; *East St. Louis Storage Co. v. Crow*, 155 Ill. 74, 39 N. E.

an injury caused by his own *needless* haste;³³⁸ but his error of judgment, caused by *necessary* haste, is not necessarily a bar.³³⁹ So the servant cannot recover for an injury which he would not have suffered, if he had not voluntarily left his post of duty to take a position of greater danger,³⁴⁰ even though his act may be well

589 [hole: no excuse given for not seeing it]; *Dieboldt v. U. S. Baking Co.*, 81 Hun, 195, 30 N. Y. Supp. 745 [elevator]; *Johnson v. Hovey*, 98 Mich. 343, 57 N. W. 172 [saw]; *Moore v. Norfolk, etc. R. Co.*, 87 Va. 489, 12 S. E. 908 [lounging too near track]; *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862 [failure to examine hole loaded with dynamite]; *Day v. Cleveland, etc. R. Co.*, 137 Ind. 206, 36 N. E. 854.

³³⁸ *Horne v. Old Colony R. Co.*, 161 Mass. 180, 36 N. E. 792.

³³⁹ *Reynolds v. Boston, etc. R. Co.*, 64 Vt. 66, 24 Atl. 134; *Baltimore, etc. Ry. Co. v. Cavanaugh*, 35 Ind. App. 32, 71 N. E. 239 (1904), (a servant is chargeable with contributory negligence in failing to use such care as one of ordinary prudence would use under the circumstances, but not for the failure to exercise the best judgment); *Spronk v. Addyston Pipe, etc. Co.*, 19 Ohio Cir. Ct. R. 714, 10 O. C. D. 675 (1900); *Barksdale v. Charleston, etc. Ry. Co.*, 66 S. C. 204, 44 S. E. 743 (1903); *Tallahassee Falls Mfg. Co. v. Moore*, 48 So. (Ala.) 593 (1909), (that if a servant had selected another way he would have avoided the injury, does not show him to have been contributorily negligent; the question is, did he knowingly select a dangerous way); *Florida, etc. Ry. Co. v. Lassiter*, 52 So. (Fla.) 975 (1910); *Bailey v. Prime, etc. Co.*, 83 Kans. 230, 109 Pac. 791 (1910); *Morgan v. Missouri, etc. Ry. Co.*, 136 Mo.

App. 337, 117 S. W. 106 (1909), (a servant is not guilty of contributory negligence because he obeys the master's order in putting himself in a dangerous place, if the place were not so dangerous that no prudent man would have done it and he merely underestimated the danger); *Smith v. Hewitt, etc. Lbr. Co.*, 104 Pac. (Wash.) 651 (1909), (where all passageways through the mill are dangerous, the servant is not guilty of contributory negligence in using the one used habitually, with knowledge of the master); *Lyon v. Charleston, etc. Ry. Co.*, 84 S. C. 364, 66 S. E. 282 (1909), (where acting under orders of the master the servant is not bound to exercise the most discriminating judgment for his own safety); *Grand Trunk, etc. Ry. Co. v. Poole*, 93 N. E. (Ind.) 26 (1910), (one is not contributorily negligent in adjusting couplers between slowly moving cars, where not manifestly negligent, in conformity with the custom of prudent employees in the railway company's service, though neither the plaintiff nor defendant were aware of such custom).

³⁴⁰ *Pittsburgh, etc. R. Co. v. Sentmeyer*, 92 Pa. St. 276 [riding on top of car: low bridge]; *S. P., Rains v. St. Louis, etc. R. Co.*, 71 Mo. 164; *Wilson v. Louisville, etc. R. Co.*, 85 Ala. 269, 4 So. 701; *Sammon v. N. Y. Central, etc. R. Co.*, 38 N. Y. Super. 414 [barrier-man at a crossing injured by going upon a track,

meant and his object to continue serving his master.³⁴¹ We have no doubt, however, that this doctrine should not be extended so far as to cover the case of a servant who, in good faith and in the exercise of a reasonable discretion, leaves his regular work to protect the interest of his master in another place, under circumstances which justify him in believing that his master would direct him to do so if personally present. Obviously, he cannot recover for an injury caused by his own negligent workmanship,³⁴² or bad judgment,³⁴³ especially where he chooses to follow his own judgment, in opposition to that of the master.³⁴⁴ Untrue statements, whether willful or not, are a bar to recovery upon any act properly done in reliance thereon.³⁴⁵ Evidence of a general habit of reck-

where he had no business to go]; *S. W.* 255 [propping mine at re-aff'd on another ground, 62 N. Y. 251; *Central R. Co. v. Chapman*, 96 Ga. 769, 22 S. E. 273 [dangerous machine]; *Colorado Coal Co. v. Carpita*, 6 Colo. App. 248, 40 Pac. 248; *Chicago, etc. Smelting Co. v. Collins*, 43 Ill. App. 478; *Mandel v. Wheeler*, 59 Ill. App. 459 [going to look at escaping steam]. We doubt the soundness of this last decision. But to render such an act negligent there must be reason to apprehend danger (*Southern Ry. Co. v. McGowan*, 149 Ala. 440, 43 So. 378 (1907); *Tennessee, etc. Coal Co. v. Gandy*, 49 So. (Ala.) 369 (1909); *Northern, etc. Ry. Co. v. Wendel*, 156 Fed. 336, 84 C. C. A. 232 (1907). When both positions are apparently safe he is not negligent in choosing either.

³⁴¹ *Sears v. Central R. Co.*, 53 Ga. 630 [conductor coupling cars]; *Brown v. Byroads*, 47 Ind. 435 [catcher exchanging place with sawyer]; *Freeberg v. St. Paul Plow Works*, 48 Minn. 99, 50 N. W. 1026 [meddling with belt]; *Knox v. Pioneer Coal Co.*, 90 Tenn. 546, 18

S. W. 255 [propping mine at request of servant not in authority]; *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100 [making dangerous repairs].

³⁴² *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725 [propping mine badly]; *Pfeffer v. Cutler*, 83 Wis. 281, 53 N. W. 508 [scaffold]. It makes no difference that the master assisted or superintended the work, if the servant participated in doing it badly (*Lucey v. Hannibal Oil Co.*, 129 Mo. 32, 31 S. W. 340).
³⁴³ *Kansas City, etc. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

³⁴⁴ *Jolly v. Detroit, etc. R. Co.*, 93 Mich. 370, 53 N. W. 526; *Davies v. Pelham Hod Elevating Co.*, 76 Hun, 289, 27 N. Y. Supp. 709; *Roblin v. Kansas City, etc. R. Co.*, 119 Mo. 476, 24 S. W. 1011; *Judkins v. Maine Cent. R. Co.*, 80 Me. 417, 14 Atl. 735; *Bolton v. Georgia Pac. R. Co.*, 83 Ga. 659, 10 S. E. 352 [having good ladder, accepted another from co-servant].

³⁴⁵ *Morgan v. Carbon Hill Co.*, 6 Wash. St. 577, 34 Pac. 152, 772 [decendent induced opening of lamp,

lessness among servants of the same master, even when known to him and unchecked, is inadmissible for the purpose of relieving any of them from the imputation of contributory negligence.³⁴⁶

§ 207a. **What is not contributory negligence.** — Negligence, which is not a proximate cause of the injury, is not *contributory* negligence.³⁴⁷ Not every risky act is necessarily negligent; nor does the servant's assumption of a particular risk, as part of his duty, make him assume, also, all increased risks due to negligence, for which his master would otherwise be responsible. A servant, whose duty requires him to do something which necessarily involves some danger, is not guilty of contributory negligence in simply performing such duty, and assumes only such risks as are inherent to his own act.³⁴⁸ The principle has been applied in favor of servants required to work in a dangerous place,³⁴⁹ to jump on or off moving

causing explosion]; *Stanley v. Chicago, etc. R. Co.*, 101 Mich. 202, 59 N. W. 393 [pretending experience to get employment]; *McDermott v. Iowa Falls, etc. R. Co. (Iowa)*, 47 N. W. 1037 [same].

³⁴⁶ *Thompson v. Boston & M. R. Co.*, 153 Mass. 391, 26 N. E. 1070.

³⁴⁷ *Kansas City, etc. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88; *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544; *Terre Haute, etc. R. Co. v. Mansberger*, 65 Fed. 196, 12 C. C. A. 574; *Murray v. Gulf, etc. R. Co.*, 73 Tex. 2, 11 S. W. 125; *Magee v. North Pac. R. Co.*, 78 Cal. 430, 21 Pac. 114.

³⁴⁸ *Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464 [dynamite]; *Galvin v. New York*, 112 N. Y. 223, 19 N. E. 675; *Stackman v. Chicago, etc.*

R. Co., 80 Wis. 428, 50 N. W. 404 [ground slippery; place narrow]. The fact that an employee has performed work, knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he performed that which was dangerous in a negligent manner (*Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146).

³⁴⁹ *Mather v. Rillston, supra*; *Lyttle v. Chicago, etc. R. Co.*, 84 Mich. 289, 47 N. W. 571 [standing on engine-step]; *Michael v. Roanoke Mach. Works*, 90 Va. 492, 19 S. E. 261; see *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Pantzar v. Mining Co.*, 99 N. Y. 368; *Doyle v. Baird*, 15 Daly, 287, 6 N. Y. Supp. 517.

cars,³⁵⁰ to walk on top of cars in a moving train,³⁵¹ to occupy a perilous position on a moving train,³⁵² to stand very near a rapidly moving train,³⁵³ to walk or stand upon a railroad track where trains are constantly running,³⁵⁴ to walk behind³⁵⁵ or between³⁵⁶ cars in a train liable to move at any moment upon notice to make a "flying switch,"³⁵⁷ to couple cars by going between them, even while they are moving,³⁵⁸ or to use dangerous appliances.³⁵⁹ The mere fact that a servant was injured because of the way of performing a duty which he

³⁵⁰ Texas, etc. R. Co. v. Reed, 88 Tex. 439, 31 S. W. 1058 [duty to get on moving cars]; Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546; Oregon, etc. R. Co. v. Tracy, 66 Fed. 931, 14 C. C. A. 199; Louisville, etc. R. Co. v. Earl, 94 Ky. 368, 22 S. W. 607 [jumping on car; caught by other car left on track]; O'Mellia v. Kansas City, etc. R. Co., 115 Mo. 205, 21 S. W. 503 [no rule forbidding it]. Where common laborer returning from work on a train was ordered by conductor to jump off at station when train was moving about four miles an hour, held that this negligence was a question for the jury, and verdict being found in its favor, it was affirmed (Northern Pacific R. Co. v. Egeland, 163 U. S. 93, aff'g 12 U. S. App. 271).

³⁵¹ Louisville, etc. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881; Baltimore, etc. R. Co. v. Leathers, 12 Ind. App. 544, 40 N. E. 1094 [for jury].

³⁵² Pennsylvania R. Co. v. Zink, 126 Pa. St. 288, 17 Atl. 614; Martin v. Louisville, etc. R. Co., 95 Ky. 612, 26 S. W. 801; Lockhart v. Little Rock, etc. R. Co., 40 Fed. 631 [riding on footboard of engine].

³⁵³ Swadley v. Missouri Pac. R. Co., 118 Mo. 268, 24 S. W. 140; Card v. Eddy, 129 Mo. 510, 28 S. W. 753.

³⁵⁴ Taylor v. Louisville, etc. R. Co.,

93 Tenn. 305, 27 S. W. 663; O'Loughlin v. N. Y. Central R. Co., 87 Hun, 538, 34 N. Y. Supp. 297; Kroener v. Chicago, etc. R. Co., 88 Iowa, 16, 55 N. W. 28 [foot caught in rails]; Craft v. Northern Pac. R. Co., 62 Fed. 735.

³⁵⁵ Mears v. Boston, etc. R. Co., 163 Mass. 150, 39 N. E. 997.

³⁵⁶ Lowe v. Chicago, etc. R. Co., 89 Iowa, 420, 56 N. W. 519 [uncoupling]; Rahman v. Minnesota, etc. R. Co., 43 Minn. 42, 44 N. W. 522.

³⁵⁷ Dooner v. Delaware, etc. Canal Co., 164 Pa. St. 17, 30 Atl. 269; St. Louis, etc. R. Co. v. French, 56 Kans. 584, 44 Pac. 12.

³⁵⁸ Horan v. Chicago, etc. R. Co., 89 Iowa, 328, 56 N. W. 507; Bennett v. Northern Pac. R. Co., 3 N. Dak. 91, 54 N. W. 314. Though plaintiff was directed by the yardmaster not to go between the cars, yet his going between them to uncouple them would not make him guilty of negligence, where there was no rule forbidding it, and he was acting under the directions of the conductor (Hannah v. Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682).

³⁵⁹ Martin v. California Cent. R. Co., 94 Cal. 326, 29 Pac. 645; Donahue v. Drown, 154 Mass. 21, 27 N. E. 675.

selected, when, if he had selected another way, injury would have been avoided, does not conclusively show contributory negligence.³⁶⁰ It is not merely no negligence in a servant to take the most obvious risks in order to save human life; it is positively commendable for him to do so; and it will in no degree prejudice his right of recovery.³⁶¹ It is not negligence to take some risks, in the proper course of business, upon the assumption that both the master³⁶² and his servants³⁶³ will do their duty. Statutes, positively requiring masters to take certain precautions against dangers to servants, justify a servant in assuming, without special inquiry, that such precautions have been taken,³⁶⁴ but not so when it is obvious that they have not been taken,³⁶⁵ nor do they at all excuse the servant's want of due care in other respects.³⁶⁶ Where a servant is suddenly subjected to imminent peril, he cannot be held guilty of contributory negligence, as a matter of law, merely because he does not choose the best

³⁶⁰ *Tennessee, etc. R. Co. v. Hern-*
don, 100 Ala. 451, 14 So. 287; *Mc-*
Elligott v. Randolph, 61 Conn. 157,
22 Atl. 1094; *Chase v. Burlington &*
N. R. Co., 76 Iowa, 675, 39 N. W.
196. See *Murphy v. N. Y. Central*
R. Co., 118 N. Y. 527, 23 N. E. 812;
McPhee v. Scully, 163 Mass. 216, 39
N. E. 1007. This is only a fair
application of the doctrine which
holds a master free to select any
reasonable method of having his work
done (*Southern Ry. Co. v. Mc-*
Gowan, 49 Ala. 440, 43 So. 378
(1907); *Tallahassee, etc. Mfg. Co. v.*
Moore, 48 So. (Ala.) 593 (1909);
Charlton v. St. Louis, etc. Ry. Co.,
200 Mo. 413, 98 S. W. 529 (1906);
Dunphy v. St. Joseph, etc. Stock
Yards Co., 118 Mo. App. 506, 95 S.
W. 301 (1906).

³⁶¹ *Omaha, etc. R. Co. v. Krayen-*
buhl, 48 Neb. 553, 67 N. W. 447, see
also *Fordyce v. Edwards*, 60 Ark.

438, 30 S. W. 758 [defective engine
may be operated to end of journey];
Houston, etc. Ry. Co. v. Burnett,
108 S. W. (Tex. App.) 404 (1907);
Crosby v. Cuba Ry. Co., 158 Fed. 144
(1908).

³⁶² *Heltonville Mfg. Co. v. Fields*,
138 Ind. 58, 36 N. E. 529.

³⁶³ *Baltzer v. Chicago, etc. R. Co.*,
89 Wis. 257, 60 N. W. 716; *Cleve-*
land, etc. R. Co. v. Brown, 18 U. S.
App. 10, 6 C. C. A. 142, 56 Fed.
804; *West Chicago R. Co. v. Dwyer*,
57 Ill. App. 440.

³⁶⁴ *Wallace v. Central Vt. R. Co.*,
138 N. Y. 302, 33 N. E. 1069; *Davis*
v. N. Y., New Haven, etc. R. Co.,
159 Mass. 532, 34 N. E. 1070.

³⁶⁵ See *Thompson v. Allis Co.*, 89
Wis. 523, 62 N. W. 527.

³⁶⁶ *Davis v. N. Y., New Haven, etc.*
R. Co., 159 Mass. 532, 34 N. E. 1070
[must look and listen for train];
Krause v. Morgan, 52 Ohio St. 662,

means of escape.³⁶⁷ Where he is in doubt about the safety of a place where he has to work, he will not be prejudiced by deferring to the opinions and assurances of those who are, from their position, bound to have special knowledge as to whether it is safe or not.³⁶⁸ Obedience to the master's rules cannot be charged as contributory negligence. A servant cannot be required to keep watch for dangers, when his duty requires him to do something inconsistent therewith.³⁶⁹ The negligence of one servant is not imputed to another co-operating with him.³⁷⁰

§ 207b. Disobedience of rules and orders. — The disobedience of a servant to reasonable³⁷¹ rules or orders of

40 N. E. 886; Linton Coal Co. v. 675 (1908); Anderson v. Northern Persons, 11 Ind. App. 264, 39 N. E. Pac. Ry. Co., 34 Mont. 181, 85 Pac. 214. 884 (1906); Cudahy Packing Co. v.

³⁶⁷ Neilson v. Hillside Coal Co., 168 Wesolowski, 71 Neb. 786, 106 N. W. Pa. St. 256, 31 Atl. 1091; Schultz v. 1007 (1906); Hall v. Northwestern Chicago, etc. R. Co., 44 Wis. 638; Ry. Co., 81 S. C. 522, 62 S. E. 848 East Tenn., etc. R. Co. v. Gurley, 12 (1908); Brown v. Southern Ry. Co., Lea, 46; Greenleaf v. Ill. Central R. 82 S. C. 528, 64 S. E. 522 (1909); Co., 29 Iowa, 47; and see Union Davis v. Holy Terror Min. Co., 20 Pacific R. Co. v. Fort, 17 Wall. 553, S. D. 399, 107 N. W. 374 (1906); aff'g, s. c., 2 Dill. 492; Pierson Lbr. Kansas City Smelting, etc. Co. v. Co. v. Hart, 144 Ala. 239, 39 So. Taylor, 107 S. W. (Tex. App.) 889 566 (1905); Self v. Adel Lbr. Co., 5 (1908); Producer's Oil Co. v. Ga. App. 846, 64 S. E. 112 (1909); Barnes, 120 S. W. (Tex. App.) 1023 Paige v. Illinois Steel Co., 233 Ill. (1909); Colusa Min., etc. Co. v. 313, 84 N. E. 239 (1908); Cleveland, etc. Ry. Co. v. Bossert, 87 N. Monahan, 162 Fed. 276, 89 C. C. A. 256 (1908).

E. (Ind.) 158 (1909); Brantner v. ³⁶⁸ Lake Superior Iron Co. v. Erickson, 39 Mich. 492.

Chicago, etc. Ry. Co., 136 Ia. 349, ³⁶⁹ Conlon v. N. Y. Central R. Co., 112 N. W. 790 (1907); Murphy v. 74 Hun, 115, 26 N. Y. Supp. 659.

(Ia.) 390 (1908); Georgetown ³⁷⁰ Abbitt v. Lake Erie, etc. R. Co., Water, etc. Co. v. Forwood, 113 S. 150 Ind. 498, 40 N. E. 40.

W. (Ky.) 112 (1908); McDonnell's ³⁷¹ The rule must be reasonable Admr. v. Wallsend Coal, etc. Co., (Receivers v. Moore, 3 Tex. Civ. 117 S. W. (Ky.) 349 (1909); Root App. 416, 22 S. W. 272; see Overby v. Kansas City, etc. Ry. Co., 195 Mo. v. Chesapeake, etc. R. Co., 37 W. Va. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 524, 16 S. E. 813; Francis v. Kansas City R. Co., 110 Mo. 387, 19 S. W. 212 (1909); Feddeck v. St. Louis 935 [rule held reasonable]). A rule Car Co., 125 Mo. App. 24, 102 S. W.

his master, of which the servant has notice and which are then in force, is, if it proximately contributes to his injury,³⁷² evidence of his contributory negligence.³⁷³

requiring brakemen to examine appliances before using them, does not relieve from liability for injuries caused by defective appliances, unless the injured brakeman had time and opportunity to make such an examination as would have revealed the defect (*O'Malley v. N. Y., Lake Erie, etc. R. Co.*, 67 Hun, 130, 22 N. Y. Supp. 48). It is not negligence for a servant to go between cars, contrary to rules, when the duty required cannot otherwise be performed (*Memphis, etc. R. Co. v. Graham*, 94 Ala. 545, 10 So. 283; *Eastman v. Lake Shore R. Co.*, 101 Mich. 597, 60 N. W. 309. But compare *Richmond, etc. R. Co. v. Hisson*, 97 Ala. 187, 13 So. 209). To the contrary is *Louisville, etc. R. Co. v. Bryant (Ky.)*, 22 S. W. 606, a very bad decision, which the court itself ordered *not* to be reported. *Holmes v. Southern Pac. Co.*, 120 Cal. 357, 62 Pac. 652 (1898), (rule impracticable); *Beaumont Trac. Co. v. Dilworth*, 94 S. W. (Tex. App.) 352 (1906), (where a rule prohibited employees from riding to and from their work, but the company provided a car for them to so ride, the fact that plaintiff was injured in consequence of his violating the rule while riding in a car so provided, constitutes no defense); *St. Louis, etc. Ry. Co. v. Spivey*, 97 Tex. 143, 76 S. W. 748, reversing 73 S. W. 973 (1903), (a rule forbidding riding on freight trains in yards if habitually disregarded, with the company's knowledge, may be treated as no rule at all, but this does not authorize employees to so ride unless his duties require him to do

so); *Southern Pac. Ry. Co. v. Winton*, 27 Tex. App. 503, 66 S. W. 477 (1901), (held that the defendant could not shift the consequences of its negligence from itself to its servants by a rule requiring the inspection of foreign cars); *Adams v. Gulf, etc. Ry. Co.*, 101 Tex. 5, 102 S. W. 906 (1907), ("we think a rule to require servants to inspect their tools, etc., ought to be construed to apply only to those already in use"); *Scott v. Eastern, etc. Ry. Co.*, 90 Minn. 141, 95 N. W. 892 (1903), (holding that a rule imposing on railway employees the duty of examining for their own safety, the condition of cars, engine and machinery before using them, as far as reasonably can be done, is valid and reasonable); *Memphis, etc. Ry. Co. v. Graham*, 94 Ala. 555, 10 So. 283; *Northern Pac. Ry. Co. v. Poirier*, 167 U. S. 48 (impracticable and inapplicable rules); *Nolan v. New York, etc. Ry. Co.*, 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305 (rules substantially the same as those of 90 per cent. of the railroads of the country, held sufficient).

³⁷² If he had observed the rule the result would have been the same; violation of the rule will not preclude recovery (*White v. Louisville, etc. R. Co.*, 72 Miss. 12, 16 So. 248; *Helfenstein v. Medart*, 136 Mo. 595, 36 S. W. 863; *Horan v. Chicago, etc. R. Co.*, 89 Iowa, 328, 56 N. W. 507. See also *Richmond, etc. R. Co. v. Brown*, 89 Va. 749, 17 S. E. 132; *Louisville, etc. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176).

³⁷³ A servant cannot recover for an injury which was the direct result

Thus, a servant has been denied the right to recover when injured while violating a known rule forbidding

of his own disobedience of specific orders (*Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999; *Louisville, etc. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41; *Cullen v. National Roofing Co.*, 114 N. Y. 45, 20 N. E. 831), or general rules (*Overby v. Chesapeake, etc. R. Co.*, 37 W. Va. 524, 16 S. E. 813; *Shenandoah Val. R. Co. v. Lucado*, 86 Va. 390, 10 S. E. 422; *Drake v. N. Y. Central R. Co.*, 80 Hun, 490, 30 N. Y. Supp. 671; *Deeds v. Chicago, etc. R. Co.*, 74 Iowa, 154, 37 N. W. 124; *Savannah, etc. R. Co. v. Folks*, 76 Ga. 527; *Memphis, etc. R. Co. v. Graham*, 94 Ala. 545, 10 So. 283; *Murray v. Gulf, etc. R. Co.*, 73 Tex. 2, 11 S. W. 125; *Fritz v. Missouri, etc. R. Co.* (Tex. Civ. App.), 30 S. W. 85; *Patnode v. Harter*, 20 Nev. 303, 21 Pac. 679; *Kansas, etc. R. Co. v. Dye*, 16 C. C. A. 604, 70 Fed. 24 [signals]). Even a reasonable belief in his mind that obedience to such rule was unnecessary is no excuse (*Louisville, etc. R. Co. v. Mothershed*, 110 Ala. 143, 20 So. 67). In a suit to recover for the death of an employee of a company operating a leased track, on account of negligence in the construction of bridges over the track, the fact that his death was caused by his violation of a rule of his employer will operate as a defense in favor of the owner of the track (*Texas, etc. R. Co. v. Moore*, 8 Tex. Civ. App. 289, 27 S. W. 962). An employee of a railroad company, who has himself disregarded its rules, cannot recover damages for an injury resulting from a disregard of the company's rules by another employee, to which injury his own disregard of the rules contributed (*Simpson v. Central Vt. R. Co.*, 5 N. Y. App. Div. 614, 39 N. Y. Supp. 464). Except in rare cases, unless the act is contrary to a statute, a servant's violation of a rule of the master is not negligence *per se* (*Galveston, etc. R. Co. v. Sweeney*, 14 Tex. Civ. App. 216, 36 S. W. 800; *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 9 S. Ct. 647 [question for jury]; *Redus v. Milner Coal Co.*, 41 So. (Ala.) 634 (1907); *Cogbill v. Louisville, etc. Ry. Co.*, 152 Ala. 154, 44 So. 683 (1907); *Mascot Coal Co. v. Garrett*, 156 Ala. 290, 47 So. 149 (1908). See *Tallahassee, etc. Co. v. Moore*, 48 So. (Ala.) 593 (1908); *Snellen v. Kansas, etc. Ry. Co.*, 82 Ark. 334, 102 S. W. 193 (1907); *Central Coal Co. v. Wilson*, 83 Ark. 428, 104 S. W. 174 (1907); *Western Coal Co. v. Burns*, 84 Ark. 74, 104 S. W. 532 (1907); *Dallas Coal Co. v. Rotenberry*, 84 Ark. 237, 107 S. W. 997 (1908); *St. Louis, etc. Ry. Co. v. Dupree*, 84 Ark. 377, 105 S. W. 878 (1907); *El Paso Min. Co. v. Ewing*, 36 Colo. 513, 86 Pac. 119 (1906); *Georgia, etc. Ry. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505 (1908); *Cleveland, etc. Ry. Co. v. Gossett*, 87 N. E. (Ind.) 723 (1909); *Robins v. Ft. Wayne Iron, etc. Co.*, 41 Ind. App. 557, 84 N. E. 514 (1908); *Beardsley v. Murray Iron Works*, 129 Ia. 675, 106 N. W. 180 (1906); *Lindquist v. King's, etc. Plaster Co.*, 130 Ia. 107, 117 N. W. 46 (1908); *Sinclair v. Ill. Cent. Ry. Co.*, 129 Ky. 828, 112 S. W. 910 (1908); *Louisville, etc. Ry. Co. v. Mounce*, 28 Ky. L. Rep. 933, 90 S. W. 956 (1906); *Day v. Louisiana, etc. Ry. Co.*, 121 La. 180, 46 So. 203 (1907); *Foley v. Boston, etc. Ry.*

him to ride on an elevator³⁷⁴ or tender,³⁷⁵ or to ride on the top of a car,³⁷⁶ or *not* to keep on the top,³⁷⁷ or to jump on a moving train,³⁷⁸ or to use defective cars,³⁷⁹ or forbidding him to couple cars in motion,³⁸⁰ or to couple them without a coupling stick,³⁸¹ or to go between cars to couple

Co., 198 Mass. 532, 84 N. E. 846 (1908); Elmgren v. Chicago, etc. Ry. Co., 102 Minn. 41, 112 N. W. 1067 (1907); Yongue v. St. Louis, etc. R. Co., 133 Mo. App. 141, 158, 112 S. W. 985 (1908); Neas v. Chicago, etc. Ry. Co., 120 S. W. (Mo.) 120 (1908); Biles v. Seaboard, etc. Ry. Co., 139 N. C. 528, 52 S. E. 129 (1905); Crawford v. Southern Ry. Co., 150 N. C. 619, 64 S. E. 589 (1909); Memphis Gas, etc. Co. v. Simpson, 109 S. W. (Tenn.) 1155 (1907); Reeves v. Galveston, etc. Ry. Co., 44 Tex. Civ. App. 352, 98 S. W. 929 (1907); Galveston, etc. Ry. Co. v. Gillespie, 106 S. W. (Tex. App.) 707 (1908); Stone v. Union Pac. Ry. Co., 100 Pac. (Utah) 362 (1909); Williams v. Norton, etc. Coal Co., 108 Va. 608, 62 S. E. 342 (1909); Boucher v. Oregon, etc. Ry. Co., 50 Wash. 627, 97 Pac. 661 (1908); Butteris v. Mifflin, etc. Min. Co., 133 Wash. 343, 113 N. W. 642 (1907); Collins v. Mineral, etc. Ry. Co., 136 Wash. 421, 117 N. W. 1014 (1908); Jacoby v. Chicago, etc. Ry. Co., 137 Wis. 131, 118 N. W. 635 (1908); Missouri, etc. Ry. Co. v. Collier, 157 Fed. 347 (1907); Elliott v. Can. Ry. Co., 161 Fed. 250, 88 C. C. A. 286 (1908); Warren v. Erie, etc. Ry. Co., 166 Fed. 423, 92 C. C. A. 175 (1908).

³⁷⁴ Railroad Co. v. Jones, 95 U. S. 439; O'Neill v. Keokuk, etc. R. Co., 45 Iowa, 546; Abend v. Terre Haute, etc. R. Co., 111 Ill. 202; Louisville, etc. R. Co. v. Wilson, 88 Tenn. 316, 12 S. W. 720; Hyde v. Wendel, 75 Conn. 140, 52 Atl. 744 (1902).

³⁷⁵ Benage v. Lake Shore, etc. R. Co., 102 Mich. 72, 79, 60 N. W. 286.

³⁷⁶ San Antonio, etc. R. Co. v. Wallace, 76 Tex. 636, 13 S. W. 565.

³⁷⁷ An employee injured by being brought in contact with a coal chute placed too near the track, while standing on the ladder at the side of the car, instead of on top thereof, as the rules and custom require, cannot recover damages for injuries (Central Trust Co. v. East Tennessee, etc. R. Co. [C. C.], 69 Fed. 353).

³⁷⁸ Francis v. Kansas City, etc. R. Co., 110 Mo. 387, 19 S. W. 935; Gulf, etc. R. Co. v. Ryan, 69 Tex. 665, 7 S. W. 83.

³⁷⁹ Shields v. N. Y. Central R. Co., 133 N. Y. 557, 30 N. E. 596.

³⁸⁰ Johnson v. Chesapeake, etc. R. Co., 38 W. Va. 206, 18 S. E. 573; Sedgwick v. Illinois Cent. R. Co., 76 Ia. 340, 41 N. W. 35; Darracott v. Chesapeake, etc. R., 83 Va. 288, 2 S. E. 511; Huggins v. Southern Ry. Co., 148 Ala. 153, 41 So. 856 (1906); Ferry v. American, etc. Co., 153 Mich. 266, 116 N. W. 1073 (1908); Bowers v. Atchison, etc. Ry. Co., 82 Kans. 95, 107 Pac. 777 (1910). See note 371, *ante*.

³⁸¹ Wolsey v. Lake Shore, etc. R. Co., 33 Ohio St. 227; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Brennan v. Michigan Cent. R. Co., 93 Mich. 156, 53 N. W. 358; Norfolk, etc. R. Co. v. Briggs [Va.] 16 S. E. 748, *aff'g* 14 Id. 753; Richmond, etc. R. Co. v. Pannill, 89 Va. 552, 16 S. E. 748; Richmond, etc. R. Co. v. Free, 97 Ala. 231, 12 So. 294; Rome, etc. Const. Co.

them,³⁸² or even to couple them at all,³⁸³ or forbidding high speed,³⁸⁴ or forbidding "flying switches."³⁸⁵ Nor can he recover for injuries caused by his omitting to give notices,³⁸⁶ warnings or signals³⁸⁷ required by such rules, or to examine and inspect cars or other instrumentalities of work,³⁸⁸ or to clean his tools.³⁸⁹ A servant cannot be charged with negligence in disobeying orders of which he had no notice,³⁹⁰ but he is chargeable with notice of

v. Dempsey, 86 Ga. 499, 12 S. E. 882; Richmond, etc. R. Co. v. Thomason, 99 Ala. 471, 12 So. 273; Pryor v. Louisville, etc. R. Co., 90 Ala. 32, 8 So. 55; Louisville, etc. R. Co. v. Ward, 10 C. C. A. 166, 61 Fed. 927; Russell v. Richmond, etc. R. Co. (C. C.), 47 Fed. 204.

³⁸² St. Louis, etc. R. Co. v. Rice, 51 Ark. 467, 11 S. W. 699.

³⁸³ Kane v. Savannah, etc. R. Co., 85 Ga. 858, 11 S. E. 493 [there being no pressing emergency].

³⁸⁴ Williams v. Norfolk, etc. R. Co., 89 Va. 165, 15 S. E. 522; Robinson v. West Virginia, etc. R. Co., 40 W. Va. 583, 21 S. E. 727; Sutherland v. Troy, etc. R. Co., 74 Hun, 162, 26 N. Y. Supp. 237; Illinois Cent. R. Co. v. Neer, 46 Ill. App. 276. *Compare* Texas, etc. R. Co. v. Lester, 75 Tex. 56, 12 S. W. 955.

³⁸⁵ Pilkinton v. Gulf, etc. R. Co., 70 Tex. 226, 7 S. W. 806; Sheets v. Chicago, etc. R. Co., 139 Ind. 682, 39 N. E. 154.

³⁸⁶ Davis v. Nuttallsburg Coal Co., 34 W. Va. 500, 12 S. E. 539.

³⁸⁷ Louisville, etc. R. Co. v. Hanning, 131 Ind. 528, 31 N. E. 187; McGrath v. N. Y. & New England R. Co., 15 R. I. 95, 22 Atl. 927; Le Bahn v. N. Y. Central R. Co., 80 Hun, 116, 30 N. Y. Supp. 7; Louisville, etc. R. Co. v. Markee, 103 Ala. 160, 15 So. 511. See note 333, *ante*.

³⁸⁸ Louisville, etc. R. Co. v. Pearson, 97 Ala. 211, 12 So. 176; Brooks v. Northern Pac. R. Co., 47 Fed. 687. See Beall v. Pittsburgh, etc. R. Co., 38 W. Va. 525, 18 S. E. 729. See note 371, *ante*. Illinois, etc. Ry. Co. v. Jones' Admr., 118 Ky. 158, 80 S. W. 844 (1904), (but if ordered to assist in making a flying switch by his superior, and while doing so, a brakeman is injured by the negligence of the conductor or engineer, he may recover).

³⁸⁹ Johnson v. Hovey, 98 Mich. 343, 57 N. W. 172 [saw and frame].

³⁹⁰ An employee is not guilty of contributory negligence merely because an act of his violates a rule of his employer, he not having notice of the rule (Brown v. Louisville, etc. R. Co., 111 Ala. 275, 19 So. 1001; Mackey v. Baltimore, etc. R. Co., 157 U. S. 72; Alabama Midland R. Co. v. McDonald, 112 Ala. 216, 20 So. 472; International, etc. R. Co. v. Hinzle, 82 Tex. 623, 18 S. W. 681. But if he knows the terms of a rule promulgated by the company to govern his conduct he is bound by the rule, though the company failed to give him notice of its existence, or to afford him a reasonable opportunity to ascertain its terms (Port Royal, etc. R. Co. v. Davis, 95 Ga. 292, 22 S. E. 833).

any rules and orders which he ought to have known.³⁹¹ It is for the master to prove the existence of rules, and either actual notice or publication in such manner that the servant ought to have known of them;³⁹² after which it is for the servant to prove that he did not know of them and was not in fault for not knowing.³⁹³ A rule which is constantly disobeyed, to the knowledge of the master, and without remonstrance on his part, may be regarded by a jury as not in force;³⁹⁴ but mere disobedience, however frequent, is of no effect, if the master was

³⁹¹ *Seese v. Northern Pac. R. Co.*, *Fordyce v. Briney*, 58 Ark. 206, 24 39 Fed. 487. S. W. 250.

³⁹² Notice of the rule must be proved by defendant (*Mackey v. Baltimore, etc. R. Co.*, 19 D. C. 282, *aff'd*, 157 U. S. 72; *Louisville, etc. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *Brunswick, etc. R. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. 252; *Louisville, etc. R. Co. v. Mother-shed*, 110 Ala. 143, 20 So. 67). A written contract, embodying a rule, signed by the servant, is best evidence of notice (*Sedgwick v. Illinois Cent. R. Co.*, 73 Ia. 158, 34 N. W. 790). § 202 and notes.

³⁹³ Where a brakeman had seen a book of rules, read some, and could have read all; held, bound by rules which he did not read, though the railroad company had not furnished him with a book of rules, nor required him to read it (*Lacroy v. N. Y., Lake Erie, etc. R. Co.*, 132 N. Y. 570, 30 N. E. 391). Rule extensively distributed and posted in conspicuous places, is admissible in evidence, though it is not shown that plaintiff actually knew of its existence (*Alcorn v. Chicago, etc. R. Co.*, 108 Mo. 81, 16 S. W. 229). *s. p.*, *Williams v. Norfolk, etc. R. Co.*, 89 Va. 165, 15 S. E. 522; *Alexander v. Louisville, etc. R. Co.*, 83 Ky. 589;

³⁹⁴ As to when rules are considered not in force, see *Newport News, etc. R. Co. v. Campbell (Ky.)*, 25 S. W. 267; *Louisville, etc. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866 ["mere form," and impracticable]; *East Line, etc. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298; *Chicago & W. I. R. Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332; *Barry v. Hannibal, etc. R. Co.*, 98 Mo. 62, 11 S. W. 308; *Francis v. Kansas City, etc. R. Co.*, 127 Mo. 658, 28 S. W. 842; *Id.*, 30 S. W. 129; *Louisville, etc. R. Co. v. Richardson*, 100 Ala. 232, 14 So. 209; *Northern Pac. R. Co. v. Nickels*, 50 Fed. 718, 1 C. C. A. 625; *Hayes v. Bush & Denslow Mfg. Co.*, 41 Hun, 407. A rule directing brakeman to not uncouple cars while in motion may be waived by disregard thereof on the part of brakeman, for such a time that the officers were chargeable with notice (*Fish v. Illinois Cent. R. Co.*, 96 Ia. 702, 65 N. W. 995; *Strong v. Iowa Cent. R. Co.*, 94 Ia. 380, 62 N. W. 799; *Lowe v. Chicago, etc. R. Co.*, 89 Ia. 420, 56 N. W. 519; *Louisville, etc. R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050). But it must be shown that notice of such disregard had been brought home to the master (*Alabama, etc.*

not chargeable with constructive notice or had no opportunity to remonstrate.³⁹⁵ A servant is justified in disobeying general rules, when positively ordered to do so by the master in person or by a vice-principal,³⁹⁶ but not so as to the orders of any other fellow servant.³⁹⁷ And a mere suggestion or assent from a vice-principal is not equivalent to a positive *order*.³⁹⁸ A servant may be

- R. Co. v. Roach, 110 Ala. 266, 20 So. 132). See note 371, *ante*.
³⁹⁵ Benage v. Lake Shore, etc. R. Co., 102 Mich. 72, 60 N. W. 286; Francis v. Kansas City, etc. R. Co., 110 Mo. 387, 19 S. W. 935; Richmond, etc. R. Co. v. Hissong, 97 Ala. 187, 13 So. 209, modifying s. c., 91 Ala. 514, 8 So. 776.
³⁹⁶ Smith v. Wabash, etc. R. Co., 92 Mo. 359, 4 S. W. 129 [train dispatcher]; Mason v. Richmond, etc. R. Co., 111 N. C. 482, 16 S. E. 698 [conductor]. See, also, Fulton Bag & Cotton Mills v. Wilson, 89 Ga. 318; Hurlbut v. Wabash R. Co., 130 Mo. 657, 31 S. W. 1051 [conductor]; especially in cases of emergency, where reasonable doubt might exist as to the binding force of the rule (Fox v. Chicago, etc. R. Co., 86 Ia. 368; East Tennessee, etc. R. Co. v. Bridges, 92 Ga. 399). But *compare* Westcott v. N. Y. & New England R. Co., 153 Mass. 460, 27 N. E. 10 [obedience to vice-principal, without protest]; Richmond, etc. R. Co. v. Finley, 63 Fed. 228, 12 C. C. A. 595, 25 U. S. App. 16 [order of conductor not sufficient]; Richmond & D. R. Co. v. Rush, 71 Miss. 987, 15 So. 133 [conductor]. Carson v. Southern Ry. Co., 68 S. C. 50, 46 S. E. 55, *aff'd*, 194 U. S. 136, 24 S. Ct. 609, 48 L. Ed. 907 (1904); Norris v. Illinois, etc. Ry. Co., 88 Ill. App. 614 (1900); Illinois, etc. Ry. Co. v. Jones' Admr., 118 Ky. 158, 80 S. W. 484 (1904); Maehren v. Great Northern Ry. Co., 98 Minn. 375, 107 N. W. 951 (1906); McGroarty v. Wanamaker, 187 Pa. 132, 40 Atl. 820 (1898); Wilson v. Southern Ry. Co., 73 S. C. 481, 53 S. E. 968 (1906); Boyle v. Union Pac. Ry. Co., 25 Utah, 420, 71 Pac. 988 (1903); Snipes v. Southern Ry. Co., 166 Fed. 1, 91 C. C. A. 593 (1908); St. Louis, etc. Ry. Co. v. Morris, 76 Kan. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1110, (1907), (a servant will not be deemed contributorily negligent for obeying the orders of his superior by putting himself in a position of danger, if he is prudent in the manner of performing the act, unless it is obvious the danger is so great that no prudent man would have encountered it); Lee v. Powell Bros., 126 La. 51, 52 So. 214 (1910); Lowe v. Southern Ry. Co., 85 S. C. 363, 67 S. E. 460 (1910); Forsman v. Seattle Elec. Co., 109 Pac. (Wash.) 121 (1910); Larsen v. Magne-Silica Co., 111 Pac. (Cal. App.) 119 (1910); Hardy v. Chicago, etc. Ry. Co., 127 N. W. (Ia.) 1093 (1910); Runians v. Keller, etc. Co., 141 Ky. 827, 133 S. W. 960 (1911).
³⁹⁷ East Tennessee, etc. R. Co. v. Smith, 89 Tenn. 114, 14 S. W. 1077 [engineer and brakeman].
³⁹⁸ Keenan v. N. Y., Lake Erie, etc. Co., 145 N. Y. 190, 39 N. E. 711 [boss not authorized to change regular rules; no *positive* orders]; Mason v. Richmond, etc. R. Co., 114 N. C. 718, 19 S. E. 362; Atchison, etc. R.

barred from recovering by acquiescence in the violation of a rule by another servant,³⁹⁹ but such acquiescence cannot be inferred from the mere silence of a servant inferior in grade to the one in fault.⁴⁰⁰

§ 207c. Rule must be plain. — But to render the violation of a rule by a servant a defence against an action for injuries caused by the negligence of the master which the servant would otherwise have a right to maintain, the rule itself must be plain and it must be violated in its plain sense.⁴⁰¹ Though, of course, the thing enjoined or prohibited by the rule may itself be an act or omission of contributory negligence.⁴⁰²

Co. v. Reesman, 60 Fed. 370, 9 C. C. ser, 4 Ga. App. 276, 61 S. E. 505 A. 20 [mere assent of conductor]. (1908). See Southern Ry. Co. v. But see Sipes v. Michigan Starch Co., Shumate, 107 S. W. (Ky.) 737, 32 137 Mich. 258, 100 N. W. 447 (1904). Ky. L. Rep. 1027 (1908); Driver v.

³⁹⁹ Richmond, etc. R. Co. v. Dudley, Southern Ry. Co., 46 So. (Miss.) 90 Va. 304, 18 S. E. 274 [conductor; 824 (1908). See Southern Pac. brakeman]; Lake Shore, etc. R. Co. Co. v. Allen, 106 S. W. (Tex. Civ. v. Knittal, 33 Ohio St. 468. App.), 441 (1907); Northern Pac.

⁴⁰⁰ New Jersey, etc. R. Co. v. Ry. Co. v. Dixon, 139 Fed. 737, 71 Young, 1 U. S. App. 96, 1 C. C. A. C. C. A. 555 (1905).

428, 49 Fed. 723 [fireman; en- ⁴⁰² Fogarty v. So. Pac. Co., 151 gineer]; Haas v. Chicago, etc. R. Cal. 785, 91 Pac. 650 (1907); Cavanaugh v. Stone Corp., 80 Conn. 585, 69 Alt. 345 (1908); Stone v. Union

⁴⁰¹ Northern Alabama Ry. Co. v. Pac. Ry. Co., 100 Pac. (Utah) 362 Key, 150 Ala. 641, 43 So. 794 (1909). (1907); Georgia, etc. Ry. Co. v. Sas-

CHAPTER X(a).

LIABILITY OF MASTERS TO SERVANTS — Con.

- | | |
|--|--|
| <p>§ 207d. Ordinary risks of the service as distinguished from extraordinary risks.</p> <p>207e. What risks servants assume.</p> <p>207f. What risks servants do not assume.</p> <p>207g. What facts servants may presume.</p> <p>207h. Risks assumed under special orders.</p> <p>207i. Risks of service outside of ordinary employment.</p> <p>208. Assumption of extraordinary risks, or basis of imputed assumption of risks arising from master's negligence.</p> <p>209. Servant accepting employment with notice of defects.</p> <p>209a. Assumed risks by continuing in the service with notice of defects.</p> <p>210. Effect of refusal to repair.</p> <p>211. True rule as to effect of servant's knowledge.</p> <p>211a. Special risks incurred under coercion.</p> <p>212. Test of servant's prudence.</p> <p>213. Excusable omissions of usual care.</p> <p>214. Notice of defect, without notice of danger, immaterial.</p> <p>214a. When the defence of the assumption of risk from the master's default becomes unavailable.</p> <p>215. Effect of master's promises or assurances.</p> | <p>§ 216. Presumption as to servant's knowledge.</p> <p>217. Means of knowledge; duty to investigate.</p> <p>218. Application of rule to minors.</p> <p>219. Special duties of masters to minors.</p> <p>219a. Inexperienced servants, etc.</p> <p>220. Servant's knowledge of master's personal defects.</p> <p>221. Servant's duty to warn and complain.</p> <p>222. Burden of proof.</p> <p>223. What is sufficient proof.</p> <p>223a. Assumption of risk by servant of neglect by master to comply with statutory duties imposed for the servant's protection.</p> <p>224. Who are fellow servants.</p> <p>225. Who are not fellow servants.</p> <p>226. American rule; vice-principals not fellow servants.</p> <p>227. British rule; no vice-principals.</p> <p>228. British rule criticised.</p> <p>229. British rule condemned at home.</p> <p>230. Who are vice-principals; general managers.</p> <p>231. Who are vice-principals; New York rule.</p> <p>232. Principle and application of the New York decision.</p> <p>233. [Consolidated with § 232.]</p> <p>233a. Examples of who are or who are not vice-principals.</p> <p>233b. Peculiar local rules.</p> <p>234. Servants must be in same common employment.</p> |
|--|--|

§ 235. Common employment; general rule.	§ 240. [Omitted.]
236. Who are in common employment.	241. [Omitted.]
237. Who are not in common employment.	241a. Effect of statutes and codes.
238. Common employment; "association" rule.	241b. Statutes of general application.
239. Illustrations of common employment.	241c. Statutes applying to railroad companies.
	241d. Exemption from liability by special contract.

§ 207d. **Ordinary risks of the service as distinguished from extraordinary risks.**—The risks encountered by the servant in the course of his service are ordinary or extraordinary. Ordinary risks are those incident to the service. These are said invariably to be assumed by the servant as a part of his implied contract of service. It is a distinct feature of ordinary risks that they arise without fault of the master. They include purely accidental injuries, and, arising without fault of the master, may also be due to no negligence of the servant himself. As will be seen later, extraordinary risks may also be assumed by the servant. Such assumption is not, however, by virtue of the implied contract of service, but arises from the conduct of the servant himself on the particular occasion and from the facts and circumstances of the case and rests on other legal principles. The unifying principle of assumed risks, ordinary and extraordinary, is said to be found in the legal maxim *volenti non fit injuria*, that which one assents to is not in law esteemed an injury; though a sufficient foundation for the assumption of ordinary risks, according to common-law reasoning, is thought to be found in the statement that such assumption is an implied stipulation in the implied contract of service. Besides being contractual, it is said that the implied assumption of ordinary risks finds a further sanction from reasons of public policy; for, it is said, that if the servant had a right of action in such case he would be less diligent in caring for his own safety and that of his fellow servants and others, for whose safety

the master may be liable; and it is often added as a controlling reason of public policy that otherwise the business of the country could not be carried on. The compensation for the assumption of such risks is said to be embraced in the servant's wages, and in reasoning on this subject it was formerly usual to say that the parties stand on an equal footing and are free to enter into the contract of service or not as they please. Not a postulate in this course of reasoning but has in modern times been vigorously attacked. The rule, however, remains, and in conformity with the doctrine of *stare decisis* must continue until altered by legislative enactment.

What risks of the service are "ordinary," that is, "incident to" or "usual in" the service, is ordinarily a question to be determined by the jury. As a general rule whether the danger to which the employee was exposed and which resulted in his injury was one fairly to be anticipated, is a question for the jury. The distinction between "ordinary" and "extraordinary" risks is without dissent, but it has not often received that emphasis essential to clearness of distinction, and sometimes, both by courts and law writers, the two characters of risk are confused. All risks not arising from a fault of the master are assumed by the servant. Prominent among the ordinary risks of service assumed by the servant, dispensing with all evidence of knowledge or notice, are the negligence of fellow servants in the same common employment, and latent defects not discoverable by the master by the exercise of ordinary care.

§ 207e.* What risks servants assume.—A servant is held to assume the ordinary risks of the business upon which he enters,⁴⁰³ so far as those risks, at the time of

⁴⁰³ *Sweeney v. Berlin, etc. Co.*, 101 R. Co., 93 Mich. 646, 53 N. W. 825 N. Y. 520, 5 N. E. 358, and cases [car coupling]; *Lewis v. Seifert*, 116 cited; *Dysinger v. Cincinnati, etc. Pa. St.* 628, 11 Atl. 514; *Lee v. Cen-*

* Original § 185.

his entering upon the business,⁴⁰⁴ are known to him, or should be readily discernible by a person of his age and capacity, in the exercise of ordinary care,⁴⁰⁵ and whether the business is dangerous or not.⁴⁰⁶ Notwithstanding the

tral R. Co., 86 Ga. 231, 12 S. E. 307; Rutledge v. Missouri Pac. R. Co., 110 Mo. 312, 19 S. W. 38. A servant assumes such risks as, from the nature of the business as ordinarily conducted, he must have known, and those risks which the exercise of his opportunities for inspection would have disclosed to him (Linton Coal Mining Co. v. Persons, 15 Ind. App. 69, 43 N. E. 651). To similar effect, Smith v. Sellars, 40 La. Ann. 527, 4 So. 333; Central R. Co. v. Sims, 80 Ga. 749, 7 S. E. 176 [jerk of train]. An employee assumes not only the risks which always attend his employment, but those, also, which commonly do so (Gulf, etc. R. Co. v. Kizziah, 86 Tex. 81, 23 S. W. 578). In a cold climate, railroad employees assume risks incident to accumulation of snow and ice on the tracks (Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546). The cases are too numerous for citation. The doctrine was first announced in Priestly v. Fowler, 3 Mees. & W. 1 (1841), and has been followed ever since wherever the common law prevails. "An employee of mature years and of ordinary mental capacity and intelligence is presumed to know, appreciate and understand the ordinary and apparent risks of injury from the machinery and appliances with or about which he is working (Jones v. Mfg. & Inv. Co., 92 Me. 565, 43 Atl. 512 (1899)). "The rule is that the servant is held by his contract of hiring to assume the risks of injury from the ordinary dangers of the employment; that is to say, from such dangers as are

known to him, or discernible by the exercise of ordinary care on his part" (Johnson v. Devoe Snuff Co., 62 N. J. L. 417, 41 Atl. 936 (1898)). The doctrine is not dependent on the care or want of care of the servant (Baltimore, etc. Ry. Co. v. Amos, 20 Ind. App. 378, 49 N. E. 854 (1894); Consol. Barb Wire Co. v. Maxwell, 116 Ill. App. 296 (1904).⁴⁰⁴ Gibson v. Erie R. Co., 63 N. Y. 449; DeForest v. Jewett, 88 Id. 264; Shaw v. Sheldon, 103 Id. 667; Haas v. Buffalo, etc. R. Co., 40 Hun, 145.

⁴⁰⁵ Servant assumes all obvious risks (Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956; Berger v. St. Paul, etc. R. Co., 39 Minn. 78, 38 N. W. 814 [roller, worked long time, danger obvious]; Burnell v. West Side R. Co., 87 Wis. 387, 58 N. W. 772 [obvious danger of cleaning electric motor]; Ohio Val. R. Co. v. McKinley [Ky.], 33 S. W. 186; Linton Coal Co. v. Persons, *supra*.

⁴⁰⁶ Stewart v. Ohio River R. Co., 40 W. Va. 188, 20 S. E. 922; Southern Pac. Co. v. Johnson, 16 C. C. A. 317, 69 Fed. 559 [locomotive]; Kennedy v. Manhattan R. Co., 33 Hun, 457 [signal-man assumes risk of want of side platform to enable him to escape from passing trains]; Murphy v. N. Y. Central R. Co., 11 Daly, 122 [laborer upon tracks in a yard assumes risk of car coming behind him]; Hopkins Bridge Co. v. Burnett, 85 Tex. 16, 19 S. W. 886, and Houston, etc. R. Co. v. Conrad, 62 Tex. 627 [injuries by clippings from good tools]; Boyle v. N. Y. & N.

general rule that the master is bound to use due care to furnish safe and sound materials, machinery, etc., yet the servant assumes the risk of obvious defects in things

England R. Co., 151 Mass. 102, 23 N. E. 827; McIntosh v. Missouri Pac. R. Co., 58 Mo. App. 281 [men injured while coupling cars from the ends of which rails projected]; Lake Shore, etc. R. Co. v. Knittal, 33 Ohio St. 468; [risks attending known custom of making "flying switches"]; Railroad Co. v. Leech, 41 Ohio St. 388 [section hand, riding on hand-car run over by delayed train]; Dowell v. Burlington, etc. R. Co., 62 Ia. 629 [brakeman injured by contact with snow bank formed by snow plow]; Coolbroth v. Maine Central R. Co., 77 Me. 165 [plaintiff injured, after three weeks' experience in throwing mail bags into train in motion]; Penn. R. Co. v. Wachter, 60 Md. 395 [trackman injured on hand-car, by collision with a special train, running, according to a custom known to him, without notice]; Taylor v. Carew Mfg. Co., 140 Mass. 150, 3 N. E. 21 [employee in mill going to adjust a belt, ordered by foreman to hurry, fell into an unguarded elevator well]; Walsh v. St. Paul, etc. R. Co., 27 Minn. 367 [freight handler rolling heavy grindstone over uneven floor]. An employer is not liable for the death of an employee who was killed by the igniting of the fumes of black varnish with which he was painting, where deceased had used black varnish for twelve years, and the torch from which the fire occurred was used at his suggestion, and the varnish was of the same quality as that he had always used (Lyons v. Boston Towage Co., 163 Mass. 158, 39 N. E. 800). Boyd v. Harris, 176 Pa. 484, 35 Atl. 222 (1896). "When a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it" (Clark v. Holmes, 7 Hurlst. & N. 943, 31 L. J. Exch. N. S. 356, per Cockburn, C. J.; Narramore v. Cleveland, etc. Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68 (1899), (in legal theory no action accrues for injuries arising from the ordinary risks of the business, because in such case the master has violated no duty); Choc-taw, etc. Ry. Co. v. Jones, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837 (1906), (the assumption of the ordinary risks of the business is implied from the contract of service); St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551 (1903), (it makes no difference whether the risk is great or small, or the danger imminent or remote); Jones v. Crawford, 123 App. Div. 558, 108 N. Y. Supp. 142 (1908), (the implied assumption of risks are either those ordinarily incident to the business, or such as are obvious); Rose v. Minneapolis, etc. Ry. Co., 107 Minn. 260, 120 N. W. 360 (1909), (it negatives a *prima facie* liability of the master and does not involve misconduct of the plaintiff, it is not based on contract, but on the maxim *volemti non fit injuria*); Bria v. Westing-house, etc. Co., 133 App. Div. 346, 117 N. Y. Supp. 105 (1909), (by the term "assumes" certain risks is meant the law casts them on him); Ross v. Chicago, etc. Ry. Co., 243 Ill. 440, 90 N. E. 701 (1910), (risks that become known to a servant in the course of the business are in-

which he voluntarily uses,^{406a} if his work consists, in

cluded in risks incident to the service); *Pratt v. Missouri, etc. Ry. Co.*, 130 Mo. App. 502, 122 S. W. 1125 (1909), (the servant does not assume the risks caused by the master's negligence); *Stearns, etc., Lbr. Co. v. Fowler*, 58 Fla. 362, 50 So. 680 (1909); *Texas, etc. Ry. Co. v. Jones*, 123 S. W. (Ky.) 501 (1910); *Graham v. Thrall*, 129 S. W. (Ark.) 532 (1910); *Glantz v. Chicago, etc. Ry. Co.*, 87 Neb. 60, 127 N. W. 221 (1910), (ordinary risks include those arising from the known manner of conducting the business and the appliances used); *Coalgate v. Hurst*, 107 Pac. (Okla.) 657 (1910), (ordinary risks embrace such as are incident to the business, and such as are liable to arise from defects apparent to one of the servant's experience); *Bagley v. Wonderland Co.*, 205 Mass. 238, 91 N. E. 317 (1910), (the doctrine of the servant's assumption of risks arising from implication from the contract of service, does not include risks subsequently arising); *Worden v. Gore-Meehan Co.*, 78 Atl. (Conn.) 422 (1910); *Maloney v. Winston*, 18 Ida. 740, 111 Pac. 1080 (1910), (the servant assumes the risks, however hazardous and dangerous the prosecution of the business, but not those superimposed by the master's negligence); *McCarthy v. Spring Valley Coal Co.*, 149 Ill. App. 275, aff'd, 90 N. E. 372 (1910); *Elliott v. Sawyer*, 77 Atl. (Me.) 782 (1910); *Snow v. Escanaba Power Co.*, 162 Mich. 579, 127 N. W. 677 (1910); *Lewis v. Gallivan Bldg. Co.*, 69 S. E. (S. C.) 212 (1910); *Southern Turpentine Co. v. Douglass*, 54 So. (Fla.) 385 (1911); *Louisville, etc. Ry. Co. v. McMillen*, 142 Ky. 257, 134 S. W. 185 (1911); *Reinert-*

sen v. Erie, etc. Ry. Co., 142 App. Div. 31, 126 N. Y. Supp. 745 (1911), (by entering into the service the servant impliedly engages that he is competent and acquainted with its ordinary risks, including both those existing and those subsequently arising, notwithstanding ordinary care by the master).

^{406a} *Kaare v. Troy Steel Co.*, 139 N. Y. 369, 34 N. E. 919 [wheeling on narrow incline]; *La Pierre v. Chicago, etc. R. Co.*, 99 Mich. 212, 58 N. W. 60; *Shaffer v. Haish*, 110 Pa. St. 575 [loose belting slipping]; *Davis v. Baltimore, etc. R. Co.*, 25 Atl. 498, 152 Pa. St. 314 [box car used as caboose]; *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405 [no guard to car wheels]; *Patton v. Central Iowa R. Co.*, 73 Ia. 306, 35 N. W. 149 [unfenced road]; *Scharenbroich v. St. Cloud Fiber Co.*, 59 Minn. 116, 60 N. W. 1093 [slippery floor and unguarded pinion]; *Graves v. Brewer*, 4 N. Y. App. Div. 327, 38 N. Y. Supp. 566 [cogs of machine uncovered in violation of Factory Act: danger obvious]; *Boyd v. Harris*, 176 Pa. St. 484, 35 Atl. 222 [projections from side tracks, well known]; *Louisville, etc. R. Co. v. Stutts*, 22 Ala. 368, 17 So. 29 [obviously defective engine]. Especially is this the rule where a servant, entirely of his own accord, goes into known danger (*Bunt v. Sierra, etc. Co.*, 138 U. S. 483, 11 S. Ct. 464). A servant who stands upon an unrailed platform two feet wide and attempts to pry a pulley off with a piece of scantling assumes the risk of the scantling breaking and causing him to fall (*Chesapeake, etc. R. Co. v. McDowell* [Ky.], 24 S. W. 607).

whole or in part, in dealing with dangerous,⁴⁰⁷ unsafe or unsound things,⁴⁰⁸ known to him to be so, or obviously so,

⁴⁰⁷ *Bormann v. Milwaukee*, 93 Wis. 524, 67 N. W. 924 [wild animals enclosed]; *Wood v. Heiges*, 83 Md. 257, 34 Atl. 872 [very dangerous iron-breaker in constant use]; *Burke v. Parker*, 107 Mich. 88, 64 N. W. 1065 [benzine paint, properly used in business]; *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187, 18 S. W. 980 [unusual couplings]; *Content v. New Haven, etc. R. Co.*, 165 Mass. 267, 43 N. E. 94 [extra large cars, projecting over track]; *Bagley v. Consolidated Gas Co.*, 5 N. Y. App. Div. 432, 39 N. Y. Supp. 302 [planks falling from scaffold]. An employee working with and about two cylinders in contact with each other and revolving inwardly, and in plain view, cannot recover for injuries caused by her fingers being caught between such cylinders (*Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469; *s. p.*, *Walsh v. Com'l Laundry Co.*, 11 N. Y. Misc. 3, 31 N. Y. Supp. 833; *Daigle v. Lawrence Mfg. Co.*, 159 Mass. 378, 34 N. E. 458 [revolving cylinder]; *Arkadelphia Lumber Co. v. Bethea*, 57 Ark. 76, 20 S. W. 808 [dangerous cylinder of knives, used in dangerous position]; *Goodnow v. Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576 [dangerous revolving screw: obvious: extra pay for special work]; *Darracott v. Chesapeake, etc. R. Co.*, 83 Va. 288, 2 S. E. 511 [dangerous couplings in common use]; *Hulett v. St. Louis, etc. R. Co.*, 67 Mo. 239 [similar]; *Hatter v. Illinois Cent. R. Co.*, 69 Miss. 642, 13 So. 827 [coupler not defective, but dangerous]). One who is employed to dig out gravel from under a thin stratum of clay cannot recover for injuries received from

the clay falling on him (*Griffin v. Ohio, etc. R. Co.*, 124 Ind. 326, 24 N. E. 888). One engaged in digging and removing earth from a nearly perpendicular bank assumes the risk (*Pederson v. Rushford*, 41 Minn. 289, 42 N. W. 1063). To similar effect, *Swanson v. La Fayette*, 134 Ind. 625, 33 N. E. 1033; *Carlson v. Sioux Falls Water Co.*, 8 S. Dak. 47, 65 N. W. 419 [digging in unsafe soil]; *Evansville, etc. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021 [construction train on obviously unfinished road]; *Evansville, etc. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092; *Walling v. Congaree Constr. Co.*, 41 S. C. 388, 19 S. E. 723; *Titus v. Bradford, etc. R. Co.*, 136 Pa. St. 618, 20 Atl. 517 [transferring broad-gauge cars to narrow tracks]. A large collection of well-selected cases will be found in *Labatt on Master Servant*, in notes to §§ 263-266.

⁴⁰⁸ *Arnold v. Delaware, etc. Canal Co.*, 125 N. Y. 15, 25 N. E. 1064 [moving defective cars]; *Anglin v. Texas, etc. R. Co.*, 60 Fed. 553, 9 C. A. 130 [moving "dead" engine]; *Dartmouth Spinning Co. v. Achord*, 84 Ga. 14, 10 S. E. 449 [repairing imperfect machinery]; *Carlson v. Oregon Short-Line R. Co.*, 21 Ore. 450, 28 Pac. 497 [repairing dilapidated track, after storms]; *Moore v. Pennsylvania R. Co.*, 167 Pa. St. 495, 31 Atl. 734 [dismantling trestle]. A servant, employed to watch a dilapidated building which is apparently liable to fall at any moment (*Paland v. Chicago, etc. R. Co.*, 44 La. Ann. 1003, 11 So. 707). Low bridge (*Williams v. Delaware, etc. Ry. Co.*, 116 N. Y. 628, 22 N. E. 1117, 41 Amer. & Eng. Ry. Cases, 254 (1889)).

and which, by the very nature of the business, must be used while in that condition, he assumes the risk of doing so. Thus a railway servant, employed to remove damaged cars to a repair shop, has no right to complain of

Operation of railways (Chicago, etc. Ry. Co. v. Londergan, 118 Ill. 41, 7 N. E. 55, 28 Amer. & Eng. Ry. Cases, 491 (1886). Excavation (Griffin v. Ohio, etc. Ry. Co., 124 Ind. 326, 24 N. E. 888 (1890). Dangerous machinery (Quinn v. Johnson Forge Co., 9 Houst. (Del.) 338, 32 Atl. 858 (1892); Chicago Veneer Co. v. Walden, 82 S. W. (Ky.) 294 (1904); Record v. Chickasaw, etc. Co., 108 Tenn. 657, 69 S. W. 334 (1902); Konold v. Rio Grande, etc. Ry. Co., 21 Utah, 379, 60 Pac. 1021, 85 Am. St. 693 (1900); Pre v. Standard Portland Cement Co., 9 Cal. App. 591, 100 Pac. 122 (1908). Injury from flying iron in foundry (Wood v. Heiges, 83 Ind. 257, 34 Atl. 872 (1896). Lowering heavy boiler into cellar (Archambault v. Same, 184 Mass. 240, 68 N. E. 199 (1902). Scaffolding (Lockwood v. Tennant, 137 Mich. 305 100 N. W. 562 (1904). Tipping of plank resting on steam chests (Mathias v. Kansas City Stockyards Co., 185 Mo. 434, 84 S. W. 66 (1904). Buzz saw (Masterson v. Eldridge, 208 Pa. St. 242, 57 Atl. 515 (1904). Demolition of defective telephone pole Britton v. Cent. Union Tel. Co., 131 Fed. 844, 65 C. C. A. 598 (1904). Defective appliance (Rogers v. Roe *et al.*, 66 Atl. (N. J.) 408 (1907). Mill employee (Arkansas Cotton Oil Co. v. Carr, 89 Ark. 50, 115 S. W. 925 (1909). Installing boiler (Ragsdale v. Illinois Cent. Ry. Co., 140 Ill. App. 71 (1908). Jumping or bumping of freight trains (Louisville & Nashville Ry. Co. v. Greenwell's Admr., 125 S. W. (Ky.) 1054 (1910). Generally, Jacobson v. U. S. Gypsum Co., 120 N. W. (Ia.) 651 (1909); Butler v. Frazee, 25 App. (D. C.) 392, *aff'd*, 211 U. S. 459, 29 Sup. Ct. 136 (1909); Tennessee Coal, etc. Co. v. King, 50 So. (Ala.) 75 (1901); Central of Georgia Ry. Co. v. Henderson, 6 Ga. App. 459, 65 S. E. 297 (1909); Loid's Admx. v. J. S. Rogers Co., 73 Atl. 488 (1909); Cavagnaro v. Soule, 202 Mass. 62, 88 N. E. 433 (1909); Goudie v. Foster, 202 Mass. 226, 88 N. E. 663 (1909); Portland Gold Min. Co. v. O'Hara, 45 Colo. 416, 101 Pac. 773 (1909); Coin v. John H. Talge, etc. Co., 222 Mo. 488, 121 S. W. 1 (1909); Southern Ry. Co. v. Lyons, 169 Fed. 557, 95 Sup. Ct. App. 55 (1909); Chesapeake & Ohio Ry. Co. v. Lang's Admx., 121 S. W. (Ky.) 993 (1909); McPherson v. Great Northern Ry. Co., 140 Wis. 473, 122 N. W. 1022 (1909); Kennedy v. City of Chicago, 144 Ill. App. 25 (1908); Duffey v. Consolidated Block Coal Co., 124 N. W. (Ia.) 609 (1910); Goure v. Storey, 17 Idaho 352, 105 Pac. 794 (1909); St. Louis, etc. Ry. Co. v. Rogers, 126 S. W. (Ark.) 375, 1199; Gjukik v. Chicago Crushed Stone Co., 146 Ill. App. 217 (1909); Hoveland v. Chicago, etc. Ry. Co., 110 Minn. 329, 125 N. W. 266 (1910); Larsen v. Lackawana Steel Co., 122 N. Y. Supp. 1077, 138 App. Div. 375 (1910); Quinn v. Glen Lumber Co., 126 S. W. (Tex.) 2 (1910). Mining and excavation (Bradley v. Chicago, etc. R. Co., 138 Mo. 294, 39 S. W. 763; Mielke v. Chicago, etc. R. Co., 79 N. W. (Wis.) 22; Reiter v.

injuries suffered from the known defects of such cars.⁴⁰⁹ And, where a business is obviously dangerous, and is conducted in a manner which is fully known to the servant at the outset, he assumes the risk of its conduct in that manner, although a safer method could have been adopted.⁴¹⁰ The ordinary risks of a particular business

Winona, etc. R. Co., 75 N. W. (Minn.) 219; Swanson v. Great Northern Ry. Co., 70 N. W. (Minn.) 978; Rasmussen v. Chicago, etc. R. Co., 21 N. W. (Ia.) 583; Vincennes, etc. Co. v. White, 24 N. E. (Ind.) 747; Allan v. Logan, 37 Pac. (Utah) 496; Aldridge v. Midland, etc. Furnace Co., 78 Mo. 559; Brown v. Chattanooga, etc. R. Co., 47 S. W. (Tenn.) 415; Griffin v. Ohio, etc. Ry. Co., 24 N. E. (Ind.) 888; Naylor v. Chicago, etc. Ry. Co., 2 N. W. (Wis.) 24; Kane v. St. Louis, etc. R. Co., 87 S. W. (Mo. App.) 571; Skidmore v. West Virginia, etc. R. Co., 23 S. E. Rep. (W. Va.) 713; White Personal Injury in Mines, §§ 185, 200, 229 and cases cited. But see LaSalle v. Kostka, 190 Ill. 130, 60 N. E. 72 (1901); Di Vito v. Crage, 35 N. Y. App. Div. 155, 55 N. Y. Supp. 64, 165 N. Y. 378; Jones v. Emmett Mining Co., 21 N. W. 361 (1885); Faulkner v. Mammoth Mining Co., 23 Utah, 437, 66 Pac. 799 (1902).

⁴⁰⁹ Flannagan v. Chicago, etc. R. Co., 50 Wis. 462, 7 N. W. 337; s. c., on former appeal, 45 Wis. 98; for similar cases, see Watson v. Houston, etc. R. Co., 58 Tex. 434; Yeaton v. Boston, etc. R. Co., 135 Mass. 418. Moving damaged cars (Chicago, etc. R. Co. v. Ward, 61 Ill. 130, 12 Am. Ry. Rep. 434; Watson v. Houston, etc. R. Co., 58 Texas, 434, 11 Am. & Eng. R. Cas. 313; Fraker v. St. Paul, etc. R. Co., 32 Minn. 54, 19 N. W. 349 (1884), 15 Am. & Eng. R. Cas. 256; Arnold v. Delaware, etc. R. Co., 125 N. Y. 15, 25 N. E. 1064 (1891); Houston, etc. R. Co. v. O'Hara, 64 Texas, 600.

⁴¹⁰ Naylor v. Chicago, etc. R. Co., 53 Wis. 661, 11 N. W. 24 [bank excavation]. Cited and followed in Galveston, etc. R. Co. v. Lempe, 59 Tex. 19 [workman, repairing a well, in obviously dangerous condition]; Galveston, etc. R. Co. v. Arispe, 81 Tex. 517, 17 S. W. 47 [trains constantly moved backwards]. A servant assumes the risk of an unusually and extra hazardous way of performing work in which he is experienced, where the danger is obvious, and he has knowledge of the nature and extent of the risk (Claybaugh v. Kansas City, etc. R. Co., 56 Mo. App. 630). A trackman, whose duty it is to watch for wild trains, assumes the danger of collision between a wild train and a hand car which he is pushing (Sullivan v. Fitchburg R. Co., 161 Mass. 125, 36 N. E. 751). Where it is the known and established practice of a railway company to run special trains at any time, without notice, sending out such a train with snow-plow, in a storm, without such notice, was not negligence, but the attendant risks to trackmen are assumed, if they knew, or ought to have known, that such a train might be expected (Olson v. St. Paul, etc. R. Co., 38 Minn. 117, 35 N. W. 866); s. p., where about one-third of the trains were

are those which are part of the natural and ordinary method of conducting that business, even though they might fairly be called extraordinary with reference to a different business, or a different department of the same business.⁴¹¹

extra trains, not running on schedule time (*Larson v. St. Paul, etc. R. Co.*, 43 Minn. 423, 45 N. W. 722). A railroad hand, working where he knows there is no one to give notice of approaching trains, assumes the risk (*Rutherford v. Chicago, etc. R. Co.*, 57 Minn. 237, 59 N. W. 302). As it is the general usage on the Mississippi to land steamboats, for the delivery of freight, by running the bow into the shore, and holding the vessel in position by revolutions of the wheel, without putting out lines, any risk attendant on this method is assumed by employees delivering or receiving freight (*Red River Line v. Cheatham*, 60 Fed. 517, 9 C. C. A. 124). One who works on tracks for several hours at a place where ties are piled near the tracks assumes the risk of their preventing his getting out of the way of a train (*Bengtson v. Chicago, etc. R. Co.*, 47 Minn. 486, 50 N. W. 531). Where a dangerous business is conducted in manner known to servant (*St. Louis, etc. Ry. Co. v. Jamison*, 113 S. W. (Ark.) 41 (1908); *Tennessee Coal, etc. Co. v. King*, *supra*; *Loid's Admx. v. J. S. Rogers Co.*, *supra*; *Ill. Cent. Trac. Co. v. Mann*, 142 Ill. App. 117 (1908); *Casey v. J. W. Reedy Elev. Mfg. Co.*, 142 Ill. App. 126 (1908); *Goudie v. Foster*, 202 Mass. 226, 88 N. E. 663 (1909); *Saversnick v. Schwarzschild et al.*, 141 Mo. App. 509, 125 S. W. 1192 (1910).

⁴¹¹ If the business is essentially attended with extraordinary dangers, these are among the risks assumed (*Joyce v. Worcester*, 140 Mass. 245, 4 N. E. 565 (fall of derrick while workman pulling up planks from trench); *Kelley v. Silver Springs, etc. Co.*, 12 R. I. 112 (gig tender injured by exposed gears); *Morse v. Minneapolis, etc. R. Co.*, 30 Minn. 465 (engineer killed while "bucking" snow off track); *Derr v. Lehigh V. R. Co.*, 158 Pa. St. 365, 27 Atl. 1002; *South-west Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015 (very dangerous work in coal mines, carefully inspected). Where plaintiff who had been engaged as a weaver after being laid off till a new mill, in which alterations were being made, was started up, was employed to assist in moving into the new mill and making alterations, he assumed the increased risk incident to alterations (*Rooney v. Carson*, 161 Pa. St. 26, 28 Atl. 996). A brakeman on a freight train was standing on a flat car, and, while approaching a bridge, the engineer signaled for brakes. The brakeman sprang, caught the ladder on the side of a box car, and, swinging himself to ascend, came in contact with the bridge with such force that he was thrown from the train, and killed. Held, that his death "was one of the accidents incident to his employment" (*Illick v. Flint, etc. R. Co.*, 67 Mich. 632, 35 N. W. 708).

§ 207f.* **What risks the servants do not assume.** — He does not, of course, assume as a part of his contract of service risks caused by the master's default. He does not assume risks arising through the consent of his master to an unlawful act of a stranger, such as the joint use of a railroad contrary to law;⁴¹² and his master is responsible for the consequences.⁴¹³ The master cannot cast upon the servant any new risk, simply by giving him notice that he must assume it.⁴¹⁴ Of course he does not assume any risks as to strangers. It is only his own master who can claim the benefit of the limitation of liability.⁴¹⁵ As to risks not assumed masters are not necessarily liable to their servants; but they are liable to the same extent as they would be to strangers. Thus, with respect to such non-assumed risks, masters are liable for the negligence of a fellow servant; and they are held to as high a degree of care as they would be towards strangers in the same situation.

§ 207g.† **What facts servants may presume.** — A servant has the right to presume, and to act upon the presumption, that his master or his vice-principal has performed and will continue to perform every duty incumbent upon him;⁴¹⁶ that there are no risks attending

⁴¹² A railroad company is liable for injury to its servant caused by the negligence of another company while using a section of its road by its permission, but without legislative authority (*Central R. Co. v. Passmore*, 90 Ga. 203, 15 S. E. 760).

⁴¹³ *Id.*

⁴¹⁴ *Texas, etc. Ry. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. 777 (1898); *Ford v. Fitchburg Ry. Co.*, 110 Mass. 240, 14 Am. Rep. (1872); *Memphis, etc. Ry. Co. v. Graham*, 94 Ala. 545, 12

So. 283 (1891); *Missouri, etc. Ry. Co. v. Wood*, 35 S. W. (Tex. App.) 879 (1896).

⁴¹⁵ *Fairbank Canning Co. v. Innes*, 125 Ill. 410, 17 N. E. 720 [elevator without proper appliances].

⁴¹⁶ *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 14 S. Ct. 474 [may assume that car is properly loaded]; *Wallace v. Central Vt. R. Co.*, 138 N. Y. 302, 33 N. E. 1069 [statutory duty]; *Western Coal Co. v. Ingraham*, 17 C. C. A. 71, 70 Fed. 219; *Helm v. O'Rourke*, 46 La. Ann.

*Original § 185a.

† Original § 185b.

the business other than such as usually attend business of that general nature, and existed when he entered into the service,⁴¹⁷ or such as have been explained to him⁴¹⁸ or are known by, or perfectly obvious to him;⁴¹⁹ that it is safe to obey orders;⁴²⁰ that his fellow servants are com-

- 178, 15 So. 400; *Gorman v. McArdle*, 67 Hun, 484, 22 N. Y. Supp. 479 [statutory duty]; *Eastman v. Curtis*, 67 Vt. 432, 32 Atl. 232 [proper construction of elevator]; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550 [reliance on superintendent returning]. *Southern Ry. Co. v. McGowan*, 149 Ala. 440, 43 So. 378 (1907); *Pettus v. Kerr*, 87 Ark. 396, 112 S. W. 886 (1908); *Bird v. Utica Gold Min. Co.*, 2 Cal. App. 674, 84 Pac. 256 (1906); *Superior Min. Co. v. Kaiser*, 229 Ill. 29, 82 N. E. 239 (1907); *Williams v. Morris*, 237 Ill. 254, 86 N. E. 729 (1908); *Diamond, etc. Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060, (1906); *Lunde v. Cudahy Packing Co.*, 139 Ia. 688, 117 N. W. 1063 (1908); *Barrett v. Dessy*, 78 Kans. 642, 97 Pac. 786 (1908); *Webster v. Stewart Iron Works*, 104 S. W. 708, 31 Ky. L. Rep. 1045 (1907); *Foreman v. Eagle Rice Mill Co.*, 117 La. 227, 41 So. 555 (1906); *Bernheimer v. Bager*, 108 Md. 551, 70 Atl. 91 (1908); *Meadowcroft v. New York, etc. Ry. Co.*, 193 Mass. 249, 79 N. E. 266 (1906); *Christanelli v. Saginaw Min. Co.*, 154 Mich. 423, 117 N. W. 910 (1908); *Fitzgerald v. International Flax & Twine Co.*, 104 Minn. 138, 116 N. W. 475 (1908); *Rowden v. Schoenherr, etc. Min. Co.*, 130 Mo. App. 376, 117 S. W. 695 (1909); *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619 (1909); *Kotera v. American Smelting, etc. Co.*, 80 Neb. 648, 114 N. W. 945 (1908); *Barclay v. Southern, etc. Waste Co.*, 147 N. C. 585, 61 S. E. 565 (1908); *Rush v. Oregon Power Co.*, 51 Ore. 519, 95 Pac. 193 (1908); *McConnell v. Pa. Ry. Co.*, 223 Pa. 442, 72 Atl. 849 (1909); *Drake v. San Antonio Ry. Co.*, 99 Tex. 240, 89 S. W. 407 (1905), 33 Utah, 27, 92 Pac. 762, 13 L. R. A. (N. S.) 565 (1907); *McDuffie v. Boston, etc. Ry. Co.*, 81 Vt. 52, 69 Atl. 124 (1908); *Jennett v. Louisville, etc. Ry. Co.*, 162 Fed. 392 (1908); *Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159 (1909).
- ⁴¹⁷ *Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, § 185a, note 2. *Pittsburg, etc. Ry. Co. v. Hewitt*, 102 Ill. App. 428, aff'd, 202 Ill. 28, 66 N. E. 829 (1903); *Wirtz v. Galveston, etc. Co.*, 132 S. W. (Tex. App.) 510, (1910).
- ⁴¹⁸ See many examples, § 203, *ante*. *Eastland v. Clark*, 28 App. Div. 621, 51 N. Y. Supp. 1140, 53 N. Y. Supp. 1103, rev'd, 160 N. Y. 420, 59 N. E. 202 (1905).
- ⁴¹⁹ The doctrine that a servant has a right to assume that his master has furnished a safe place in which to work, does not apply where dangers are apparent (*Jennings v. Tacoma R. Co.*, 7 Wash. St. 275, 34 Pac. 937; *Pennsylvania Co. v. Burgett*, 7 Ind. App. 338, 34 N. E. 650). *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 66 N. E. 883, 98 Am. St. Rep. 281 (1903), 20 L. R. A. 751 (1901); *Kent Mfg. Co. v. Zimmerman*, 110 Pac. (Colo.) 187 (1910).
- ⁴²⁰ *Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197; *Karczewski v.*

petent and careful;⁴²¹ that they are under such proper supervision as the case may require;⁴²² that they will do their duty as faithfully as such men usually do;⁴²³ that the place of work is safe⁴²⁴ and the materials and appliances reasonably good and adequate;⁴²⁵ that dangerous

Wilmington, etc. Ry. Co., 4 Pennw. 24, 54 Atl. 746 (1902); *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863 (1904); *Lord v. Inhabitants of Wakefield*, 185 Mass. 214, 70 N. E. 123 (1904); *St. Louis, etc. Ry. Co. v. Morris*, 76 Kans. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 400 (1907). Safe to obey orders (*Choc-taw, etc. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837 (1906); *Smith v. Southern Ry. Co.*, 8 Ga. App. 822, 70 S. E. 192 (1910).

⁴²¹ A section hand working on track did not assume risk of foreman's negligence (*Davis v. New Haven R. Co.*, 159 Mass. 532, 34 N. E. 1070; *Chicago, etc. R. Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221; *Id.*, 37 N. E. 21). And see § 207f, *ante*. *Giordano v. Brandywine Granite Co.*, 3 Pennw. 423, 52 Atl. 332 (1901); *B. Lantry Sons v. Lowrie*, 58 S. W. (Tex. App.) 837 (1900); *Olsen v. Northern Pac. Lbr. Co.*, 100 Fed. 384, 40 C. C. A. 427 (1900); *Lawrence v. Texas, etc. Ry. Co.*, 25 Tex. App. 293, 61 S. W. 342 (1901).

⁴²² See § 203a, *ante*.

⁴²³ *Haugh v. Chicago, etc. R. Co.*, 73 Ia. 66, 35 N. W. 116 [car badly loaded].

⁴²⁴ *Vanesse v. Catsburg Coal Co.*, 159 Pa. St. 403, 28 Atl. 200 [entrance to mine]; *Western Coal Co. v. Ingraham*, 17 C. C. A. 71, 70 Fed. 219 (U. S. App.); *Union Pacific R. Co. v. Jarvi*, 53 Fed. 65, 10 U. S. App. 444 [mines]; *Consolidated Coal Co. v. Bruce*, 47 Ill. App. 444 [mine];

Taylor, etc. R. Co. v. Taylor, 79 Tex. 104, 14 S. W. 918 [unsafe railroad track]; *Diamond Iron Co. v. Giles* [Del.], 11 Atl. 189 [defective roof]; *Calloway v. Agar-Packg. Co.*, 129 Ia. 1, 104 N. W. 721 (1905); *Utah Consol. Min. Co. v. Bateman*, 176 Fed. 57, 99 C. C. A. 365, 27 L. R. A. (N. S.) 958 (1910).

⁴²⁵ *Bushby v. N. Y., Lake Erie, etc. R. Co.*, 107 N. Y. 374, 14 N. E. 407 [car]; *Smith v. Buffalo, etc. R. Co.*, 72 Hun, 545, 25 N. Y. Supp. 638 [coupling]; *Ingebregtsen v. N. D. Lloyd S. S. Co.*, 57 N. J. Law, 400, 31 Atl. 619; *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213 [latent defects in bumpers of cars]; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529; *Chicago, etc. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021; *Norfolk, etc. R. Co. v. Nunnally*, 88 Va. 546, 14 S. E. 367; *Louisville, etc. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360; *Grannis v. Chicago, etc. R. Co.*, 81 Ia. 444, 46 N. W. 1067; *Banks v. Wabash R. Co.*, 40 Mo. App. 458. *New York, etc. Ry. Co. O'Leary*, 93 Fed. 737, 35 C. C. A. 562 (1899); *Smith v. Erie, etc. Ry. Co.*, 67 N. J. Law, 636, 52 Atl. 634, 59 L. R. A. 302 (1902); *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 66 N. E. 882, 98 Am. St. Rep. 281 (1903); *Bartholomew v. Kemmerer*, 211 Pa. 277, 60 Atl. 908 (1905); *Atlantic Coast Line Co. v. Linstedt*, 184 Fed. 36, 106 C. C. A. 238 (1910); *Northern Pac. Ry. Co. v. Altimus*, 179 Fed. 275, 102 C. C. A. 631 (1910).

things are properly secured; ⁴²⁶ that proper repairs, supports or supplies, of the need of which the master has notice, will be promptly provided; ⁴²⁷ that obstacles will be removed within the proper time; ⁴²⁸ that warning of danger will be given whenever it ought to be given; ⁴²⁹ and that, if there is any defect or if any change takes place, with respect to incidents of the business, increasing his perils, he will receive timely notice thereof. ⁴³⁰ He is especially entitled to rely implicitly upon the truth of his master's statements ⁴³¹ and upon his master's perform-

⁴²⁶ A servant, who is directed by his superintendent to steady a stone which is being hoisted, is not, as a matter of law, guilty of negligence in doing so, in a proper manner; having the right to assume that the stone is properly fastened (*Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197). *Knight v. Overman Wheel Co.*, 174 Mass. 455, 54 N. E. 890 (1899); *Dieters v. St. Paul Gaslight Co.*, 86 Minn. 474, 94 N. W. 15 (1902); *Thompson v. Amer. Writing Paper Co.*, 187 Mass. 93, 72 N. E. 343 (1904).

⁴²⁷ *Delude v. St. Paul R. Co.*, 55 Minn. 63, 56 N. W. 461 [repairs for coupling cars]; *Chicago, etc. Coal Co. v. Peterson*, 39 Ill. App. 114 [props for mine].

⁴²⁸ *McChesney v. Panama R. Co.*, 74 Hun, 150, 26 N. Y. Supp. 245.

⁴²⁹ *Wallace v. Cent. Vt. R. Co.*, 138 N. Y. 302, 33 N. E. 1069 [low bridge; "tell-tale" out of order]; *Savannah, etc. R. Co. v. Day*, 91 Ga. 676, 17 S. E. 959 [same]; *Rehman v. Minneapolis, etc. R. Co.*, 43 Minn. 42, 44 N. W. 522 [engine backing]; *Shumway v. Walworth Mfg. Co.*, 98 Mich. 411, 57 N. W. 251 [machinery started without warning]; *Anderson v. Northern Mill Co.*, 42 Minn. 424, 44 N. W. 315 [usual signal omitted]; *Louisville, etc. R. Co. v. Hanning*,

131 Ind. 528, 31 N. E. 187. When a servant is placed in a situation of danger, where engrossing duties are required of him, he has a right to assume that the master will not without warning subject him to other perils unknown to him (*Michael v. Roanoke Mach. Works*, 90 Va. 492, 19 S. E. 261). A section hand, working on a track, was justified in relying on receiving from the foreman warning of approach of any train (*Davis v. New Haven R. Co.*, 159 Mass. 532, 34 N. E. 1070); *s. p.*, *Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 12 S. Ct. 740; *Bradley v. N. Y. Central R. Co.*, 62 N. Y. 99.

⁴³⁰ *Chicago, etc. R. Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221, 37 Id. 21 [employment of inexperienced servants]; *Grannis v. Chicago, etc. R. Co.*, 81 Ia. 444, 46 N. W. 1067 [appliances]; *Donahoe v. Old Colony R. Co.*, 153 Mass. 356, 26 N. E. 868 [defect in cars]; *St. Louis, etc. R. Co. v. Holman*, 155 Ill. 21, 39 N. E. 573.

⁴³¹ *Lawrence v. Hagemeyer*, 93 Ky. 591, 20 S. W. 704 [assurance repairs done]; *Atchison, etc. R. Co. v. McKee*, 37 Kans. 592, 15 Pac. 484 [may assume truth of statements]; *s. p.*, as to condition of works (*Morbach v. Home Min. Co.*, 53 Kans. 731, 37 Pac. 122); *St. Louis, etc. Ry. Co. v. Mangan*, 86 Ark. 507, 112 S. W. 168

ance of his promises.⁴³² But these are all mere presumptions; and if the servant becomes aware that any of them are contrary to the fact, he cannot justify himself in shutting his eyes to the truth. In short, he cannot be heard to say that he *relied* upon that which he did not *believe*. These are familiar conditions in the law of estoppel. These presumptions moreover are stated here only as affording a standard by which to judge of the servant's prudence. Masters are not bound to make all these presumptions good. The extent of their duty to do so is stated elsewhere.

§ 207h.* Risks assumed under special orders. —

Where a servant, seeing a defect, and notifying his master thereof, is nevertheless ordered to continue his work, without any express or implied promise of a remedy, it has sometimes been held that he cannot recover, on the theory that from that time he assumes the risk.⁴³³ But

(1909); *N. Chicago, etc. Ry. Co. v. Aufmann*, 221 Ill. 614, 77 N. E. 1120, 112 A. St. Rep. 207 (1906); *Keen's Admr. v. Keystone, etc. Lum. Co.*, 118 S. W. (Ky.) 355 (1909); *Mayer v. Detroit Ry. Co.*, 152 Mich. 276, 116 N. W. 429 (1908); *Schmitt v. Hamilton Mfg. Co.*, 135 Wis. 117, 115 N. W. 353 (1908).

⁴³² *Floetli v. Third Ave. R. Co.*, 10 N. Y. App. Div. 308, 41 N. Y. Supp. 792.

⁴³³ See *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206, 9 N. E. 728; *Daily v. Fiberloid Co.*, 186 Mass. 318, 71 N. E. 554 (1905), (where a servant complained of a defect rendering the place of work unnecessarily dangerous, and the superintendent replied that he would see to it; held, that the servant continuing to work, knowing no change had been made,

assumed the risk); *Texas, etc. Ry. Co. Bingle*, 91 Tex. 287, 42 S. W. 971 (1897), approving s. c., 9 Tex. App. 322, 29 S. W. 674 (1895), (where the servant "simply protests, and, without any promise or anything said or done by the master to induce him to remain in the service in the confidence that repairs will be made, continues to use the defective thing, it seems to be settled in this State that the rule is not changed and the risk is still on the servant. Some authorities hold, that under this state of facts the servant does not assume the risks, but that the question presented is simply one of contributory negligence;" and the plaintiff, a fireman, having complained to the engineer of a loose step on the engine, who said, "I will attend to it," such

* Original number § 186.

this is unsound. A master's *order* is at least as much justification for the servant's continuance as would be another's *invitation*; and we have seen (§ 91) that a mere invitation is, in some cases, enough to acquit the person acting upon it from the imputation of contributory negligence. The true rule, in this, as in all other cases, is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon the master's opinion. So, if the peculiar risk of the act commanded by the master is not obvious, the servant has a right to assume that he is not sent into any unusual peril, and he is not bound to investigate into the risk, before obeying his orders.⁴³⁴ A servant is not called

statement cannot be construed as a promise and the servant assumes the risk, without regard to whether he was contributorily negligent in continuing to work, knowing the repairs had not been made, or whether he was negligent in the manner of the use). But in the same State, where the foreman assured the servant there was no danger, and the latter, relying thereon, continued to work, the master was held liable) (*Industrial Lbr. Co. v. Bivens*, 47 Tex. App. 396, 105 S. W. 831 (1907); the servant assumes the risk in the absence of a promise, even though the foreman assured him it was safe. ing directed to perform the act by an experienced man, the representative of the defendant, plaintiff was not required to make such examination into the danger of the operation as he would have been under other circumstances" (*Howard Oil Co. v. Farmer*, 56 Tex. 301). Where, by orders of the master, the servant is carried beyond his employment, he is relieved from his implied undertaking to assume risks incident to the employment (*Pittsburgh, etc. R. Co. v. Adams*, 105 Ind. 151 [section-hand ordered to couple cars]). *Virginia, etc. Ry. Co. v. Harris*, 103 Va. 708, 49 S. E. 991 (1905), (where the defendant refuses to repair, or by conduct gives the servant notice he did not intend to repair, but directs him to go on with his work; held, instruction that he thereby assumed the risk, was properly refused, unless the defect is so serious that only a reckless man would have assumed it; the servant in such case may assume that the master consid-

⁴³⁴ *Stephens v. Hannibal, etc. R. Co.*, 96 Mo. 207, 9 S. W. 589. It is the duty of a servant to obey an order given by one in authority over him, if not manifestly unreasonable; and where by such order he is directed to work in an unsafe place, and is injured, the master is liable therefor (*Illinois Steel Co. v. Schymanowski*, 59 Ill. App. 32). "Be-

upon to set up his own unaided judgment against that of his superiors; and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own.⁴³⁵ If the master directs the servant to do some

ers it reasonably safe); *Buey's Admx. v. Chess, etc. Co.*, 27 Ky. L. Rep. 198, 84 S. W. 563 (1905); *Jellow v. Fore River, etc. Co.*, 201 Mass. 464, 87 N. E. 906 (1909), (where the servant has complained, though there is no express promise to repair, he may rely on the presumption that the master intends to remove any reasonable ground of complaint); *Missouri, etc. Ry. Co. v. Bailey*, 115 S. W. (Tex. App.) 601 (1909), (by statute, Acts of 1905, in the railway service the servant does not assume the risk where the master is aware of the defect, though no complaint has been made); *International, etc. Ry. Co. v. Clark*, 125 S. W. (Tex. App.) 959 (1910). See *Alkire v. Myers Lbr. Co.*, 106 Pac. (Wash.) 915 (1910).

⁴³⁵ Cited and adopted, *Harrison v. Denver, etc. R. Co.*, 7 Utah, 523, 27 Pac. 728. Where one was injured in digging a well by a falling derrick, it appeared he was ordered to go up on the derrick and unscrew one of the guy poles. He told the boss he had heard that one of the poles was cracked and asked if it was so, and if there was any danger. The boss replied with an oath, saying there was no danger. Held, the evidence should have been submitted to the jury (*Jackson v. Georgia Ry. Co.*, 77 Ga. 82 (1885)). "Where the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening or with regard to whether the force or appliances are reasonably safe to the performance of the task, and where the

master insists, after objection, that the servant proceed with the work, or assures him that the force is adequate, or the machine safe, the servant has a right to rely on the master's presumed superior knowledge. The risk is thereby assumed entirely by the master, and he impliedly assures the servant, who relies upon his statement or who obeys his positive directions, that if he, the master, is in error as to the safety, he will indemnify the obedient servant against the consequences (*Illinois Cent. Ry. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32, 25 Ky. L. Rep. 500 (1903)). "Where a servant is apprehensive that the place in which he is required to work is dangerous and unsafe, but relies, as the evidence in this case shows that the plaintiff did rely, upon the assurance of the foreman in charge of the work and in charge of the servant, that it is safe, and the servant is injured without any fault on his own part, the master is liable" (*Burkard v. Leschen, etc. Co.*, 217 Mo. 466, 117 S. W. 35 (1909); *Harder, etc. Coal Co. v. Schmidt*, 104 Fed. 282, 43 C. C. A. 532 (1900); *Chicago Screw Co. v. Weiss*, 107 Ill. App. 39, aff'd, 203 Ill. 536, 68 N. E. 54 (1903); *Harte v. Frazer*, 104 Ill. App. 201 (1902), (he may, however, still be contributorily negligent); *Reis v. Struck*, 23 Ky. L. Rep. 1113, 64 S. W. 729 (1901); *Goga v. Amer. Car, etc. Co.*, 142 Mich. 340, 105 N. W. 859 (1905); *Epperson v. Postal Tel., etc. Co.*, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050 (1900), (foreman's assurance not relied on);

act which is dangerous, but which could be made less dangerous by the use of special care on the part of the master, the servant has a right to assume that such special care will be taken, and does not take the greater risk upon himself.⁴³⁶ If the master calls suddenly upon the

Carter v. Baldwin, 107 Mo. App. 217, 81 S. W. 204 (1904); Floetli v. Third Ave. Ry. Co., 75 N. Y. St. Rep. 1191, 10 App. Div. 308, 41 N. Y. Supp. 792 (1896); Hughes v. Fayette Mfg. Co., 214 Pa. 282, 63 Atl. 692 (1906); Haygood v. Galveston, etc. Ry. Co., 38 Tex. App. 101, 85 S. W. 433 (1905), (the foreman ordered the plaintiff and three others to pick up and carry a large piece of timber. Plaintiff protested that it was too heavy for four men; the foreman ordered them to go ahead, saying they could carry it with ease, and if anything happened he would stand the consequences. Held, that the plaintiff was not entitled to recover on the ground of the suddenness of the order, for the right of action based thereon is predicated on the theory that plaintiff had no time to make a careful examination. Here he already knew of the danger. Said the court: "A servant, though directly commanded to perform certain work by his master, where the danger is so obvious that a prudent man would not undertake it, cannot recover. It is further the rule that where there is no dispute as to the facts, and the danger of obedience to an order is as apparent to the servant as to the master, or his representative, the servant cannot hold the master liable for damages for obedience to the order. It seems to be the contention of the appellant that if he acted upon the assurance of the foreman that there was no danger in carrying the timber and that he, the foreman, would stand the consequences, that appellant was justified in lifting the timber, regardless of his experience and knowledge of the danger attending the work. Such is not the law. In such cases an assurance that appliances are in good condition, or that the work is safe will not entitle the servant to a recovery when the risk is known and comprehended by the servant"); Anderson v. Pitt Iron Min. Co., 103 Minn. 252, 114 N. W. 953 (1908), (the servant may rely on the master's judgment to a reasonable extent, and the order and assurance of safety may be considered by the jury in determining whether he really appreciated the danger); Stenvog v. Minnesota Tr. Ry. Co., 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362 and note (1909). See Galveston, etc. Ry. Co. v. Bonn, 44 Tex. App. 631, 99 S. W. 413 (1907); Texas, etc. Ry. Co. v. Sherman, 87 S. W. (Tex. App.) 887 (1905); Industrial Lbr. Co. v. Bivens, 105 S. W. (Tex. App.) 831 (1907); Burkard v. Leschen, etc. Co., 217 Mo. 476, 117 S. W. 35 (1909); Merriweather v. Sayre Min. Co., 49 So. (Ala.) 916 (1909); Louisville, etc. Ry. Co. Armstrong, 125 S. W. (Ky.) 126 (1910); Herron v. American Steel, etc. Co., 230 Pa. 90, 79 Atl. 228 (1911), (such assurances will not preclude the defense of assumed risk, where the risk was known).

⁴³⁶ Plaintiff was sent to repair a wrecked caboose on the line of its road. It was exremely cold, and a village nine miles away was the nearest point at which he could get food

servant, under circumstances which give no time for consideration,⁴³⁷ or if he asks the servant to extricate him from danger,⁴³⁸ he is bound to indemnify the servant for injuries sustained through obedience to such a call. The servant's dependent and inferior position is to be taken into consideration; and, if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not obviously so dangerous that no man of ordinary prudence would have obeyed.⁴³⁹

and shelter. He was not provided with food or sufficient clothing for exposure to such weather. The company knew this, and that he relied on its sending for him in the evening. It did not do so, and he walked to the village. By the exposure he contracted rheumatism, and was permanently injured. Held, that he was not guilty of contributory negligence; that the company was negligent; and whether the injury was the proximate result was for the jury (*Schumaker v. St. Paul*, etc. R. Co., 46 Minn. 39, 48 N. W. 559).

⁴³⁷ Adopted in *Rush v. Missouri Pac. R. Co.*, 36 Kans. 129, 12 Pac. 582, followed in *Birmingham R. Co. v. Allen*, 99 Ala. 359, 13 So. 8; *Baltimore, etc. Ry. Co. v. Leathers*, 12 Ind. App. 544, 40 N. E. 1094 (1895); *Bennett v. Crystal*, etc. Co., 124 S. W. (Mo. App.) 608 (1910).

⁴³⁸ In *Lorentz v. Robinson*, 61 Md. 64, a master was held liable to his servant for injuries sustained by the fall of an elevator, on which the master was ascending, when, finding it unmanageable, he called the servant to his aid, and thereby himself escaped unharmed.

⁴³⁹ *Hawley v. Northern Central R. Co.*, 82 N. Y. 370, aff'g s. c., 17 Hun, 115; *Kain v. Smith*, 89 N. Y. 375; *Patterson v. Pittsburgh*, etc. R. Co.,

76 Pa. St. 389; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700; *Greene v. Minneapolis*, etc. R. Co., 31 Minn. 248; *Flynn v. Kansas City*, etc. R. Co., 78 Mo. 195; *Kroy v. Chicago*, etc. R. Co., 32 Ia. 357; *Light v. Chicago*, etc. R. Co., 93 Ia. 83, 61 N. W. 380; *Colorado*, etc. R. Co. v. *Ogden*, 3 Colo. 499. In an action for injuries to a youthful servant from a dangerous machine which he was cleaning while in motion, there was evidence that the foreman told plaintiff to hurry up with his machine, as he would have to clean another. Held, that defendant was liable if plaintiff was not aware of the danger, and he obeyed, because he thought the foreman knew better, or because he was afraid to disobey (*Tagg v. McGeorge*, 155 Pa. St. 368, 26 Atl. 671, following *Lee v. Woolsey*, 109 Pa. St. 124, and *Kehler v. Schwenk*, 151 Id. 519, 25 Atl. 130). A laborer, jumping off a train moving only four miles an hour, in obedience to conductor's orders, may be acquitted of negligence by the jury (*Northern Pac. R. Co. v. Egeland*, 163 U. S. 93, 16 S. Ct. 975, aff'g s. c., 12 U. S. App. 271, 56 Fed. 200, 5 C. C. A. 471). Jumping off even a swiftly moving train, in obedience to orders, may be justified, especially by a new hand (*Patton v. Western*,

More especially is this the case where the master insists upon the servant proceeding with the work, either with a promise of inspection ⁴⁴⁰ or repair ⁴⁴¹ or with an assurance

etc. R. Co., 96 N. C. 455, 1 S. E. N. Y. 519, 66 N. E. 1107 (1903); 863). So as to a brakeman coupling moving cars, in obedience to conductor's order (Mason v. Richmond, etc. R. Co., 111 N. C. 482, 16 S. E. 698). But a general command by a conductor to go between cars when couplings cannot otherwise be made, does not justify the brakeman in so doing several months later, when under the control of another conductor (Mason v. Richmond, etc. R. Co., 114 N. C. 718, 19 S. E. 362). The servant's duty is that of obedience, and he does not assume the risk when ordered to perform a service of danger if he exercises the care of an ordinarily prudent person under the circumstances in the manner of its execution (Kapaczynski v. Wells, 110 Ill. App. 477, aff'd, 218 Ill. 149, 75 N. E. 751 (1903); Wurtenberger v. Metropolitan St. Ry. Co., 68 Kan. 642, 75 Pac. 1049 (1904); Bering Mfg. Co. v. Femelat, 35 Tex. App. 36, 79 S. W. 869 (1904); Bone v. Irwin, 172 Mo. 306, 72 S. W. 522 (1903); Goldthorpe v. Clark, etc. Lbr. Co., 31 Wash. 467, 71 Pac. 1091 (1903); Allen v. Gilman, 127 Fed. 609 (1904); Illinois Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734, 102 Ill. App. 347, aff'd, 200 Ill. 280, 65 N. E. 734 (1902); Long's Admr. v. Illinois, etc. Ry. Co., 113 Ky. 806, 68 S. W. 1095, 101 Am. St. Rep. 374, 58 L. R. A. 237 (1902); Illinois, etc. Ry. Co. v. Keebler, 27 Ky. L. Rep. 305, 84 S. W. 1167 (1905); Ross-Paris Co. v. Brown, 121 Ky. 821, 90 S. W. 568 (1906); American Bridge Co. v. Bialk, 129 Ill. App. 202 (1906); Eicholz v. Niagara Falls, etc. Co., 68 App. Div. 441, 73 N. Y. Supp. 842, aff'd, 174 N. E. 262 (1908), (held that the doctrine of assumed risks does not apply in case of specific orders); Kennedy v. Swift, 140 Ill. App. 141, 85 N. E. 287 (1908); Heywood v. Morrill, etc. Co., 236 Ill. 570, 86 N. E. 110 (1908), (while the doctrine of assumed risks does not apply in case of specific instructions, a servant may act in such case with such recklessness as to preclude his recovery). But see Illinois Steel Co. v. Brenshall, 141 Ill. App. 36 (1908); Weber v. Illinois, etc. Ry. Co., 143 Ill. App. 498 (1908); Slavick v. Hirsh, 143 Ill. App. 509 (1908); Buckner v. Stockyards, etc. Co., 221 Mo. 700, 120 S. W. 766 (1909); Western Coal, etc. Co. v. Moore, 131 S. W. (Ark.) 960 (1910), (unless he "knows and appreciates" the danger, or it is obvious); Newberry v. Getchel, etc. Lbr. Co., 100 Ia. 441, 69 N. W. 743 (1896); Stephens v. Hannibal, etc. Ry. Co., 96 Mo. 207, 9 S. W. 589 (1888).

⁴⁴⁰ Schlacker v. Ashland Iron Co., 89 Mich. 253, 50 N. W. 839.

⁴⁴¹ Patterson v. Pittsburgh, etc. R. Co., 76 Pa. St. 389.

that there is no danger.⁴⁴² This, we are glad to say, is now settled law. In short, the law of estoppel applies to such cases. The master is estopped from alleging the falsity of his own representations, unless it appears clearly that the servant did not rely upon them.⁴⁴³ Yet there are extreme cases in which "the danger was so glaring that no prudent man would have entered into it, even under orders."⁴⁴⁴ In such cases servants cannot generally recover for risks thus assumed.⁴⁴⁵ Yet, if it is

⁴⁴² *Keegan v. Kavanugh*, 62 Mo. 230; *Dailey v. Schaaf*, 28 Hun, 314; *Ind.* 268, 28 N. E. 183 (1891); *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Schlacker v. Ashland Iron Co.*, *supra*; *Haas v. Balch*, 12 U. S. App. 534, 56 Fed. 984, 6 C. C. A. 201. See note 435, *ante*.

⁴⁴³ *Chicago, etc. R. Co. v. Bayfield*, 37 Mich. 205; *Schlacker v. Ashland Min. Co.*, 89 Mich. 253, 50 N. W. 839; *Rettig v. Fifth Ave. Tr. Co.*, 6 N. Y. Misc. 328, 26 N. Y. Supp. 896. ⁴⁴⁴ *Shortell v. St. Joseph*, 104 Mo. 114, 16 S. W. 397; *Miller v. Union Pac. R. Co.*, 12 Fed. 600.

⁴⁴⁵ *Kean v. Detroit, etc. Mills*, 66 Mich. 277, 33 N. W. 395; *Gavigan v. Lake Shore, etc. R. Co.*, 110 Mich. 71, 67 N. W. 1097; *Drake v. Union P. R. Co.*, 2 Ida. 453, 21 Pac. 560; *Wilson v. Tremont Mills*, 159 Mass. 154, 34 N. E. 90; *Roul v. East Tennessee, etc. R. Co.*, 85 Ga. 197, 11 S. E. 558 [getting on rapidly moving train]. See, also, *Lake v. Mining Co.*, 71 Mich. 364; *Bradshaw v. Louisville, etc. R. Co. (Ky.)*, 21 S. W. 346 [getting on overcrowded hand car]. One who knowingly engages in dangerous work, because he is told he will lose his place if he refuses to do so, assumes the risk (*Dougherty v. West Superior Iron Co.*, 88 Wis. 343, 60 N. W. 274). But this ruling is opposed to the later and sounder decisions (see § 211a, *post*). *Nall v. Louisville, etc. Ry. Co.*, 129

Thompson v. Chicago, etc. Ry. Co., 14 Fed. 564 (1883); *Texas, etc. Ry. Co. v. Lewis*, 26 S. W. (Tex. App.) 873 (1894); *Larson v. Center Creek Min. Co.*, 71 Mo. App. 512 (1897); *Harvey v. Missouri, etc. Ry. Co.*, 80 Mo. App. 667 (1899); *Illinois Steel Co. v. Schymanowski*, 162 Ind. 447, 44 N. E. 876 (1896); *St. Louis, etc. Ry. Co. v. Rickman*, 65 Ark. 138, 45 S. W. 56 (1898); *Punkowski v. New Castle, etc. Co.*, 4 Pennw. 544, 57 Atl. 559 (1904); *Truly v. North Lbr. Co.*, 83 Miss. 430, 36 So. 4 (1904); *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191 (1902); *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351 (1904); *Shaver v. Home Tel. Co.*, 36 Ind. App. 233, 75 N. E. 288, 114 Am. St. Rep. 373 (1905); *Demers v. Deering*, 93 Me. 272, 44 Atl. 922 (1899); *Atlantic, etc. Ry. Co. v. Beasley*, 54 Fla. 311, 45 So. 761 (1908); *St. Louis, etc. Ry. Co. v. Morris*, 76 Kans. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100 (1907); *Weber v. Illinois, etc. Ry. Co.*, 143 Ill. App. 498 (1908); *Briggs v. Tennessee Coal, etc. Co.*, 50 So. (Ala.) 1025 (1909); *Southern Oil Co. v. Walker*, 51 So. (Ala.) 169 (1909); *Burke v. Davis*, 191 Mass. 20, 76 N. E. 1039, 114 Am. St. Rep. 591, 4 L. R. A. (N. S.) 971 (1906),

the duty of the servant to obey such an order, even in the face of a known danger, as it would be in the case of a seaman, he is entitled to indemnity against the risk.⁴⁴⁶ And a risk must be voluntarily assumed, to relieve the master from liability. Risks incurred under coercion are not assumed.⁴⁴⁷

§ 207i.* Risks of service, outside of ordinary employment. — In many cases it has been said, in general terms, that a servant does not assume the risks attendant upon services which he is called upon to render, outside of his regular employment, and more hazardous.⁴⁴⁸ But

(when an employee incurs a danger she is fully acquainted with, reluctantly, and under pain of dismissal, and on the assurance of the superintendent that it is safe, she assumed the risk). But the cases are in conflict on the question of the effect to be given to such an assurance. If the servant's knowledge is excusably imperfect, the master is liable (*Nelson v. St. Paul Plow Works*, 57 Minn. 53, 58 N. W. 863. See note to *McKee v. Tourtellotte*, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542 (1897), and note to *Houston, etc. Ry. Co. v. DeWalt*, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877 (1903). See § 207h.

⁴⁴⁶ This principle, which we advanced in opposition to some New York decisions, has now been adopted by the highest court (*Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66 [seaman, under compulsion]; *Hosie v. Chicago, etc. R. Co.*, 75 Ia. 683, 37 N. W. 963 [brakeman obeying danger signal]; *Stephens v. Hannibal, etc. Ry. Co.*, 96 Mo. 207, 9 S. W. 589 (1888); *Fox v. Chicago, etc. Ry. Co.*, 86 Ia. 368, 17

L. R. A. 289, 53 N. W. 259 (1892); *Frandsen v. Chicago, etc. Ry. Co.*, 36 Ia. 372 (1873); *Lafourche Pckt. Co. v. Henderson*, 94 Fed. 871, 36 C. C. A. 519 (1899).

⁴⁴⁷ See § 211a, *post*.

⁴⁴⁸ Where a servant is ordered by his master to do work outside of his regular duties, and bringing him into contact with a different class of fellow servants, the latent risks incident to the new work are, as to him, extra hazardous, because additional to the risks of his regular duties (*Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Lehman Co. v. Siggeman*, 35 Ill. App. 161; *East Line, etc. R. Co. v. Scott*, 68 Tex. 694, 5 S. W. 501; *Cincinnati, etc. R. Co. v. Lang*, 118 Ind. 579, 21 N. E. 317; *Pittsburgh, etc. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Chicago, etc. R. Co. v. Bayfield*, 37 Mich. 210; *Mann v. Oriental Works*, 11 R. I. 152). A servant ordered to more dangerous work than he was employed to perform, can protect himself by protest (*Jones v. Lake Shore, etc. R. Co.*, 49 Mich. 573 [brakeman recovered for injuries sustained

it has been pointed out that, in all these cases, the real liability incurred by the master was simply for his omission to give due warning of the risks which were especially attendant upon the new and strange work to which the servant was suddenly assigned.⁴⁴⁹ A servant, thus directed to undertake work outside of that which he had engaged to do, is not presumed to be aware of its peculiar risks;⁴⁵⁰ and therefore, if the master does not fully explain them to the servant before putting him at such new work, the servant is entitled to assume that it has no greater risks than those which attach to his regular work, either in the nature of the work itself or in the habits of fellow servants with whom it brings him into contact.⁴⁵¹

while doing yard work, pursuant to orders of the superintendent]). The complaint alleged that plaintiff was employed as trackman; that he was ordered to assist in unloading rails from a train—work which was out of the line of his duty, and much more hazardous than that which it was his duty to perform; that while thus engaged he received the injuries complained of. Held to state a cause of action (*Cincinnati, etc. R. Co. v. Madden*, 134 Ind. 462, 34 N. E. 227).

⁴⁴⁹ The liability of a master, in cases of injury to his servant, received in a dangerous employment outside of that for which he had engaged, arises not from the direction of the master to the servant to depart from the one service and engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger (*Reed v. Stockmeyer*, 20 C. C. A. 381, 74 Fed. 186). To this should be added: "Or has not ample time to become aware of the danger

before entering upon the work." *Quinn v. Johnson Forge Co.*, 9 Houst. 338, 32 Atl. 858 (1892), (servant ordered to work on a crane outside his employment, and of the management of which he was ignorant, without warning); *Tennessee Coal, etc. Co. v. Jarrett*, 111 Tenn. 565, 82 S. W. 224 (1904), (where a servant is ordered to do work outside of and more dangerous than his employment, and no warning is given him, the master is liable); *Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341 (1908), (when the master directs the servant to perform work outside his employment, he is under obligation to instruct and warn him); *Gagnon v. Klaunder, etc. Co.*, 174 Fed. 477 (1909). See excellent monographic note to *James v. Rapids Lbr. Co.*, 44 L. R. A. 1; *Felton v. Girardy*, 104 Fed. 127 (1900); *Louisville, etc. Ry. Co. v. Miller*, 104 Fed. 124 (1900), and cases there cited by *Lurton, C. J.*, delivering the opinion of the court.

⁴⁵⁰ *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162.

⁴⁵¹ See *Pittsburgh, etc. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187.

Nor is the servant bound to make any inquiries on these subjects.⁴⁵² In such cases, the master must indemnify the servant against injuries then suffered;⁴⁵³ provided the master knew or ought to have known of the defect causing the injury, but not otherwise.⁴⁵⁴ If, however, the servant knows what the new dangers are,⁴⁵⁵ or if they are obvious to persons thus suddenly called to do such work,⁴⁵⁶ and he is able to appreciate the peril involved,⁴⁵⁷ and is not acting under such coercion as would in other cases excuse him,⁴⁵⁸ he assumes the risks of this new work to the same extent as he did those of his regular employment. The liability of the master in such cases depends upon the principles stated heretofore in section 203.

This much, indeed, is implied in all the decisions.

⁴⁵² U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100, 5 N. E. 92.

⁴⁵³ Where an employee is ordered, out of the line of his employment, to work upon machinery with the management of which he is ignorant, and is not warned of the danger incident thereto, the master is liable for personal injuries resulting therefrom (Quinn v. Johnson Forge Co., 9 Houst. 338, 32 Atl. 858). To same effect, Linderberg v. Crescent Min. Co., 9 Utah, 163, 33 Pac. 692 [miner]; Colorado Electric Co. v. Lubbers, 11 Colo. 505, 19 Pac. 479 [carpenter sent to handle electric wires]; Cole v. Chicago, etc. R. Co., 71 Wis. 114, 37 N. W. 84.

⁴⁵⁴ Id.

⁴⁵⁵ Where a servant of mature years deviates from the original contract with a full knowledge of the new risks, he is looked upon as entering into a new contract (Houston, etc. R. Co. v. Fowler, 56 Tex. 452 [yardmaster ordered to run a relief train to a wreck, after a violent storm, and himself wrecked in a culvert]; Pren-

tiss v. Manufacturing Co., 63 Mich. 478, 30 N. W. 109; Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876 [circular saw: plaintiff protested, but was familiar with its use]). McDonald v. Lovell, 196 Mass. 583, 82 N. E. 955 (1906); Coin v. Talge Lounge Co., 121 S. W. (Mo.) 1 (1910); Guilmartin v. Solvay Process Co., 189 N. Y. 490, 82 N. E. 725 (1906); Marshall v. St. Louis, etc. Ry. Co., 107 S. W. (Tex. App.) 883 (1908); Hatch v. Reynolds, 80 Vt. 204, 67 Atl. 816 (1907). See Drown v. New England Tel., etc. Co., 81 Vt. 358, 70 Atl. 599 (1908).

⁴⁵⁶ See Alford v. Metcalf, 74 Mich. 369, 42 N. W. 52. But in none of the cases in this and the last note was any real negligence proved against the defendants. The opinions on risks assumed are, therefore, *obiter*.

⁴⁵⁷ Not otherwise (Railroad Co. v. Fort, 17 Wall. 553; Consol. Coal Co. v. Haenni, *supra*; s. p., Broderick v. Detroit Depot Co., 56 Mich. 261, 22 N. W. 802; Chicago, etc. R. Co. v. Bayfield, 37 Mich. 205).

⁴⁵⁸ Kehler v. Schwenk, 151 Pa. St.

§ 208. **Assumption of extraordinary risks, or basis of imputed assumption of risks arising from master's negligence.**—The exemption of masters from liability to servants for the master's negligence is founded, in most cases, upon the general doctrine as to contributory negligence.⁴⁵⁹ But it has been held, on due consideration, that such a risk, arising from the master's negligence, may be deliberately assumed without any want of care, irrespective of any negligence. To bring a case within this maxim the employee must know of the defect, appreciate the danger, and voluntarily assume the risk.⁴⁶⁰ He is

505, 25 Atl. 130; *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66. See further, § 211a, *post*.

⁴⁵⁹ See *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521; *Allerton, etc. Co. v. Egan*, 86 Ill. 253; *Devitt v. Pacific R. Co.*, 50 Mo. 302 [low bridge]; *Crutchfield v. Richmond, etc. R. Co.*, 78 N. C. 300 [coupling cars]; *Mad River, etc. R. Co. v. Barber*, 5 Ohio St. 541 [conductor injured through a defect which he should have discovered]; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148 [operator of a lathe injured by defects of which he had knowledge]. For general discussions of the subject, see *Greene v. Minneapolis, etc. R. Co.*, 31 Minn. 248; *O'Rourke v. Union Pacific R. Co.*, 22 Fed. 189; *Hough v. Texas, etc. R. Co.*, 100 U. S. 213.

⁴⁶⁰ *Miner v. Conn. R. Co.*, 153 Mass. 398, 26 N. E. 994; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Texas, etc. Ry. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971, 9 Tex. App. 322, 29 S. W. 674 (1897), ("the assumption of risk and contributory negligence are treated as distinct defenses. The servant may remain in the service

when he knows of a defective condition of the appliances, without having negligence imputed to him. He, nevertheless, assumes the risk unless the facts take his case out of the general rule and bring it within the exception noted"), promise by the master to repair. "On the other hand the protest and promise to repair may be shown, and the servant may yet be guilty of contributory negligence in using a defective and dangerous machine." See *Street on Law of Personal Injuries in Texas*, § 161. *Turner v. Southern Pac. Ry. Co.*, 142 Cal. 580, 76 Pac. 384 (1904), (it is not the duty of the master to warn an experienced servant); *Iowa Gold, etc. Co. v. Diefenthaler*, 32 Colo. 391, 76 Pac. 981 (1904), (operator in an ore concentrating mill not entitled to recover on account of the want of safety device, known to him"); *Punkowski v. New Castle, etc. Co.*, 4 Pennw. 544, 57 Atl. 559 (1904), (master's duty to instruct is qualified by his right to assume that servant has average knowledge of one of his age and experience); *Cobb, etc. Co. v. Knudson*, 207 Ill. 452, 69 N. E. 816, aff'g 107 Ill. App. 668 (1904), (that the

plaintiff knew of the danger and continued to work is not conclusive of his assumption of risk in case of specific orders); Louisville, etc. Ry. Co. v. Hall, 115 Ky. 567, 74 S. W. 280 (1903), (one on the side of a box car injured by a portable coal chute); Cavan v. Bodwell, etc. Co., 99 Me. 278, 59 Atl. 285 (1904), (whether the servant assumed the risk depends on whether he saw, or ought reasonably to have known of the defect); Meehan v. Holyoke St. Ry. Co., 186 Mass. 511, 72 N. E. 61 (1904), (where the danger is open and obvious, the master is not chargeable with the injury); Harrison v. Detroit, etc. Ry. Co., 137 Mich. 78, 100 N. W. 451 (1904), (obvious defect); McGinty v. Waterman, 93 Minn. 242, 101 N. W. 300 (1904), (experienced workman); McCabe v. Montana, etc. Ry. Co., 30 Mont. 323, 76 Pac. 701 (1904), (freight brakeman: risk of switch standing too near the track not assumed without knowledge); Omaha, etc. Co. v. Theiler, 59 Neb. 257, 80 N. W. 821, 80 Am. St. Rep. 673 (1899), (minor entitled to warning); Kline v. Abraham, 178 N. Y. 377, 70 N. E. 923, reversing 80 App. Div. 641, 81 N. Y. Supp. 1132 (1904), (clerk familiar with slippery condition of marble steps); Jones v. American Warehouse Co., 137 N. C. 337, 49 S. E. 355; s. c., 138 N. C. 546, 51 S. E. 106 (1905), (an employee does not assume the risk of extraordinary dangers, unless the inherent probability of injury, known to him, is greater than the probability of safety); Davis v. Turner, 69 Ohio St. 101, 68 N. E. 819 (1903), (miner injured by fall of mine); Neely v. Southwestern, etc. Co., 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 146 (1903), (where employee receives the master's assurance that the defect he complained of would be repaired, continuing in the service on account of such promise, he can generally recover); Wagner v. Portland, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300 (1902), (experienced employee, acquainted with the danger, cannot recover); Masterson v. Eldridge, 208 Pa. St. 242, 57 Atl. 515 (1904), (experienced servant operating a buzz saw); Desrosiers v. Bourn, 25 R. I. 6, 57 Atl. 935 (1904), (experienced servant, who fed rubber to rollers); Ohio River, etc. Ry. Co. v. Edwards, 111 Tenn. 31, 76 S. W. 897 (1903), (employee assumes the risk, knowing the facts); Ft. Worth, etc. Ry. Co. v. Robinson, 84 S. W. (Tex. App.) 410, aff'd, 87 S. W. 667 (1905), (railroad bridge workman); Faulkner v. Mammoth Min. Co., 23 Utah, 437, 66 Pac. 799 (1901), (right to rely on master's assurances); Sias v. Consol., etc. Co., 73 Vt. 35, 50 Atl. 554 (1911), (experienced lineman assumes the risk when he climbs a pole, without inspection, though in obedience to orders, knowing their liability to decay a few inches underground); Partlett v. Dunn, 102 Va. 459, 46 S. E. 467 (1904), (a servant, knowing the danger when employed, cannot recover); Young v. O'Brien, 36 Wash. 570, 79 Pac. 211 (1905), (servant assumes the risk, when he knows of the defect and appreciates its significance); Kreider v. Louisville, etc. Ry. Co., 133 Fed. 904, 66 C. C. A. 509 (1904), (a switchman assumes the risk of the known condition of the yard); St. Louis Cordage Co. v. Miller, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551 (1903), (defining distinction between assumed risk and contributory negligence and holding former a defense to the violation by the

master of a statutory duty); *Marshall v. St. Louis, etc. Ry. Co.*, 78 Ark. 213, 94 S. W. 56, 115 Am. St. Rep. 27 (1906), (working with disabled cars, a risk assumed); *Brown v. Sharphouser Contr. Co.*, 112 Pac. (Cal.) 874 (1910), (liability of master when danger known to him and not to servant, for failure to warn); *Elie v. Cowles*, 82 Conn. 236, 73 Atl. 258 (1909), (servant assumes the risk when he knows of the defective appliance, appreciates the danger and voluntarily encounters it); *Elkton Min. Co. v. Sullivan*, 41 Colo. 241, 92 Pac. 679 (1907), (miner assumes risk of violating rules); *Walls v. People's Ry. Co.*, 80 Atl. 355 (1911), (motorman must look out for obstructions in the exercise of reasonable care for his own safety); *Atlantic, etc. Ry. Co. v. Ryland*, 50 Fla. 190, 40 So. 24 (1905), (knowingly using defective machinery); *Christiansen v. Graver Tank Wks.*, 223 Ill. 142, 79 N. E. 97, 126 Ill. App. 86 (1906), (continuing to work, with knowledge of dangerous defect); *Grand Trunk, etc. Ry. Co. v. Melrose*, 166 Ind. 658, 78 N. E. 190 (1906), (that an employee "did not know" of the defect is insufficient, he must also negative notice); *Mumford v. Chicago, etc. Ry. Co.*, 128 Ia. 685, 104 N. W. 1135 (1905), (there can be no assumption of risk except based on knowledge actual or implied); *Kansas, etc. Ry. Co. v. Loosely*, 76 Kans. 103, 90 Pac. 990 (1907), (if the servant voluntarily chose to assume the risk of appreciated danger, the prudence of his conduct is not open to investigation); *Louisville Belt, etc. Ry. Co. v. Hart*, 122 Ky. 731, 92 S. W. 951 (1906), (after the master's promise to repair the servant may continue in the business for a reasonable time without assuming the risk); *Young v. Randall*, 104 Me. 135, 71 Atl. 647 (1908), (evidence held not to sustain a verdict for plaintiffs); *Bernheimer v. Bager*, 108 Md. 551, 70 Atl. 91, 129 Am. St. Rep. 458 (1908), (the servant has a right, in the absence of notice to the contrary, to assume that the place of work is safe); *Feneff v. Boston, etc. Ry. Co.*, 196 Mass. 575, 82 N. E. 705 (1907), (a yard brakeman riding on a passenger locomotive, only assumes risks known to him); *Stenvog v. Minnesota Trans. Co.*, 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362 (1909), (plaintiff is the best judge of his lifting capacity, and cannot recover for injury when unloading steel rails because they were too heavy, and was told by the foreman to "go on"); *Yazoo, etc. Ry. Co. v. Woodruff*, 53 So. (Miss.) 687 (1910), (an engineer running an engine he knows to be defective, assumes the risk); *Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884 (1906), (low bridge on spur tracks, for the jury); *Grimm v. Omaha Elec. Light, etc. Co.*, 79 Neb. 395, 114 N. W. 769 (1908), (the burden of establishing the assumption of risk is on the defendant); *Cronin v. Columbian Mfg. Co.*, 75 N. H. 319, 74 Atl. 180, 29 L. R. A. (N. S.) 111 (1909), (master need not instruct a boy fourteen years old of the danger of extending his foot beyond the cage of an elevator, it is presumed to be obvious to a boy of that age of ordinary capacity); *Cincinnati Gas, etc. Co. v. Johnston*, 76 Ohio St. 119, 81 N. E. 155 (1907), (an experienced servant, knowing the number of men required, assumes the risk of undertaking the work with less); *Colgate Co. v. Hurst*, 25 Okl. 588, 107 Pac. 657 (1910), (servant does not as-

sume wrong adjustment by superintendent of fan in mine, when unknown to him); *Westman v. Wind River Lbr. Co.*, 50 Ore. 137, 91 Pac. 478 (1907), (the plaintiff being an inexperienced minor, it was a question for the jury whether the dangers were open and obvious to him); *Bowen v. Pennsylvania Ry. Co.*, 219 Pa. 405, 68 Atl. 963 (1908), (an employee has notice of such risks, as ought to be obvious to one of his experience); *Wilson v. New York, etc. Ry. Co.*, 29 R. I. 146, 69 Atl. 364 (1908), (danger from a post maintained too close to the track, is not assumed by the servant); *Biggers v. Catawba Power Co.*, 72 S. C. 264, 51 S. E. 882 (1905); *Norman v. Southern Ry. Co.*, 119 Tenn. 401, 104 S. W. 1088 (1907), (the rule requiring the master to furnish a safe place to work and safe appliances does not apply when the very work is to make a dangerous place safe. Nor is the master required to warn of transitory occurrences such as the servant knows must occur from time to time and cause danger); *Gulf, etc. Ry. Co. v. Huyett*, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669 (1906), (employee assumes the risk of the master's habitual negligence); *Cook v. United States Smelting Co.*, 34 Utah, 190, 97 Pac. 28 (1908), (in determining a youth's alleged assumption of risk, his comprehension of the risk is not to be judged by the same standard as an adult); *Nordstrom v. Spokane Ry. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364 (1909), (a servant knowing of a dangerous condition is chargeable with a knowledge of the injurious results naturally and proximately caused thereby); *Chandler v. Amer. Car, etc. Co.*, 71 S. E. (W. Va.) 387 (1911), (servant assumes incidental risks, whether dangerous or not, and of incomplete appliances known to him); *Cincinnati, etc. Ry. Co. v. Robertson*, 139 Fed. 519, 71 C. C. A. 375 (1905), (where on complaint of defect the foreman said "well they must be fixed," it was for the jury to say whether it was a promise to repair, and whether plaintiff relied on it, and if so whether a reasonable time had elapsed); *Galveston, etc. Ry. Co. v. Drew*, 59 Tex. 10, 46 Am. Rep. 261 (locomotive fireman injured by derailment caused by operating engine without a pilot on striking a cow, though under protest and acting under threat of discharge); *Missouri, etc. Ry. Co. v. Somers*, 8 Tex. 442, 14 S. W. 779 (1890), (using defective brake); *Gulf, etc. Ry. Co. v. Schwabbe*, 1 Tex. App. 573, 21 S. W. 709 (1902); *Texas, etc. Ry. Co. v. Johnson*, 89 Tex. 519, 35 S. W. 1042 (1896), (incompetency of fellow servant); *Gulf, etc. Ry. Co. v. Harriet*, 80 Tex. 73, 15 S. W. 556 (1891), (running water train without a conductor); *Gulf, etc. Ry. Co. v. Brentford*, 79 Tex. 619, 13 S. W. 561, 23 Am. St. Rep. 377 and note (1891), (continuing dangerous work in the dark); *Ely v. San Antonio, etc. Ry. Co.*, 15 Tex. App. 511, 40 S. W. 174 (1896), (projecting rail on car); *Quill v. Houston, etc. Ry. Co.*, 93 Tex. 616, 15 S. W. 1156 (1900), (defective fences); *Gulf, etc. Ry. Co. v. Hyatt*, 99 Tex. 631 (1906), (an habitually negligent method of work); *St. Louis, etc. Ry. Co. v. Briscoe*, 100 Tex. 354 (1907); *International, etc. Ry. Co. v. Royall*, 37 Tex. App. 261 (1904); *Haywood v. Galveston, etc. Ry. Co.*, 38 Tex. App. 101 (1905), (order negligently given); *Hyson v. St. Louis, etc. Ry. Co.*, 101 Tex. 543, 109 S. W. 929 (1908), (unblocked guard rails); *Drake v. Union, etc. Ry. Co.*, 2 Ida.

presumed to know obvious risks and bound to take notice of patent defects.^{460a}

The judicial dissent from this doctrine of the assumption of extraordinary risks, or risks caused by the master's negligence, if any, is so slight that it may be considered negligible. But confusion sometimes arises from inadequate statements of the doctrine. Some courts and text writers seek to import such assumption into the contract of service instead of considering it, as it should be, as a rule of universal application and independent of the relation of master and servant; in which latter relation, however, it receives its chief exposition because the circumstances and conditions there arising chiefly call for its application. The better opinion would seem to be that the servant's assumption of risks caused by the master's negligence is solely referable to the maxim *volenti non fit injuria*. The application by the court of this defence so as to effectually defeat the servant's action for personal injuries often becomes a matter of law, while, on the other hand, the defence of contributory negligence must generally be submitted to the jury. The principle is, of course, the same in both classes of cases, viz.: that the defence should be submitted to the jury unless the fact of contributory negligence or assumption of risk is so clear upon the evidence that reasonable minds cannot differ. But it is readily seen that in the case of an experienced employee where the fact of his knowledge of the defect is established beyond question, it must often occur that his appreciation of the risk and voluntary acceptance of it will be equally apparent; in such case his assumption of the risk becomes a peremptory inference of law. Great

453, 21 Pac. 560; Louisville, etc. Kentucky, etc. Ry. Co., 4 S. W. Co. v. Hanning, 131 Ind. 528, 31 (Ky.) 303; Texas, etc. Ry. Co. v. N. E. 187, 53 Am. & Eng. Ry. Cas. Rogers, 57 Fed. 378; Davidson v. 452; Gaffney v. New York, etc. Ry. Southern Pac. Ry. Co., 44 Fed. 476; Co., 15 R. I. 456, 7 Atl. 284, 31 Am. Waldheir v. Hannibal, etc. Ry. Co., & Eng. Ry. Cas. 265. 87 Mo. 37; Texas, etc. Ry. Co. v.

^{460a} St. Louis, etc. Ry. Co. v. Minnick, 57 Fed. 362; Grand Trunk, Marker, 41 Ark. 542; Derby v. etc. Ry. Co. v. Melrose, 166 Ind. 658,

dissatisfaction has long been felt with the doctrine of the servant's assumption of risks, whether ordinary or extraordinary.^{460b}

§ 209. Servant accepting employment with notice of defects. — A marked distinction is to be made between risks, of which the servant had notice when he entered into service, and risks which arose or were first brought to his notice, at some subsequent period.⁴⁶¹ It is well settled that a servant assumes the risk of every defect of which he had actual or constructive notice when he accepted the employment,⁴⁶² so far as he comprehends, or ought to com-

78 N. E. 190 (1906); *Mumford v. Paper Co.*, 155 Mass. 155.) The visible Chicago, etc. Ry. Co., 128 Ia. 685, 104 N. W. 1135 (1905).

^{460b} In the case of *Butler v. Frazee*, 211 U. S. 459 (1908), the Supreme Court of the United States, after noting the fact that the rule of assumption of risks has been thought by many a hard one, when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently made that the imperative need of employment leaves the workman no real freedom of choice, and that the influence of these conditions is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications, such as the Safety Appliance Law, says: "Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as a matter of law, to understand, appreciate and assume the risk of it. (*Tex. & Pac. Ry. Co. v. Swearingen*, 196 U. S. 51; *Fitzgerald v. Connecticut R.*

Paper Co., 155 Mass. 155.) The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of risk is plainly for the jury. But where the conditions are constant and long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly (*Patton v. Texas Ry. Co.*, 179 U. S. 658").

⁴⁶¹ See §§ 207e, 207f, *ante*; *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366.

⁴⁶² *Gibson v. Erie R. Co.*, 63 N. Y. 449 [low bridge]; *De Forest v. Jewett*, 88 N. Y. 264 [ditches in yard]; *Shaw v. Sheldon*, 103 N. Y.

prehend, the peril involved,⁴⁶³ even though such defect was due to the master's personal negligence, provided there was no express promise to remove the defect,⁴⁶⁴ nor any new obligation subsequently imposed upon the master with respect thereto. In such a case the master may insist that the servant go on with the work, under existing conditions; and a threat to dismiss him, if he will not go on, is not coercion.⁴⁶⁵ This doctrine, however, has only been applied to risks inherent in a place, tool or other instrumentality, or in the nature of the work, or in the character of a fellow servant. It is wholly inapplicable to the faults of the master or vice-principal, even though such faults should be so habitual as to form a part of his very nature. The carelessness, violent temper or incapacity of the master or vice-principal are not risks assumed by the servant, even if he knows of them from the beginning.

§ 209a. Extraordinary risks assumed by servant's continuing in the service with notice of defects. — A servant who, with actual or constructive notice⁴⁶⁶ of a defect, due

667, 9 N. E. 183 [uncovered rollers]; 188 [unguarded hatchway]; *Manning v. Chicago, etc. R. Co.*, 105
Bancroft v. Boston & M. R., 67 N. H. 466, 30 Atl. 409 [no gates at crossing]; *Goodes v. Boston & A. R. Co.*, 162 Mass. 287, 38 N. E. 500 [switch too near main track]; *Marean v. N. Y., Susquehanna, etc. R. Co.*, 167 Pa. St. 220, 31 Atl. 562 [no proper signals furnished]; *St. Louis, etc. R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895 [unblocked frogs]; *Norfolk, etc. R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706 [bad couplings; no promise to change]; *Williamson v. Newport News, etc. Co.*, 34 W. Va. 657, 12 S. E. 824 [low bridge]; *Sheets v. Chicago, etc. R. Co.*, 139 Ind. 682, 39 N. E. 154 [same]; *Lake Shore, etc. R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Gleeson v. Excelsior Mfg. Co.*, 94 Mo. 201, 7 S. W.

[defective locomotive].
⁴⁶³ This limitation is recognized in *Shaw v. Sheldon*, 103 N. Y. 667, 9 N. E. 183.

⁴⁶⁴ See *Sweeney v. Berlin Envelope Co.*, 101 N. Y. 520, 5 N. E. 358.

⁴⁶⁵ *Sweeney v. Berlin Envelope Co.*, 101 N. Y. 520, 5 N. E. 358.

⁴⁶⁶ The servant must have notice of some kind in order to relieve the master (*Scanlan v. Boston & A. R. Co.*, 147 Mass. 484, 18 N. E. 209; *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075; *Slater v. Chapman*, 67 Mich. 523, 35 N. E. 106; *Alabama G. S. R. Co. v. Richie*, 99 Ala. 346, 12 So. 612

to the master's fault, and of the danger to which he is exposed thereby,⁴⁶⁷ and either fully comprehending the

[danger not obvious]; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700). For instances of actual knowledge see *Appel v. Buffalo, etc. R. Co.*, 111 N. Y. 550, 19 N. E. 93 [knew frog unblocked]; *Horrigan v. N. Y. Central R. Co.*, 7 N. Y. App. Div. 377, 39 N. Y. Supp. 938 [defective derrick]; *Schwartz v. Cornell*, 59 Hun, 623, 13 N. Y. Supp. 355 [hole in floor]; *Wannamaker v. Burke*, 111 Pa. St. 423, 2 Atl. 500 [same]; *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16; *Baltimore, etc. R. Co. v. State*, 75 Md. 152, 23 Atl. 310 [tunnel not ventilated]; *Nelson v. Central R. Co.*, 88 Ga. 225, 14 S. E. 210 [defective brake]; *East Tennessee, etc. R. Co. v. Head*, 92 Ga. 723, 18 S. E. 976 [post near track]; *O'Neal v. Chicago, etc. R. Co.*, 132 Ind. 110, 31 N. E. 669 [track]; *Pitrowsky v. Reedy Mfg. Co.*, 54 Ill. App. 253 [unprotected gearing]; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, Id. 30 S. W. 102 [ladder in house]; *Lucey v. Hannibal Oil Co.*, 129 Mo. 32, 31 S. W. 340; *McLaren v. Wiliston*, 48 Minn. 299, 51 N. W. 373; *Olson v. St. Paul, etc. R. Co.*, 38 Minn. 117, 35 N. W. 866; *Norton v. Louisville, etc. R. Co.*, 16 Ky. L. Rep. 846, 30 S. W. 599 [lever on hand car]; *Emma Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. 600; *Crilly v. Texas, etc. R. Co.*, 44 La. Ann. 95, 10 So. 400; *Brown v. Brown*, 71 Tex. 355, 9 S. W. 261; *Texas & Pacific R. Co. v. Minnick*, 6 C. C. A. 387, 57 Fed. 362 [no watchman on track]). Plaintiff continued in service some months with knowledge of the general condition of the track. Held, that he had assumed the risk, though he may not have known of the particular defects which caused the injury (*Green v. Cross*, 79 Tex. 130, 15 S. W. 220). To similar effect *Allen v. Logan City*, 10 Utah, 279, 37 Pac. 496 [earth bank]. As to what is sufficient constructive notice or when notice is presumed, see § 216, *post*. As to the servant's duty to investigate, see § 217a, *post*. Where it appears that a brakeman, injured through a defect in the coupling machinery of a car, only discovered his danger at the moment of the accident, the question of contributory negligence is for the jury (*Goodrich v. N. Y. Central R. Co.*, 116 N. Y. 398, 22 N. E. 397).

⁴⁶⁷ That servant must be aware of the danger to charge him with negligence, see § 214, *post*; *Mullin v. Cal. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Wagner v. Jayne Co.*, 147 Pa. St. 475, 23 Atl. 772; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440, 4 S. W. 937. If plaintiff "without any negligence on his part," by reason of his youth or inexperience, or reliance on the directions given him, failed to appreciate the danger, the defendants will be responsible for their negligence in not properly guarding the shaft (*Dowling v. Allen*, 102 Mo. 213, 14 S. W. 751). Both master and servant knowing of the defect, and neither regarding it as dangerous, servant cannot recover on account of that defect (*Jenney Electric Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30). Otherwise, however, where the defect causing the injury, though in the same appliance, was not the same defect thus agreed upon (*Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097).

risk,⁴⁶⁸ or by his own fault failing to do so⁴⁶⁹ "voluntarily takes his chance"⁴⁷⁰ and continues in work which exposes him to such danger,⁴⁷¹ without reasonable excuse⁴⁷² and without complaint or objection,⁴⁷³ though ordinary pru-

⁴⁶⁸ *Fitzgerald v. Conn. Paper Co.*, 155 Mass. 155, 29 N. E. 464; see § 214, *post*. The workman's knowledge of the defects should amount to thorough comprehension of the risk incurred to justify the withdrawal of the case from the jury (*Brooke v. Ramsden*, 63 Law T. 287).

⁴⁶⁹ *Suter v. Park Lumber Co.*, 90 Wis. 118, 62 N. W. 927; *Luebke v. Berlin Works*, 88 Wis. 442, 60 N. W. 711.

⁴⁷⁰ Quoted from *Fitzgerald v. Conn. Paper Co.* (155 Mass. 155, 29 N. E. 464), where plaintiff had no way of leaving the mill, except by going down icy steps. Held, a question for the jury. *s. p.*, *Osborne v. London*, etc. R. Co., 21 Q. B. Div. 220; *Chicago, etc. R. Co. v. McGraw*, 22 Colo. 363, 45 Pac. 383. The assumption of risk must be really voluntary, not "under extraneous pressure, which amounts almost to compulsion" (*Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Smith v. Baker* (Ho. Lords), 1891, App. Cas. 325).

⁴⁷¹ *Lake Shore, etc. R. Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Spencer v. Ohio, etc. R. Co.*, 130 Ind. 181, 29 N. E. 915; *Bradshaw v. Louisville, etc. R. Co.* (Ky.), 21 S. W. 346; *Bogenschutz v. Smith*, 84 Ky. 330, 3 S. W. 800. Injured servants were debarred from recovery, on this ground, in *Clark v. Barnes*, 37 Hun, 389 [floor slippery from drips of water and oil]; *Pingree v. Leyland*, 135 Mass. 398 [machinist used a "jack-winch," knowing it to be "an old rattle-trap," destitute of a guard]; *Russell*

v. Tillotson, 140 Mass. 201 [revolving shaft, plainly visible]; *Assop v. Yates*, 2 Hurlst. & N. 768 [machine in dangerous position]; *Senior v. Ward*, 1 El. & El. 385 [miner warned to test rope, but did not]; *Simmons v. Chicago, etc. R. Co.*, 110 Ill. 340, and *Rasmussen v. Chicago, etc. R. Co.*, 65 Iowa, 236 [employee killed by falling of a bank which he was undermining]; *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81 [use of narrow plank over swift water, as standing place].

⁴⁷² As to what is sufficient excuse, see §§ 211, 213, 215, *post*. The master is responsible for an injury caused by obvious defects in the instrumentalities furnished only where the danger was not fully appreciated owing to the want of time for consideration, or the increased danger, by reason of the defective agencies, was not so imminent and threatening as to require the servant to abandon the service (*Reichla v. Gruensfelder*, 52 Mo. App. 43).

⁴⁷³ *Kaare v. Troy Steel Co.*, 139 N. Y. 369, 34 N. E. 901 [platform, no objection]; *Powers v. N. Y., Lake Erie, etc. R. Co.*, 98 N. Y. 274; *Mundie v. Hill Mfg. Co.*, 86 Me. 400, 30 Atl. 16 [splinter in floor]; *Latre-mouille v. Bennington, etc. R. Co.*, 63 Vt. 336, 22 Atl. 656 [incompetent co-servant]; *Feely v. Pearson Cordage Co.*, 161 Mass. 426, 37 N. E. 368 [unguarded well]; *Goldthwait v. Haverhill R. Co.*, 160 Mass. 554, 36 N. E. 486; *N. Y., Lake Erie, etc. R. Co. v. Lyons*, 119 Pa. St. 324, 13 Atl. 205; *Foster v. Pusey*, 8 Del. 168, 14 Atl. 545; *Graver Tank*

dence might require him to refuse the risk,⁴⁷⁴ is held to assume the risk.⁴⁷⁵ This rule has been applied to cases

Works v. McGee, 58 Ill. App. 250; Chicago Packing Co. v. Rohan, 47 Id. 640 [unguarded vat]; Shackelton v. Manistee, etc. R. Co., 107 Mich. 16, 64 N. W. 728 [conductor using defective car without objection]; Hewitt v. Flint, etc. R. Co., 67 Mich. 61, 34 N. W. 659; Needham v. Louisville, etc. R. Co., 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; Balle v. Detroit Leather Co., 73 Mich. 158, 41 N. W. 216; Scott v. Darby Coal Co., 90 Iowa, 689, 57 N. W. 619 [defective engine, well known, no complaint]; Beckman v. Consolidation Coal Co., 90 Iowa, 252, 57 N. W. 889 [switch often left open]; Gogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578 [no complaint]; Greenleaf v. Dubuque, etc. R. Co., 33 Iowa, 52; Hanrathy v. Northern Central R. Co., 46 Md. 288; Galveston, etc. R. Co. v. Drew, 59 Tex. 10. It is not intended by the statement in the text that mere complaint or objection would exonerate the servant from his assumption of the risk, that subject is treated in next succeeding sections.

⁴⁷⁴ See §§ 211, 214, *post*. For a fireman, knowing of a defect in the air-brake, to remain upon a locomotive is not conclusive of negligence on his part, and it is a proper question for the jury whether the defect is such that a man of ordinary prudence and intelligence would not have remained (New Jersey, etc. R. Co. v. Young, 1 U. S. App. 96, 1 C. C. 428, 49 Fed. 723). See *contra*, Worden v. Humeston, etc. R. Co., 72 Iowa, 201, 33 N. W. 629. Servant assumed the risk, and was guilty of contributory negligence, having continued the work after the danger

became so plain and imminent that a man of ordinary prudence would not have taken the risk (Pollich v. Sellers, 42 La. Ann. 623, 7 So. 786).

⁴⁷⁵ "A servant knowing the facts may be utterly ignorant of the risks" (Clark v. Holmes, 7 Hurlst. & N. 937, 31 L. J. Exch. N. S., 356 (1862); Pennsylvania, etc. Co. v. Kelly, 54 Ill. App. 626 (1894); Galveston, etc. Ry. Co. v. Lempe, 59 Tex. 19 (1883); Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210 (1890). "The general rule undoubtedly is that a person cannot be said to take a risk unless he knows not only the condition of things, but also that danger exists in such condition" (Anderson v. Clark, 155 Mass. 368, 20 N. E. 589 (1892). Affirmative statement of rule (Marshall v. St. Louis, etc. Ry. Co., 78 Ark. 213, 94 S. W. 56, 115 Am. St. Rep. 27 (1906); Bush v. Wood, 8 Cal. App. 647, 97 Pac. 709 (1908); Elkton, etc. Min. Co. v. Sullivan, 41 Colo. 241, 92 Pac. 679 (1907); Flowers v. Louisville, etc. Ry. Co., 55 Fla. 603, 46 So. 718 (1908); Knox v. Am., etc. Mill, 236 Ill. 437, 86 N. E. 90, 127 Am. St. Rep. 291 (1908); Antioch Coal Co. v. Rockey, 169 Ind. 247, 82 N. E. 76 (1907); Atoka Coal, etc. Co. v. Miller, 7 Ind. Ter. 104, 104 S. W. 555 (1907); Sutton v. Des Moines Bakery Co., 135 Iowa 390, 112 N. W. 836 (1907); St. Louis, etc. Ry. Co. v. Mealman, 78 Kans. 496, 97 Pac. 381 (1908); Wallace v. South, etc. Ry. Co., 118 S. W. (Ky.) 962 (1909); Ball v. Vicksburg, etc. Ry. Co., 123 La. 7, 48 So. 565 (1900); Podvin v. Pepperell Mfg. Co., 104 Me. 561, 72 Atl. 618 (1908); Bernheimer v.

in which a servant has suffered injuries from the employment of an incompetent or habitually negligent fellow

Bager, 70 Atl. (Md.) 91 (1909); Co. v. Andrews, 150 Ala. 368, 43 O'Toole v. New Eng., etc. Co., 20 So. 3, 48 (1907); Choctaw, etc. Ry. Mass. 126, 87 N. E. 608 (1909); Co. v. Jones, 77 Ark. 367, 92 S. W. Cristinelli v. Saginaw Mfg. Co., 154 244, 4 L. R. A. (N. S.) 837 (1906); Mich. 423, 117 N. W. 910; Bradley DeWitt v. Floriston Pulp, etc. Co., v. Forbes Tea, etc. Co., 213 Mo. 7 Cal. App. 774, 96 Pac. 397 (1908); 320, 111 S. W. 919 (1908); Anderson v. Northern, etc. Ry. Co., 34 Vindicator, etc. Min. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313 Mont. 181, 85 Pac. 884 (1906); (1906); Sparta Oil Mill v. Russell, Grimm v. Omaha Elec. Light, etc. 65 S. W. (Ga. App.) 37 (1909); Co., 79 Neb. 395, 399, 114 N. W. Mann v. Illinois Cent. Tr. Co., 236 769 (1908); O'Neal v. Karr, 110 Ill. 30, 86 N. E. 161 (1908); Cleveland, etc. Ry. Co. v. Gossett, 87 App. Div. 571, 97 N. Y. Supp. 148; N. E. (Ind.) 723 (1909); Mumford Millen v. Pacific Bridge Co., 51 v. Chicago, etc. Ry. Co., 128 Ia. 685, Ore. 538, 550, 95 Pac. 196 (1908); 104 N. W. 1135 (1905); Louisville, Wilson v. N. Y. Cent. Ry. Co., 222 etc. Ry. Co. v. McMillen, 119 S. W. Pa. 341, 70 Atl. 183 (1908); Wilson v. N. Y., etc. Ry. Co., 69 Atl. (Ky.) 221 (1909); Starnes v. Pine (R. I.) 364 (1908); Norman v. Woods Lbr. Co., 122 La. 284, 47 So. Southern Ry. Co., 119 Tenn. 401, 607 (1908); Crown Cork, etc. Co. v. 104 S. W. 1088 (1907); Gulf, etc. O'Leary, 108 Md. 463, 69 Atl. 1068 Ry. Co. v. Huyett, 99 Tex. 630, 92 (1908); Jellow v. Fore River, etc. S. W. 454, 5 L. R. A. (N. S.) 669 Co., 201 Mass. 464, 87 N. E. 906 (1906); Maxwell Ginning Co. v. (1909); DeKallands v. Washtenaw, Wallan, 121 S. W. (Tex.) 182 etc. Tel. Co., 153 Mich. 25, 116 N. (1909); Stone v. Union Pac. Ry. W. 564 (1908); Clay v. Chicago, Co., 100 Pac. (Utah), 362 (1909); etc. Ry. Co., 104 Minn. 1, 115 N. W. Norton Coal Co. v. Wheeler, 108 Va. 949 (1908); Root v. Kansas, etc. 448, 62 S. E. 269 (1908); Meshishnek Ry. Co., 195 Mo. 348, 92 S. W. 621, v. Seattle Land, etc. Co., 51 Wash. 6 L. R. A. (N. S.) 212 (1906); 382, 99 Pac. 9 (1909); Yezick v. Shroder v. Montana Iron Works, 38 Chicago Brass Co., 138 Wis. 342, Mont. 474, 100 Pac. 619 (1909); 120 N. W. 247 (1909); Lake v. Grimm v. Omaha, etc. Light, etc. Co., 79 Neb. 395, 399, 114 N. W. Shenango Furnace Co., 160 Fed. 769 (1908); Charrier v. Boston, etc. 887, 88 C. C. A. 69 (1908); Federal Ry. Co., 70 Atl. (N. H.) 1078 Lead Co. v. Swyers, 161 Fed. 687, (1908); Pelow v. Oil Well, etc. Co., etc. Co. v. Bloomfeld, 163 Fed. 827, 105 N. Y. 64, 86 N. E. 812 (1909); 91 C. C. A. 390 (1908). The converse Tanner v. Hitch, *et al.*, 140 N. C. 475, 53 S. E. 287 (1906); Manzi v. Washburn Wire Co., 72 Atl. (R. I.) 394 (1909); Latimer v. General Elec. Co., 81 S. C. 374, 62 S. E. 438 (1908); Currie v. Missouri, etc. Ry. Co., 101 Tex. 478, 100 S. W. 1167

servant,⁴⁷⁶ or from inadequacy in the force employed,⁴⁷⁷ from defects in the place of work, materials or appliances,⁴⁷⁸ from the dangerous nature of the work, from

(1908); *Tuckett v. Amer. Steam Laundry*, 30 Utah, 273, 84 Pac. 500, 116 Am. St. Rep. 832, 4 L. R. A. (N. S.) 760 (1906); *Goshorn v. Wheeling Mold, etc. Co.*, 65 W. Va. 250, 64 S. E. 22 (1909); *Rankel v. Buckstaff, etc. Co.*, 138 Wis. 442, 120 N. W. 269 (1909); *Oregon, etc. Lbr. Co. v. Portland, etc. S. S. Co.*, 162 Fed. 912 (1908); *Inv. Co. v. McFarland*, 166 Fed. 76, 91 C. C. A. 504 (1909); *Cooperant Tel. Co. v. St. Clair*, 168 Fed. 645 (1909); *Stewart v. Southern Ry. Co.*, 168 Fed. 685 (1909).

⁴⁷⁶ *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104; *Kroy v. Chicago, etc. R. Co.*, 32 Iowa, 357; *St. Louis, etc. R. Co. v. Morgart*, 45 Ark. 318; *Consolidated Coal Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610; *Smith v. Sibley Mfg. Co.*, 85 Ga. 333, 11 S. E. 616; *Richmond, etc. R. Co. v. Worley*, 92 Ga. 84, 18 S. E. 361 [no objection made]; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596. By continuing to work with an incompetent fellow servant without notifying the master, one assumes the risk of injuries resulting from the incompetency (*St. Louis Brick Co. v. Kenyon*, 57 Ill. App. 640; *McCharles v. Horn Silver Mining Co.*, 10 Utah, 470, 37 Pac. 733; *White v. Lewiston, etc. Ry. Co.*, 94 App. Div. 4, 87 N. Y. Supp. 901 (1904), (conductor of street car having knowledge of the incompetency of the motorman, by reason of his intemperance); *Austin v. Tanning Co.*, 96 App. Div. 550, 89 N. Y. Supp. 137 (1904), (knowledge by deceased of incompetency, through want of acquaintance with

the English language, in a dangerous service); *Lantry v. Lowrie*, 58 S. W. (Tex. App.) 837 (1900), (low order of intellect); *Wiskie v. Montello Granite Co.*, 111 Wis. 443, 87 N. W. 461, 87 Am. St. Rep. 885 (1901).

⁴⁷⁷ *Baltimore, etc. R. Co. v. State*, 41 Md. 268 [only one brakeman to entire train]; *Robinson v. Houston, etc. R. Co.*, 46 Tex. 540 [deficiency of brakemen]; *Texas & Pac. R. Co. v. Rogers*, 6 C. C. A. 403, 57 Fed. 378; *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170; *Gulf, etc. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556 [no conductor on train]; *St. Louis, etc. R. Co. v. Lemon*, 83 Tex. 143, 18 S. W. 331 [obvious deficiency]; *Richmond, etc. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Eddy v. Rogers (Tex. Civ. App.)*, 27 S. W. 295; *Southern Kansas R. Co. v. Drake*, 53 Kans. 1, 35 Pac. 825; *Texas, etc. R. Co. v. Smith*, 67 Fed. 524, 14 C. C. A. 509; *Monroe v. Kilgore, etc. Co.*, 107 Minn. 347, 120 N. W. 340 (1909), (where he appreciates the danger of working with an inadequate number of men).

⁴⁷⁸ Deceased was a car cleaner on defendant's elevated railroad yards, and was killed by stepping backwards from a car at night, and falling through an opening in the structure on which the tracks were laid. It was shown that the structure was new, and not yet finished; that deceased had been there daily for three weeks in the capacity of watchman and car cleaner, saw carpenters at work planking the structure, and knew its condition. Held, that defendant was not liable. *Andrews,*

unlawful speed of trains,⁴⁷⁹ or from failure to maintain safeguards required by law.⁴⁸⁰ But those cases in which it has been held, regardless of these limitations, that notice of defects or continuous negligence of the master was a bar to the action, as matter of law, are overruled and obsolete.⁴⁸¹ The latest and best authorities hold that the liability of the master for risks, caused by his negligence, which did not exist when the servant accepted the employment, depends upon the "question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily or endures it because he feels constrained to."⁴⁸² If he *voluntarily* continues work, with full notice of the risk, he assumes it,⁴⁸³ but not so if he acts under coercion.⁴⁸⁴

§ 210. Effect of refusal to repair.—It has been distinctly held, in some cases, and plainly implied in others,

C. J., and O'Brien, J., dissenting (Kennedy v. Manhattan R. Co., 145 N. Y. 288, 39 N. E. 956). For other examples, see *La Pierre v. Chicago, etc. R. Co.*, 99 Mich. 212, 58 N. W. 60; *McGlynn v. Brodie*, 31 Cal. 376; *Griffiths v. Gidlow*, 3 Hurlst. & N. 648 [servant injured by a defect in machinery, which he had used voluntarily, knowing its defects]; *Green, etc. R. Co. v. Bresmer*, 97 Pa. St. 103 [groom kicked by mare which he knew to be vicious]. An employee calking pipe in a trench for water works who is of mature years and of ordinary intelligence, and who knows the liability of such trenches to cave in, and who, a few minutes after seeing the trench in which he is working partially cave in a few feet from him, again goes to work, assumes the risk (*Showalter v. Fairbanks*, 88 Wis. 376, 60 N. W. 257; *Secord v. Chicago, etc. R. Co.*, 107 Mich. 540, 65 N. W. 550 [defects in coupling]; *Texas, etc. R. Co. v. McKee*, 9 Tex. Civ. App. 100, 29 S. W. 544). The rule that a servant is deemed to assume the risks attendant on the use of defective machinery on his work does not extend to a careless use of such machinery by other servants of the master (*Moran v. Harris*, 63 Iowa, 390).

⁴⁷⁹ *Bengtson v. Chicago, etc. R. Co.*, 47 Minn. 486, 50 N. W. 531.

⁴⁸⁰ *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378 [mine].

⁴⁸¹ See *Hawley v. Northern Central R. Co.*, 82 N. Y. 370; *Kain v. Smith*, 89 Id. 375.

⁴⁸² *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *McC Campbell v. Cunard Steamship Co.*, 69 Hun, 131, 23 N. Y. Supp. 477.

⁴⁸³ *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Coal Co. v. Jones*, 127 Ill. 379, 8 N. E. 865; *Hol-loran v. Union Iron Co.*, 133 Mo. 470, 35 S. W. 260.

⁴⁸⁴ *Wells Co. v. Gortorski*, 50 Ill. 445. See § 211a, *post*.

that, no matter how serious may be the defects in a master's selection of materials or of fellow servants, a servant who remains in his employment, knowing that the master does not intend to remedy these defects, assumes the risk and waives all right of action against the master, in case of injury arising therefrom. Such decisions are founded upon the assumption that a master can change the whole rule of law governing the relation between himself and his servants, by a mere notice, without their assent. It must be conceded that this cannot be done in any other relation of life. Whatever contract is implied by law in any other case can only be modified by mutual consent. A notice, if assented to, may suffice for this purpose; but a bare notice has no such effect.⁴⁸⁵ There is no foundation for a different rule in this instance. Where either party to the contract of service desires to alter the contract implied by law, it is not enough for him to give notice of that desire or intention to the other party. The legal rights of the parties can only be altered by mutual assent. There can be no doubt that the courts would disregard any notice served by an employee upon his employer, to the effect that he should look to the employer for compensation for all injuries suffered in his service, unless the employer acted in such a manner as to give the employee a right to believe that he accepted this modification of their legal relations. But on what principle can a different rule be applied, where the notice proceeds from the employer? We know of none; and we are, therefore, satisfied that a servant is not bound by any mere notice given by his master of an intent not to per-

⁴⁸⁵ Carriers of goods cannot limit their common-law liability for losses, by a mere notice; this is established law in New York (*Cole v. Goodwin*, 19 Wend. 251; *Camden Co. v. Belknap*, 21 Id. 354; *Blossom v. Dodd*, 43 N. Y. 264; *Rawson v. Penn. R. Co.*, 48 Id. 212); in the United States courts (*Railroad Co. v. Mfg. Co.*, 16 Wall. 318; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Ayres v. Western R. Co.*, 14 Blatchf. 9; *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174); and in nearly or quite all of the State courts. See *Lawson Contr. Carr.*, 33-55, 1 Add. Contr. (Am. ed.), 1883, pp. 766, 768, 541, note, citing numerous cases.

form his ordinary legal duties. The master must require an assent or must dismiss the servant, if he expects to avoid the usual responsibilities of a master. In view of the obvious superiority of the master's position, which, in the United States, is constantly increasing, it should not be presumed that the servant assents to any such notice, by acts which, in more equal relations of life, might fairly be deemed to amount to a tacit assent. We certainly think that all reasonable presumptions should be against construing the servant's silence into such an assent. We fully admit that many decisions or *dicta* are adverse to these views;⁴⁸⁶ but they have been practically overruled in Great Britain, in our Federal courts, and even in Massachusetts;⁴⁸⁷ much more in other States.⁴⁸⁸

§ 211. True rule as to effect of servant's knowledge. — The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have been justified in continuing the same work under the same risk;⁴⁸⁹ but not otherwise. All the circumstances must

⁴⁸⁶ See *Leary v. Boston, etc. R. Co.*, 139 Mass. 580; *East Tennessee, etc. R. Co. v. Duffield*, 12 Lea, 63; *Galveston, etc. R. Co. v. Drew*, 59 Tex. 10. *Co.*, 24 Hun, 48; *Poirier v. Carroll*, 35 La. Ann. 699; *Kain v. Smith*, 89 N. Y. 375; *Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389. See § 214a, note 523.

⁴⁸⁷ See cases cited under § 209a and § 215, *post*.

⁴⁸⁸ *Francis v. Kansas City R. Co.*, 127 Mo. 658, 28 S. W. 842, *aff'd*, 30 S. W. 129; where servants complained, and were "told to go on; they would have to get along the best they could;" and see *Hough v. Texas, etc. R. Co.*, 100 U. S. 213, 225; *Dale v. St. Louis, etc. R. Co.*, 63 Mo. 455; *Hawley v. Northern Central R. Co.*, 82 N. Y. 370, *aff'g s. c.*, 17 Hun, 115; *McMahon v. Port Henry Ore*

⁴⁸⁹ *Patterson v. Pittsburg, etc. R. Co.*, 76 Pa. St. 389; *Clarke v. Holmes*, 7 Hurlst. & N. 937, 945; *Hough v. Texas, etc. R. Co.*, 100 U. S. 213; *Greene v. Minneapolis, etc. R. Co.*, 31 Minn. 248; *Dwyer v. St. Louis, etc. R. Co.*, 52 Fed. 87. It is generally a question for the jury whether the surrounding circumstances made it contributory negligence for the servant to continue using the appliance (*Hamilton v. Rich Hill Coal Co.*, 108 Mo. 364,

be taken into account, and not merely the isolated fact of risk. Thus, to take a strong case, an engineer, who should discover, for the first time, while midway between two stations, that his engine was dangerously defective, would unquestionably be justified in continuing to run it to the next station.⁴⁰⁰ To take a weaker case, he would still be justified in running it beyond that station, if no other engine could be obtained there, unless the danger of explosion were imminent. But can we stop there? Would not an engineer, having a train full of passengers, bound for a station one hundred miles distant, be entitled and indeed almost bound to take the train through with an engine which, though defective, is probably manageable with unusual care, and which is the only engine obtainable by which the train can be taken through on schedule time?⁴⁹¹ Is there any doubt that the most pru-

18 S. W. 977); s. p., *Murtaugh v. N. Y. Central R. Co.*, 49 Hun, 456, 3 N. Y. Supp. 483.

⁴⁰⁰ *Ford v. Fitchburg R. Co.*, 110 Mass. 240. Where no opportunity is afforded to make complaint [*Missouri, etc. Ry. Co. v. Williams*, 28 Tex. App. 615, 68 S. W. 805 (1902); but see *Texas, etc. Ry. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971 (1897); *Louisville, etc. Ry. Co. v. Kelly*, 63 Fed. 407, 11 C. C. A. 260 (1894); *Mason, etc. Ry. Co. v. Yockey*, 103 Fed. 265, 43 C. C. A. 228 (1901); *Hinion v. New York, etc. Ry. Co.*, 79 Fed. 903, 25 C. C. A. 223 (1898); *Irvine v. Flint, etc. Ry. Co.*, 89 Mich. 416, 50 N. W. 1008 (1891); *Francis v. Kansas, etc. Ry. Co.*, 127 Mo. 658, 28 S. W. 842, aff'd in 127 Mo. 678, 30 S. W. 129 (1895). Compare *Crane v. Chicago, etc. Ry. Co.*, 123 Ia. 81, 99 N. W. 169 (1904). Or repairs (*McCabe v. Mont. Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 701 (1904)).

⁴⁰¹ *Fordyce v. Edwards*, 60 Ark.

438, 30 S. W. 758. "Whether or not an engineer under such circumstances should abandon his journey and report the condition of matters to headquarters for instruction, or should make such temporary repairs as were possible and proceed for the short remainder of his run, was for the engineer in the exercise of his best judgment to determine; and he does not necessarily assume the risks of the journey because he erred in judgment. It is not every defect in his engine discovered by the engineer that would justify him in stalling his train and waiting for repairs from distant headquarters, and whether any particular case required such action must necessarily be left to the good judgment of the engineer, both on general principles governing the duty of an employee to his master and the special rule of the defendant company given in evidence at the trial. Whether the engineer in this case was required to do one thing or the other was, I

dent engineer would do so? But that which is true of an engineer, under such circumstances, is equally true of all classes of servants under other circumstances, similar in principle. If every man should cease from work upon the instant of discovering that his safety was imperiled by the negligence of some other person, the business world would come to a stand. If every servant on a railroad or in a factory should refuse to work by the side of a negligent fellow servant or with defective materials, immediately upon becoming aware of the fact such enterprises could never be carried on. Obviously, a reasonable time must be given for removal of the defect; and meantime, the business must be carried on with no prejudice to the servant's rights,⁴⁹² unless the risk is so great that no one, acting with ordinary prudence, would go on under the circumstances.

§ 211a. Special risks incurred under coercion. — As already stated, it is now held by the most conservative authorities, that a servant is not deprived of his right to recover for defects caused by his master's negligence, arising or first coming to the servant's notice, after he has entered into service, unless he assumes the risk of his own free and unconstrained will.⁴⁹³ If, therefore, he continues to incur the risk of such defects, under any kind of necessity,⁴⁹⁴ or coercion, he does not *voluntarily*

think, for the jury to say (Koreis v. Minneapolis, etc. Ry. Co., 108 Minn. 499, 122 N. W. 662, 25 L. R. A. (N. S.) 339 and note (1909); Fordyce v. Edwards, 60 Ark. 938, 30 S. W. 758. See, also, Irvine v. Flint, etc. Ry. Co., 89 Mich. 416, 50 N. W. 1008 (1891); Pierson v. New York, etc. Ry. Co., 53 App. Div. 363, 63 N. Y. Supp. 1039 (1900); O'Rourke v. Union, etc. Ry. Co., 22 Fed. 191 (1880), remarks of Brewer, J.).

⁴⁹² The entire doctrine of this sec-

tion was adopted, in effect, in cases of injury from the known incompetency of a co-servant (Northern Pac. R. Co. v. Mares, 123 U. S. 710; Francis v. Kansas City, etc. R. Co., 127 Mo. 658, 28 S. W. 842, aff'd, 30 S. W. 129); or known defects in instrumentalities of work (Hamilton v. Rich Hill Coal Co., 108 Mo. 364, 18 S. W. 977; O'Mellia v. Kansas City, etc. R. Co., 115 Mo. 205, 21 S. W. 503).

⁴⁹³ § 209a, *ante*.

⁴⁹⁴ Such as there being no safe

assume the risk, and is not, necessarily, debarred from recovery thereby.⁴⁹⁵ Whether reasonable fear or threat of dismissal constitute such coercion is a question upon which the authorities are not entirely agreed. The greater number of adjudications undoubtedly are to the effect that they do not constitute such coercion as will excuse the servant for continuance in the service so as to deprive such action on his part of its voluntary character.⁴⁹⁶ On principle, however, we concur with the Vir-

means of access to the place of work (Fitzgerald v. Conn. Paper Co., 155 Mass. 155, 29 N. E. 464).

⁴⁹⁵ Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; Thrussell v. Handy-side, 20 Q. B. Div. 359; Yarmouth v. France, 19 Id. 647; see Smith v. Baker (Ho. Lords), 1891, App. Cas. 325; Fitzgerald v. Conn. Paper Co., 155 Mass. 155, 29 N. E. 464.

⁴⁹⁶ Fear of being discharged will not relieve the servant from the assumption of the risks known to him or such as are obvious (Wormell v. Maine Cent. Ry. Co., 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321; Leary v. Boston, etc. Ry. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; Sweeney v. Berlin, etc. Co., 101 N. Y. 520, 54 Am. Rep. 722; Brown v. Oregon Lbr. Co., 24 Ore. 315, 33 Pac. 557 (1893); Worlds v. Georgia Ry. Co., 99 Ga. 283, 5 Am. & Eng. Ry. Cas. (N. S.) 514, 25 S. E. 646 (1896); Robertson v. Chicago, etc. Ry. Co., 46 Ind. 486, 45 N. E. 655, 6 Am. & Eng. Ry. Cas. (N. S.) 611 (1896). "The plaintiff, on his own evidence, appreciated the danger more than any one else. He perfectly understood what was likely to happen. That likelihood did not depend upon the doing of some negligent act by people in another branch of the employment. * * * He complained, and was notified he could go if he

would not face the chance. He stayed and took the risk. * * * He did so none the less that the fear of losing his place was one of his motives" (Lamson v. Am. Axe, etc. Co., 177 Mass. 144, 58 N. E. 585 (1900). But compare Erickson v. Milwaukee, etc. Ry. Co., 83 Mich. 281, 47 N. W. 237; Jones v. Lakeshore, etc. Ry. Co., 49 Mich. 473, 14 N. W. 551; Orr v. Southern Bell Tel. Co., 130 N. C. 627, 41 S. E. 880 (1902). "Whether he directly consented to the risk or was constrained in some manner, such as a fear of losing employment, is a question for the jury" (Rigsby v. Oil Well Supply Co., 115 Mo. App. 322, 91 S. W. 467 (1906). "It is held in many cases where the servant knowingly incurs the risk of defective machinery, still, if not so defective as to threaten immediate injury it is for the jury to determine whether there was negligence on his part" (Stevens v. Hannibal, etc. Ry. Co., 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336). "If a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order" (1 Labatt on Master and Servant,

ginia court in condemning such decisions as founded on "a cruel and inhuman doctrine."⁴⁹⁷ In some jurisdictions it has been held that such threats or reasonable apprehension of discharge may be given in evidence and considered by the jury in determining the question whether the acceptance of the risk was voluntary unless the danger was so great that no person of reasonable prudence would have encountered it, notwithstanding such threat or prospect of dismissal.⁴⁹⁸ In some States railway companies are prohibited by the constitution or statute from setting up the defence of assumed risk.^{498a}

§ 212. Test of servant's prudence. — The test of prudence, in these cases, in analogy to that applied in ordi-

§ 439). See also *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Mason v. Richmond, etc. Ry. Co.*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814. "When the plaintiff complained of the absence of a fixed post and of the use of the devices furnished by appellants in lieu thereof, he was told by Sturgis that others worked with the appliances furnished and that if he did not want to do so he could quit" (*Jewell v. Kansas City Bolt, etc. Co.*, 231 Mo. 176, 132 S. W. 703 (1910); held, that the plaintiff did not voluntarily assume the peril caused by the absence of the post and that the case should have been submitted to the jury on the question of contributory negligence. See § 223a and notes, *post*).

⁴⁹⁷ *Richmond, etc. Ry. Co. v. Norment*, 84 Va. 167, 4 S. E. 211.

⁴⁹⁸ *East Tennessee, etc. Ry. Co. v. Duffield*, 12 Lea, 63, 47 Am. Rep. 319.

^{498a} *Bodie v. Charleston, etc. Ry. Co.*, 61 S. C. 468, 39 S. E. 715; *Norfolk, etc. Ry. Co. v. Cheatwoof*, 103 Va. 356, 49 S. E. 489 (1904); *Bryce v. Burlington, etc. Ry. Co.*, 119 Iowa,

275, 93 N. W. 275, 128 Iowa, 483, 104 N. W. 483 (1905); *Texas Mex. Ry. Co. v. Trijerina*, 51 Tex. App. 100, 111 S. W. 239 (1905); *El Paso, etc. Ry. Co. v. Alexander*, 117 S. W. Tex. App.) 927. The statute of New York as amended by Laws of 1910, p. 352, declares that necessary risks are those "inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of employees and complied with the laws affecting or regulating such business or occupation for the greater safety of such employees." And that other risks are not assumed unless the employee fails within a reasonable time to give notice thereof, providing the defect was not actually known to the employer or superior servant or could have been discovered by the employer "by reasonable and proper care, tests or inspection." See *Ward v. Manhattan*, 95 N. Y. App. Div. 437, 88 N. Y. Supp. 795; *Hurley v. Olcott*, 134 N. Y. App. Div. 631, 119 N. Y. Supp. 430, *aff'd*, 198 N. Y. 132. The defence is entirely abolished in California by Act of 1911.

nary cases of contributory fault, is that which a prudent servant, of the same class,⁴⁹⁹ using such prudence and judgment as such persons usually possess,⁵⁰⁰ but no more,⁵⁰¹ might reasonably be expected to apply to the particular case.⁵⁰² A conductor should be required to exercise the care and judgment of an ordinarily prudent conductor; an engineer, that of an ordinarily prudent engineer; a skilled mechanic, that of an ordinarily prudent mechanic of the same class; but from a brakeman or common laborer, only that which can fairly be expected from a brakeman or a laborer.⁵⁰³ This has been too often overlooked; but it is well settled in other branches of the law of contributory negligence; and the later cases apply this test here.

§ 213. Excusable omissions of usual care. — A servant is not debarred from recovery, as matter of law, by his omission to exercise, under peculiar circumstances, the same kind or degree of care which he should exercise under ordinary circumstances.⁵⁰⁴ Thus, in an emergency, to avoid a greater peril, either to himself or to others to whom he owes any duty, he may, with full knowledge of the peril incurred, go into a dangerous place,⁵⁰⁵ use a

⁴⁹⁹ The test is whether an ordinarily prudent person of his age and experience, under like circumstances, would have appreciated the danger (Craven v. Smith, 89 Wis. 119, 61 N. W. 317; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701. See Fox v. Glastonbury, 29 Conn. 204; Hassenyer v. Michigan Central R. Co., 48 Mich. 205).

⁵⁰⁰ § 211, *ante*; National Syrup Co. v. Carlson, 42 Ill. App. 178.

⁵⁰¹ Brick v. Bosworth, 162 Mass. 334, 39 N. E. 36.

⁵⁰² Where an instruction was requested that deceased was bound to exercise the same care and diligence as would have been used by men of

ordinary care and prudence under the same or similar circumstances, it was error to substitute the words "under ordinary circumstances" (Overman Wheel Co. v. Griffin, 67 Fed. 659, 14 C. C. A. 609).

⁵⁰³ McGovern v. Central Vermont R. Co., 123 N. Y. 280, 25 N. E. 373; Gill v. Homrighausen, 79 Wis. 634, 48 N. W. 862.

⁵⁰⁴ Texas, etc. R. Co. v. Overheiser, 76 Tex. 437, 13 S. W. 468 [stepping between moving cars].

⁵⁰⁵ Johnson v. Steam Gauge Co., 72 Hun, 535, 25 N. Y. Supp. 689 [escaping from fire by defective fire escape]. Where an engineer fails to go on a siding in order to permit a

dangerous appliance,⁵⁰⁶ undertake a dangerous task⁵⁰⁷ or make a dangerous leap.⁵⁰⁸ The mere technical fact of the servant's knowledge of a defect is not sufficient to exonerate the master, if, for any reason arising from the exigency of the service, the servant forgets it, and is not in fault in forgetting it, at the precise time when he suffers thereby.⁵⁰⁹ In analogy to the principles already stated under the head of contributory negligence,⁵¹⁰ the servant's rights are not prejudiced by his excusable forgetfulness of or failure to observe a defect or danger, under the influence of sudden alarm⁵¹¹ or of an urgent necessity for speed,⁵¹² or if his duties are such as neces-

train about due to pass, and a brakeman, in imminent danger of a collision, goes forward on top of the cars to warn him to stop, and is injured, the company is liable (*Simmons v. East Tennessee, etc. R. Co.*, 92 Ga. 658, 18 S. E. 999). So where he takes great risks to save a train (*Omaha, etc. R. Co. v. Krayenbuhl*, 48 Neb. 553, 67 N. W. 447).

⁵⁰⁶ A brakeman acting under orders, who attempted to couple cars with defective tool, knowing that a passenger train was soon due, and that unless the coupling was made there would be danger of collision may recover for injuries caused thereby (*Strong v. Iowa Cent. R. Co.*, 94 Ia. 380, 62 N. W. 799).

⁵⁰⁷ *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430, 38 N. E. 67 [trying to leave train]; *Schroeder v. Chicago, etc. R. Co.*, 108 Mo. 322, 18 S. W. 1094 [getting out of way of train to protect passengers]; *Fox v. Chicago, etc. R. Co.*, 86 Ia. 368, 53 N. W. 259 [endeavoring to catch a fast moving freight car, under orders of conductor, and in an emergency].

⁵⁰⁸ *Louisville, etc. R. Co. v. Rains (Ky.)*, 23 S. W. 505 [jumping from a train to avoid a collision]; *s. p.*,

Haney v. Pittsburgh R. Co., 38 W. Va. 570, 18 S. E. 748.

⁵⁰⁹ *Wallace v. Cent., etc. Ry. Co.*, 18 N. Y. Supp. 280; *Port Royal, etc. Ry. Co. v. Davis*, 95 Ga. 292, 22 S. E. 833 (1895); *Allen v. Wisconsin, etc. Ry. Co.*, 107 Min. 5, 119 N. W. 423 (1909); *Brett v. Frank*, 153 Cal. 263, 1051 (1908); *Cooperage Co. v. Headrick*, 159 Fed. 680, 83 C. C. A. 548 (1908).

⁵¹⁰ See § 89, *ante*.

⁵¹¹ *Rima v. Rossie Iron Works*, 120 N. Y. 433, 24 N. E. 940; *Haas v. Chicago, etc. R. Co.*, 90 Ia. 259, 57 N. W. 894 [fireman *not* jumping off, in view of collision]; *s. p.*, *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134; *Hudson v. East Tennessee, etc. R. Co.*, 93 Ga. 816, 21 S. E. 126 [attention distracted by noise]; *San Antonio, etc. R. Co. v. McDonald* [Tex. Civ. App.], 31 S. W. 72. In *Columbus, etc. R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90, the excuse for forgetfulness was held insufficient.

⁵¹² His duty having compelled servant to act at once without opportunity for inspection, the question of contributory negligence is for the jury (*Dooner v. Delaware, etc. Canal*

sarily to absorb his whole attention, leaving him no reasonable opportunity to look for defects,⁵¹³ or if the light

Co., 164 Pa. St. 17, 30 Atl. 269); *s. p.*, *Irvine v. Flint, etc. R. Co.*, 89 Mich. 416, 50 N. W. 1008). Servant obliged to work quickly, excusable (*Carter v. Oliver Oil Co.*, 34 S. C. 211, 13 S. E. 419). Plaintiff, a brakeman, while making a trip on a cold, stormy night, discovered that a step was missing from a car, between his post and the caboose, and notified the conductor, who promised to drop the car at a certain point. Before reaching that point the train stopped at a station, and plaintiff went back to the caboose, as was the custom, to eat and warm himself. The train suddenly started, and plaintiff hastily ran out over the cars, to resume his post, and, forgetting about the missing step, fell and was injured. Held, that the question of contributory negligence should have been submitted to the jury (*Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 S. Ct. 16). Where a laborer while working under the eye and voice of his employer, who was urging speed, and saying "all right," did not think at the moment, owing to this urgency, of a danger of which he had some previous knowledge, and in consequence was injured; held, that he was not deprived of his remedy (*Lee v. Woolsey*, 109 Pa. St. 124, 42 Leg. Int. 375). *Brennan v. Front St. R. Co.*, 8 Wash. St. 363, 36 Pac. 272, perhaps *contra*, is a very harsh and oppressive decision. A command given by the master in a loud and harsh voice to the engineer in charge of a derrick to "Hoist her! There is a team waiting"—is not negligence entitling an employee to recover for injuries caused by the engineer

obeying in a negligent manner (*Griffin v. Glen Mfg. Co.*, 67 N. H. 287, 30 Atl. 344).

⁵¹³ *Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 14 S. Ct. 474; *Wallace v. Cent. Vt. R. Co.*, 138 N. Y. 302. In *Plank v. N. Y. Central, etc. R. Co.*, 60 N. Y. 607, where a brakeman was killed while attempting to couple cars, in the night, while snow was on the ground, by stepping into a sluice-way which had existed for years, and of which he knew, a nonsuit was held error, because the act in which he was engaged necessarily required his whole attention and thought. To similar effect, *Greenleaf v. Ill. Central R. Co.*, 29 Ia. 47; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. 682; *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258, 24 S. W. 57 [switchman, failing to see coming train]; *Tobey v. Burlington, etc. R. Co.*, 94 Ia. 256, 62 N. W. 761 [similar case]; *Fiero v. N. Y. Cent., etc. R. Co.*, 71 Hun, 213, 24 N. Y. Supp. 805 [conductor busy collecting tickets]; *Fitzgerald v. New York, etc. Ry. Co.*, 37 App. Div. 127, 55 N. Y. Supp. 1124 (1899), [low bridge]; *Benthin v. New York, etc. Ry. Co.*, 24 App. Div. 303, 48 N. Y. Supp. 503 (1897), [telegraph pole]; *Brown v. N. Y., etc. Ry. Co.*, 42 App. Div. 548, 59 N. Y. Supp. 672 (1899), [mail crane]. See *McGovern v. Standard Oil Co.*, 11 App. Div. 588, 42 N. Y. Supp. 595 (1896; *Young v. Syracuse, etc. Ry. Co.*, 45 App. Div. 296, 61 N. Y. Supp. 202 (1899). See, also, *West v. Southern Pac. Co.*, 29 C. C. A. 219, 85 Fed. 392 (1898).

is imperfect.⁵¹⁴ Oaths and violent language in giving orders have been held insufficient excuse for errors of judgment on the part of a frightened servant.⁵¹⁵

§ 214. Notice of defect, without notice of danger, immaterial. — The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant foresaw, or, in the exercise of ordinary prudence, ought to have foreseen, might endanger his safety.⁵¹⁶ If a servant of ordinary prudence would have believed that he could not, in the regular discharge of his duties, be injured by the defect, the servant may properly disregard it, without losing the right to complain if, while pursuing his ordinary course, under such belief, he suffers from such defect.⁵¹⁷ And so,

⁵¹⁴ *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258, 24 S. W. 57 [confused by electric lights]; *McLarney v. Long Island R. Co.*, 11 N. Y. Misc. 64, 31 N. Y. Supp. 862 [lantern just gone out].

⁵¹⁵ *Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 10 S. Ct. 382.

⁵¹⁶ *Dale v. St. Louis, etc. R. Co.*, 63 Mo. 455, approving the doctrine of the text; *Mehan v. Syracuse, etc. R. Co.*, 73 N. Y. 585; *Worden v. Humeston, etc. R. Co.*, 76 Ia. 310, 41 N. W. 26; *Sullivan v. Hannibal, etc. R. Co.*, 107 Mo. 66, 17 S. W. 748; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551; *Newhart v. St. Paul City R. Co.*, 51 Minn. 42, 52 N. W. 983; *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61, 12 S. W. 838; *Sanborn v. Madera Flume Co.*, 70 Cal. 261, 11 Pac. 710; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118, 35 Pac. 572; *Bjorman v. Ft. Bragg Redwood Co.*, 104 Cal. 626, 38 Pac. 451. The test is whether the servant *ought* to have comprehended the danger

v. Smith, 89 Wis. 119, 61 N. W. 317).

⁵¹⁷ *Russell v. Minneapolis, etc. R. Co.*, 32 Minn. 230, 20 N. W. 147 [brakeman crushed while coupling]; *Cook v. St. Paul, etc. R. Co.*, 34 Minn. 45, 24 N. W. 311; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130, reaffirmed in *Ford v. Fitchburg, etc. R. Co.*, 110 Mass. 240; *Lawless v. Conn. River R. Co.*, 136 Mass. 1 [low draw-bar on locomotive]; *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3. The fact that a servant knows of a defect in machinery, likely to injure him, is not necessarily conclusive of want of due care on his part. It is for the jury to say whether the defect was such that none but a reckless person, utterly careless of his safety, would have used the machine (*Hough v. Texas, etc. R. Co.*, 100 U. S. 213, 225). In *Kain v. Smith*, 89 N. Y. 375, a carpenter sued to recover for injuries received while loading car wheels, under the direc-

if the danger is one which a servant of ordinary prudence would believe could be entirely avoided by the use of certain additional precautions, the servant would not, by continuing his service, lose his right to recover for damages suffered by him, while using such precautions.⁵¹⁸ But, on the other hand, it is clearly the duty of a servant, in such a case, to use all those additional precautions which ordinary prudence, in view of the risk, would dictate;⁵¹⁹ and the burden of proof would justly be laid upon him to prove that he did so. The servant loses no rights, unless he comprehends and appreciates the danger,⁵²⁰ or, having the necessary capacity and information,

tion of a foreman by means of a defective "jigger." A nonsuit was held error; Danforth, J., saying: "It is said that the plaintiff might also see the defects; true, but he did not know the effect of such deficiencies, and was, moreover, directed by his superior to get and use the instrument, and whether, under these circumstances, he should be charged with knowledge and with negligence by reason of it, was also for the jury."

⁵¹⁸ This was vaguely implied in the opinion of Bartley, J., in *Mad River, etc. R. Co. v. Barber*, 5 Ohio St. 541, 562, 565, and expressly declared in *Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389, where defendant was held liable to its conductor for injuries sustained through defects in a switch, of which he had notified the superintendent, who had promised to make the required repairs, and requested plaintiff to continue his work meanwhile, observing due care; Gordon, J., saying: "Where the servant, in obedience of the requirement of the master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or

where it is reasonably probable it may be safely used by extraordinary caution or skill * * * the master is liable for a resulting accident." See *Sioux City, etc. R. Co. v. Finlayson*, 16 Neb. 578 [locomotive with weak throat-sheet, which engineer used with great caution].

⁵¹⁹ *Taylor v. Carew Mfg. Co.*, 143 Mass. 470, 10 N. E. 308 [servant walked quickly in a dark basement room, where he should have groped carefully, and fell into an unguarded hatchway hole]; *Gates v. Pennsylvania R. Co.*, 154 Pa. St. 566, 26 Atl. 598 [attempting to cross at night unlighted bridge, with which servant was familiar, for the jury]. If a servant, killed by the sudden drawing of a coal-car out of the mine in which he is working, knew that the car would probably soon be drawn, it is immaterial that the master took no steps to notify the servant of that fact (*Lehigh, etc. Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387).

⁵²⁰ *Fitzgerald v. Conn. Paper Co.*, 155 Mass. 155, 29 N. E. 464; *Prendible v. Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675; *Thomas v. Quartermaine*, 18 Q. B. Div. 685:

fails to do so by his own fault.⁵²¹ But one who comprehends the danger is not excused by his inability to realize the full extent of the injuries which may possibly result therefrom.⁵²²

Yarmouth v. France, 19 Id. 647; *Osborne v. London, etc. R. Co.*, 21 Id. 220, approved, *Mundle v. Hill. Mfg. Co.*, 86 Me. 400, 30 Atl. 16; s. p., *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Smith v. Peninsular Car. Works*, 60 Mich. 501, 27 N. W. 662; *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551. The present state of the law in England on the question is reflected by the following decisions: "Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent * * * " (*Yarmouth v. France*, L. R. 19, Q. B. Div. 647, 657, 57 L. J. Q. B. N. S. 7 (1887); and in the same case it was said that the plaintiff was entitled to recover, "unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with a full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." See, also, *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. 340 (1887); *Osborn v. London, etc. Ry. Co.*, L. R. 21, Q. B. Div. 220, 57 L. J. Q. B. N. S. 618 (1888); *Amos v. Duffy* (Q. B. Div.), 6 T. L. R. 339 (1890); *Brooks v. Ramdsen*, 63 L. T. N. S. 287 (1890). See *Labatt on Master and Servant*, § 377, and notes, where the conclusion reached by the House of Lords in *Smith v. Baker*, A. C. 325, 60 L. J. Q. B. Div. N. S. 683, 65 L. T. N. S. 467, is thus summarized by the learned

writer, "the mere fact of the servant's having continued to work with a knowledge of the abnormal risk which caused his injury does not necessarily and as matter of law require the inference that he had voluntarily consented, within the meaning of the maxim, to assume that risk." And see the very forcible passage in the opinion of Lord Herschell in this case quoted by Mr. Labatt. The case itself arose under the Employers' Liability Act, but it was subsequently applied in *Williams v. Birmingham Battery, etc. Co.*, 2 Q. B. 338, 68 L. J. Q. B. N. S. 918 (1899), in enforcing a common-law liability. For further discussion of the English authorities see *Beven on Negligence* (3d ed), pp. 631-646, "The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence, which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact whether a servant who works on, appreciating the risk, assumes it voluntarily or endures it because he feels constrained to" (*Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366 (1892). See, also, *Fitzgerald v. Connecticut River, etc. Co.*, 155 Mass. 156, 29 N. E. 464 (1891).

⁵²¹ *Suter v. Park Lumber Co.*, 90 Wis. 118, 62 N. W. 927.

⁵²² *Feely v. Pearson Cordage Co.*, 161 Mass. 426, 37 N. E. 368; *Truntle v. North Star Woolen-Mill Co.*, 57 Minn. 52, 58 N. W. 832.

§ 214a. When the defence of the assumption of risks of the master's default becomes unavailable. — Where all the conditions exist essential to support the defence of risk of the master's default having been assumed by the servant, viz., knowledge of the defect in ways or place of work, or number and competency of employees, or in appliances or machinery, or rules or manner in which the business is conducted, and knowledge or comprehension of the danger and its voluntary acceptance by continuance in the service, such defence can only be overcome by evidence showing that the servant complained thereof to his proper superior, that the complaint was made for his own protection, that the master or his proper representative promised to remedy it, and that the servant's continuance in the service was due to his reliance on the fulfillment of such promise, and that the time which had elapsed between the making of the promise and the happening of the injury was not unreasonable therefor. If these conditions have been duly complied with the servant does not assume the risk, but the action may nevertheless still be subject to be defeated by the defence of contributory negligence if the danger be so glaring that no prudent person would have continued in the service under the circumstances.⁵²³

⁵²³ Generally, *Britt v. Carolina*, (Ark.) 168 (1908); *Brown v. Musser, etc. Co.*, 144 N. C. 242, 56 S. E. 910 (1907); *Morden Frog, etc. Co. v. Forstall*, 159 Fed. 893, 87 N. E. 862 (1907); *Western Coal Co. v. Burns*, 85 Ark. 74, 104 S. W. 535 (1907); *Sapp v. Christie Bros.*, 115 N. W. (Neb.) 319 (1907); *Shea v. Seattle Lbr. Co.*, 91 Pac. (Wash.) 623 (1907); *Texas, etc. Ry. Co. v. Bingle*, 91 Tex. 287, 42 S. W. 971 (1897); *Same v. Same*, 9 Tex. App. 322, 29 S. W. 674 (1895); *Crosby v. Cuba, etc. Co.*, 158 Fed. 144 (1908); *Harris v. Bottum*, 81 Vt. 346, 70 Atl. 560 (1908); *St. Louis, etc. Ry. Co. v. Mangon*, 112 S. W. 112 (1908); *Brown v. Musser, etc. Co.*, 104 Minn. 156, 116 N. W. 218 (1908); *Pennsylvania R. Co. v. Forstall*, 159 Fed. 893, 87 C. C. A. 73 (1908); *Hollis v. Widener*, 221 Pa. 72, 70 Atl. 287 (1908); *Marcum v. Three States Lbr. Co.*, 113 S. W. (Ark.) 357 (1908); *St. Louis, etc. Ry. Co. v. Mealman*, 97 Pac. (Kans.) 381 (1908); *Allen v. Standard Box Co.*, 96 Pac. (Ore.) 1109, 97 Pac. 555 (1908); *Jellow v. Fore River, etc. Co.*, 201 Mass. 464, 87 N. E. 906 (1909); *Meade v. Pittsburg Ry. Co.*, 223 Pa. 145, 72 Atl. 263 (1909); *Ellis v. C. Cowles & Co.*, 82 Conn.

§ 215. Effect of master's promises or assurances. — In some old cases the mere continuance of a servant in his

236, 73 Atl. 258 (1909); *Shue v. Central, etc. Ry. Co.*, 6 Ga. App. 714, 65 S. E. 697 (1909); *Suchomel v. Maxwell*, 240 Ill. 231, 88 N. E. 558 (1908); *Kellogg v. Switchboard Supply Co.*, 158 Mich. 312, 122 N. W. 620 (1909), (and includes simple tools); *Buckner v. Stock Yards, etc. Co.*, 221 Mo. 700, 120 S. W. 766 (1909); *Stokes v. Barber Asphalt Pav. Co.*, 119 N. Y. Supp. 37, 134 App. Div. 363 (1909); *Price, etc. Co. v. Haley*, 125 S. W. (Ky.) 720 (1910); *Scott v. Parlin, etc. Co.*, 245 Ill. 460, 92 N. E. 318 (1910); *Schultz v. Chicago, etc. Ry. Co.*, 129 S. W. (Mo. App.) 1051 (1910); *Schmidt v. Southwestern Brewery, etc. Co.*, 107 Pac. (N. M.) 677 (1910); *Carron v. Standard Refrig. Co.*, 123 N. Y. Supp. 682, 138 App. Div. 723 (1910); *Medlin Milling Co. v. Schmidt*, 126 S. W. (Tex. App.) 689 (1910). "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such period of time after the promise as would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept" (*Hough v. Texas, etc. Ry. Co.*, 100 U. S. 213, 21 Am. Rep. 451 (1879)). The qualification of the foregoing is well stated in *Indianapolis Railway Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824 (1887), "when an employee knows that the danger is great and immediate, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defect which produced the danger he cannot recover." "Within a reasonable period of time after the promise was said to have been made, or * * * within a period which would not preclude all reasonable expectation that the promise might be fulfilled" (*Rothenberger v. Northwestern, etc. Co.*, 57 Minn. 461, 59 N. W. 531 (1894)). In the absence of a stipulated time, the servant may rely on the master's promise for reasonable time (*St. Louis, etc. Ry. Co. v. Holman*, 120 S. W. (Ark.) 146 (1909); "the testimony was not of such character as to bring home to the appellant knowledge of the particular defect discovered by the appellee; telling the foreman that the car was in bad shape was not sufficient; he should have pointed out with more particularity the defect which caused him to believe the car unsafe" (*Burlington, etc. Ry. Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175 (1892)). Where the superintendent of drawbridge was injured by a fall owing to the rotten condition of a plank in the pier and it appeared that some days before he had complained of the condition, but with a view to the safety of others rather than of himself, the court said there was "no case" (*Lewis v. New York, etc. Ry. Co.*, 153 Mass. 73, 26 N. E. 431, 10 L. R. A. 513 (1891)). Complaint must be made for one's own safety and not for convenience merely (*St. Louis, etc. Ry. Co. v. Mealman*, 97 Pac. (Kans.) 381 (1908); *Primley v. Elbe Lbr., etc. Co.*, 53 Wash. 687, 102 Pac. 763 (1909); *Texas, etc. Ry. Co. v. Nichols*, 41 Tex. App. 119 (1905)). Where an engineer complained that

work, with knowledge of defects in his associates or his materials, was treated as conclusive evidence of his hav-

a cable for pulling logs was liable to break, and told the master some one would get hurt, the verdict of the jury finding that complaint was made for his own safety will not be disturbed (*Alkire v. Myers Lbr. Co.*, 106 Pac. 915, 57 Wash. 300, 915 (1910)). That the servant would be relieved from the defense of assumed risk by complaint and promise applies to incompetency of servants (*Williams v. Kimberly, etc. Co. et al.*, 131 Wis. 303, 111 N. W. 481, 10 L. R. A. (N. S.) 1043 (1907)). It is necessary that the servant should intend to quit work unless the defect was remedied, but not necessary that he should so declare (*Morden Frog, etc. Co. v. Fries*, 228 Ill. 246, 81 N. E. 862 (1907); *St. Louis, etc. Ry. Co. v. Mealman*, 97 Pac. (Kans.) 381 (1908); *Coin v. John H. Talge Lounge Co.*, 222 Mo. 488, 121 S. W. 1 (1909)). A promise to remove the servant to a safer place for work does not relieve him from the assumption of risk (*United States Sugar Refinery v. Welcher*, 123 Ill. App. 374 (1905); Servant has as much right to rely on second promise as on first (*Czajkowski v. Robinson*, 124 Ill. App. 97 (1905)). Continuance in the service must be induced by the promise (*Ray v. Hodge*, 74 N. H. 190, 66 Atl. 123 (1907)). Where the master promised to repair in two days the promise constituted a contract for that time (*Altman v. Schwab Mfg. Co.*, 104 N. Y. Supp. 349, 54 Misc. 243 (1907)). A promise to repair by a particular day may justify continuance in employment beyond date so fixed (*Chicago, etc. Ry. Co. v. Clark*, 231 Ill. 548, 83 N. E. 286 (1907)). Servant is not justified in continuing three weeks in employment, where promise might have been complied with in a single day (*Samuel Kupples, etc. Co. v. Walins*, 140 Ill. App. 623 (1908)). Where, in response to complaint made on Monday, the master promised to repair on Saturday, servant protected meanwhile (*Schwartz v. R. M. Wilson Mfg. Co.*, 193 N. Y. 623, 86 N. E. 1133, aff'g 100 N. Y. Supp. 1054, 115 App. Div. 739 (1908)). A lumber mill foreman's promise to repair as soon as he could, held not too indefinite; it is good for reasonable time (*Cook v. Pittock, etc. Lbr. Co.*, 51 Wash. 316, 98 Pac. 1130 (1909)). Assumed risk is not a defense against the failure to perform a statutory duty (*Ziehr v. Maumee, etc. Co.*, 28 Ohio Cir. Ct. R. 342 (1905); *contra*, *Stokes v. Barber Asphalt Pav. Co.*, 119 N. Y. Supp. 37, 134 App. Div. 363 (1909)). Promise of superintendent without authority, to remedy, whose only actual or apparent authority was to report complaints, will not relieve the servant from the defense of assumed risk (*United Zinc Companies v. Wright*, 156 Fed. 571, 84 C. C. A. 337 (1907)). Those having the authority to employ have also the authority to make the promise (*Burch v. Southern Pac. Co.*, 104 Pac. (Nev.) 225 (1909)). A promise made by one having authority to repair is binding on the master (*Stokes v. Barber Asphalt Pav. Co.*, *supra*). Promise of foreman, who is a mere fellow servant, is not binding on the master (*Burgess v. Humphrey Bookcase Co.*, 156 Mich. 345, 120 N. W. 790 (1909)). Promise of the foreman of a switch crew bind-

ing waived objections thereto.⁵²⁴ Such rulings were unjust; because a servant has the same right that any one else has to complete his contract in reliance upon its original terms. And those opinions have now been distinctly overruled.⁵²⁵ A party to any other contract having

ing on the company (*Berglund v. Illinois Cent. Ry. Co.*, 109 Minn. 317, 123 N. W. 928 (1908)). Repeated reports and promises with respect to defective hand car does not relieve the servant from the defense of assumed risk (*Boney v. Atlantic, etc. Ry. Co.*, 145 N. C. 248, 58 S. E. 1082 (1907)). Exemption from assumed risk by promise to remedy complaint applies only to work where skill and experience are necessary to appreciate the danger, and not to ordinary labor or common tools (*Kistener v. Amer., etc. Foundry*, 233 Ill. 35, 84 N. E. 34 (1908); *Douchy Iron Works v. Nevin*, 130 Ill. App. 475 (1906); *Rahnn v. Chicago, etc. Ry. Co.*, 129 Mo. App. 679, 108 S. W. 570 (1908); *McGill v. Cleveland, etc. Co.*, 79 Ohio St. 203, 86 N. E. 989, 19 L. R. A. (N. S.) 793 (1909)). Promise must be made by one authorized and the facts shown by the plaintiff; no inference can be drawn that the foreman of a gang of track layers was so authorized (*Cicalese v. Lehigh Valley Ry. Co.*, 69 Atl. (N. J.) 166 (1908)). Complaint of the manner in which one near him was using a pick, and promise of master to protect servant complaining, is binding (*Manks v. Moore*, 108 Minn. 284, 122 N. W. 5 (1909)). The servant is relieved from the disability of assumed risk, where, after complaint, he is told by the foreman the defect has been remedied, the fact not being readily perceptible (*Holacek v. T. M. Sinclair & Co.*, 124 N. W. (Ia.) 331 (1910)).

The master's undertaking need not be expressed, it may be implied (*Southern Cotton Oil Co. v. Walker*, 51 So. (Ala.) 169 (1909)). When the risk is glaring and immediate the servant is not protected by the promise (*Alteirac v. West Pratt Coal Co.*, 49 So. (Ala.) 867 (1909)).

⁵²⁴ See *Mad River, etc. R. Co. v. Butler*, 5 Ohio St. 541; *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562, 569.

⁵²⁵ *Hoey v. Dublin, etc. R. Co.*, Irish Rep., 5 C. L. 206; *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521 [overruling the *dicta* in *Wright's* case]; *Hawley v. Northern Central R. Co.*, 82 N. Y. 370; *Flynn v. Kansas City, etc. R. Co.*, 78 Mo. 195; *Dale v. St. Louis, etc. R. Co.*, 63 Mo. 455 [fireman injured by defective joint in rails]; *Francis v. Kansas City, etc. R. Co.*, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; *Graham v. Newburg Coal Co.*, 38 W. Va. 273, 18 S. E. 584. Defendant held liable, where superintendent promised to repair, and requested plaintiff to continue work until the repairs could be effected (*Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389). "It would seem to be unreasonable that one who has undertaken a service which, in itself, has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. We do not think that this is the rule; and it seems

mutual obligations is allowed to perform fully his part, notwithstanding the failure of the other party to fulfill a condition precedent, without *necessarily* waiving his right to insist upon performance of such condition at a later period. It is not fair to require from servants a more peremptory assertion of their rights against masters than would be required between parties standing upon a more equal footing. Indeed, the dependent position of servants generally makes it reasonable to hold any notice on their part sufficient, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists, and that they desire its removal.⁵²⁶ The real question to

to us that the plaintiff had a right to go to the jury, on the question whether he was, under the circumstances, justified in going on with his work" (McMahon v. Port Henry Ore Co., 24 Hun, 48). It is generally held sufficient if it can reasonably be inferred from all that transpired that the servant wanted the defect removed for his own protection—a question for the jury (Rothenberger v. Northwestern, etc. Co., 57 Minn. 461, 59 N. W. 531 (1894), ("these are questions of fact rather than of law, at least if not entirely free from doubt;" referring to the text). Thorpe v. Missouri Pac. Ry. Co., 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120 (quoting and adopting the text); Alkire v. Meyers' Lbr. Co., 57 Wash. 300, 106 Pac. 915 (1910), ("It is not necessary that the servant shall state in exact words that he apprehends injury, nor need there be a formal notification that he will leave the service unless the defect be removed or remedied"); Jellow v. Fore River, etc. Co., 201 Mass. 464, 87 N. E. 906 (1909), (generally a question for the jury); Gulf, etc. Ry. Co. v. Donnelly, 70 Tex. 371, 8 S. W. 52, 8 Am. St. Rep. 608 (1893); Myhra v. Chicago, etc. Ry. Co., 62 Wash. 1, 112 Pac. 939 (1911), (approving Alkire v. Meyers' Lbr. Co., *supra*, and Thorpe v. Missouri, etc. Ry. Co., *supra*. But see Burlington, etc. Ry. Co. v. Liehe, 17 Colo. 280, 29 Pac. 175 (1892), (general statement to the foreman that car was in bad condition, held insufficient); Lewis v. New York, etc. Ry. Co., 153 Mass. 73, 26 N. E. 431, 10 L. R. A. 513 (1891), (conversation held to import that complaint was made for the protection of others); Gulf, etc. Ry. Co. v. Garren, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939 (1903), (the fireman said to the engineer, "Here is a loose step; give me a wrench," and the engineer, after trying to fasten it with a wrench, as he turned it under the engine, said, "I will have it fixed;" held, not to amount to a promise to repair, and, moreover, that an engineer, without authority to employ and discharge, could not bind the company by a promise); Texas, etc. Ry. Co. v. Bingle, 91 Tex. 287, 42 S. W. 971 (1903).

⁵²⁶ This language, used in our old section 96, although not quoted, is,

be determined in each case is whether, under all the circumstances, the master believed and the servant intended to make him believe, that all objections to the unfitness of a fellow servant, or to the defects in the materials provided for the work, were waived,⁵²⁷ and that an implied contract exempting the master from liability was freely accepted. This is a question of fact, not of law; and if not free from doubt, it must be left to the jury.⁵²⁸ There is no longer any doubt that where a master has expressly promised to repair a defect,⁵²⁹ the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance,⁵³⁰ or indeed, within any period which

in spirit, reproduced in *Hawley v. Northern Central R. Co.*, 82 N. Y. 370. It is literally quoted and adopted in *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3. When complaining of defective machinery, it is not necessary that the servant shall state in exact words that he apprehends danger to himself from the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired (*Rothenberger v. Northwestern Milling Co.*, 57 Minn. 461, 59 N. W. 531).

⁵²⁷ This proposition cited from old section 96, with approval, and followed in *Poirier v. Carroll*, 35 La. Ann. 699 [distinction taken in favor of a servant hired for a limited time].

⁵²⁸ It has been expressly held that the mere continuance of a servant in his work, in face of a known danger, only raises a question for the jury (*McMahon v. Port Henry Iron Co.*, 24 Hun, 48; *Hawley v. Northern Central R. Co.*, 17 Id. 115, aff'd, 82 N. Y. 370; see *Kain v. Smith*, 89 Id. 375). But perhaps *Shaw v. Sheldon*, 103 Id. 667, de-

cided by a bare majority of the court, is to the contrary, where the facts are undisputed and no excuse for continuance appears. The text was quoted and adopted in *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337.

⁵²⁹ For examples of evasive answers held not to amount to a promise, see *Breig v. Chicago, etc. R. Co.*, 98 Mich. 222, 57 N. W. 118; *Wilson v. Winona, etc. R. Co.*, 37 Minn. 326, 33 N. W. 908. It is often said to be essential that the servant should be "induced to remain" by the promise (*Lewis v. N. Y., New England, etc. R. Co.*, 153 Mass. 73, 26 N. E. 431; *Burlington, etc. R. Co. v. Liehe*, 17 Colo. 280, 29 Pac. 175). It is of no importance that the promise was not made to the injured employee individually (*Atchison, etc. R. Co. v. Sadler*, 38 Kans. 128, 16 Pac. 46; *Interstate, etc. R. Co. v. Fox*, 41 Kans. 715, 21 Pac. 797 [promise made to contractor under whom plaintiff worked]).

⁵³⁰ *Hough v. Texas, etc. R. Co.*, 100 U. S. 213; *New Jersey, etc. R. Co. v. Young*, 49 Fed. 723, 1 U. S. App. 96, 1 C. C. A. 428; *Wust v. Erie Iron*

would not preclude all reasonable expectation that the

Works, 149 Pa. St. 263, 24 Atl. 291 [incompetent helper]; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Chicago Forge Co. v. Van Dam, 149 Ill. 337, 36 N. E. 1024; St. Clair Nail Co. v. Smith, 43 Ill. App. 105; Lyttle v. Chicago, etc. R. Co., 84 Mich. 289, 47 N. W. 571; Breckenridge Co. v. Hicks, 94 Ky. 362, 22 S. W. 554; Weber Wagon Co. v. Kehl, 139 Ill. 644, 29 N. E. 714; Rothenberger v. Northwestern Milling Co., 57 Minn. 461, 59 N. W. 531 [defective machinery not immediately dangerous]. An employee who is told to work with a defective tool, of which he had complained, until a good one, promised, should arrive, and relying on such promise, and there being no immediate danger, does so, and is injured by the use of the defective tool, can recover for the injury (Southern Kan. R. Co. v. Croker, 41 Kans. 747, 21 Pac. 785; Atchison, etc. R. Co. v. Midgett, 1 Kans. App. 138, 40 Pac. 995; Morbach v. Home Min. Co., 53 Kans. 731, 37 Pac. 122; Gulf, etc. R. Co. v. Donnelly, 70 Tex. 371, 8 S. W. 52; Harvey v. Alturas Gold Min. Co., 3 Ida. 510, 31 Pac. 819; Anderson v. Northern Pac. Lumber Co., 21 Ore. 281, 28 Pac. 5; see Counsell v. Hall, 145 Mass. 468, 14 N. E. 530). In determining what is a reasonable time, the jury should consider all the circumstances, such as the opportunity for making repairs, and the frequency with which the engine was used (Lyttle v. Chicago, etc. R. Co., 84 Mich. 289, 47 N. W. 571). When plaintiff has duly reported a defect, and been twice assured that it will be repaired, the fact that he could have repaired it himself, or dispensed with the appliance in which it occurred, does not deprive him of his right to recover for an injury caused by it (Gibson v. Minneapolis, etc. R. Co., 55 Minn. 177, 56 N. W. 686). Much more can he recover, if forbidden to repair himself (Ferriss v. Berlin Machine Works, 90 Wis. 541, 63 N. W. 234 [several weeks allowed]). The promise must come from the master or his proper representative (Ehmcke v. Porter, 45 Minn. 388, 47 N. W. 1066). "Of course, in supposable cases the servant may not be warranted in continuing to use the machinery, though a promise to repair be made, for the danger may be so great and patent that no prudent man would incur it; or the servant may, by subsequent carelessness of his own, add to the risk assumed by the master, in either of which cases the promise to supply the defect could not avail him. But, in our opinion the mere fact that the servant acting under such a promise, knows at the time he receives his injury from the defective condition that it has not been removed, does not impose upon him the risk, any more than did his continuance in the service with knowledge of the defect at the time the promise was made. A limitation, generally recognized, upon the doctrine that the promise to repair places the risk upon the master is that the servant can rely upon the promise only for a reasonable time for the master to comply with it; and must not himself be guilty of a want of due care contributing to his injury" (Texas, etc. Ry. Co. v. Bingle, 9 Tex. App. 322, 29 S. W. 674 (1895), adopted by Sup. Ct. in Same v. Same, 91 Tex. 287, 42 S. W. 671 (1897)). See, also, Illinois, etc. Co. v. Mann, 170 Ill. 200, 40 L. R. A. 781, 48 N. E.

417 (1897); *Trotter v. Furniture Works v. Fries, supra*; continuance Co., 101 Tenn. 257, 47 S. W. 425 (1898). When there is notice and promise, risk not assumed (*Britt v. Carolina, etc. Ry. Co.*, 144 N. C. 242, 56 S. E. 210 (1907); *Marcum v. Three States L. Co.*, 113 S. W. (Ark.) 357 (1908); *Miller v. White, etc. Co.*, 118 N. W. (Ia.) 518 (1908); *St. Louis, etc. Ry. Co. v. Mealman*, 97 Pac. (Kans.) 381 (1908); *Allen v. Standard, etc. Co.*, 96 Pac. 1109, 97 Pac. 555 (1908); *Meade v. Pittsburg Ry. Co.*, 223 Pa. 145, 72 Atl. 263 (1909); *Morgan v. Rainer, etc. Co.*, 51 Wash. 335, 98 Pac. 1126 (1909); *Merriweather v. Sayre, etc. Co.*, 49 So. (Ala.) 916 (1909); *Ohio, etc. Co. v. Hutchings*, 172 Fed. 201, 96 C. C. A. 653 (1909); *St. L., etc. Ry. Co. v. Holman*, 120 S. W. (Ark.) 146 (1909); *Elie v. Cowles, et al.*, 82 Conn. 236, 73 Atl. 258 (1909); *Shue v. Cent., etc. Ry. Co.*, 6 Ga. App. 714, 65 S. E. 697 (1909); *Brouseau v. Kellogg, etc. Co.*, 158 Mich. 312, 122 N. W. 620 (1909); is not limited to complicated machinery but includes simple tools (*Stokes v. Barber Asphalt Pav. Co.*, 119 N. Y. Supp. 37, 134 App. Div. 393 (1909); *So. Cotton Oil Co. v. Walker*, 51 So. (Ala.) 169 (1909); applies to incompetency of servant (*Williams v. Kimberly*, 131 Wis. 303, 111 N. W. 481, 10 L. R. A. (N. S.) 1043 (1907); a new relation is created (*Morden, etc. Works v. Fries*, 228 Ill. 246, 81 N. E. 862 (1907); and where the master promises to have defect remedied within two days the promise constituted a contract by the master to assume the risk for that time (*Altman v. Schwab Mfg. Co.*, 104 N. Y. Supp. 349, 54 Misc. 243 (1907); essential that servant must intend to quit, but not that he should so declare (*Morden, etc. Works v. Fries, supra*); continuance in the service must be induced by the promise (*Roy v. Hodge*, 74 N. H. 190, 66 Atl. 123 (1907); where servant complains and master orders him to proceed and answer him there is no danger, doctrine of assumed risk by servant does not apply (*Bush v. West, etc. Co.*, 2 Ga. App. 295, 58 S. E. 529 (1907); *Chicago, etc. Ry. Co. v. Rathneau*, 124 Ill. App. 427, aff'd, 225 Ill. 278, 80 N. E. 119 (1907); where months before the accident, the servant called the foreman's attention to a broken tooth in a saw, and he replied, "that cuts no figure with the saw at all; it is all right; go ahead, start it up," such expressions constitute neither such assurance of safety or command as would relieve the servant (*Elgin, etc. Co. v. Myers*, 226 Ill. 358, 80 N. E. 897 (1907); where plaintiff complained of the dangerous condition of a machine in proximity to his work, and was assured by the foreman there was no danger, and relying on such assurance continued work, there was no assumption of risk by the servant (*Industrial L. Co. v. Bivens*, 105 S. W. (Tex. App.) 831 (1907); held, that complaint made to foreman, whose duty was only to report such complaints and not to remedy, insufficient (*United Zinc Cos. v. Wright*, 156 Fed. 571, 84 C. C. A. 337 (1907). *Contra*, *Pana Coal Co. v. Buker*, 130 Ill. App. 40 (1906); servant not relieved where complaint is made to foreman of gang without authority to have repairs made (*Cicalise v. Lehigh, etc. Ry. Co.*, 69 Atl. (N. J.) 166 (1908); does not assume risk within reasonable time for repairs after promise, or within any period which would not preclude all reasonable expectation that the promise might be kept (*Western Coal, etc.*

Co. v. Burns, 84 Ark. 74, 104 S. W. 535 (1907); nor within the specific time named (*Swarts v. Wilson Mfg. Co.*, 193 N. Y. 623, 86 N. E. 1133 (1908); complaint and promise relieving servant of assumption of risk (*Sapp v. Christie Bros.*, 115 N. W. (Neb.) 319 (1908); *Boney v. Atlantic, etc. Ry. Co.*, 145 N. C. 248, 58 S. E. 1082 (1907); *Shea v. Seattle L. Co.*, 91 Pac. (Wash.) 623 (1907); *Pa. Ry. Co. v. Forestall*, 159 Fed. 893, 87 C. C. A. 73 (1908); *Hollis v. Widner*, 221 Pa. 72, 70 Atl. 287 (1908); commands and assurances that relieve the servant (*Chicago, etc. Ry. Co. v. Strong*, 129 Ill. App. 196, aff'd, 228 Ill. 281, 81 N. E. 1011 (1907); *St. Louis, etc. Ry. Co. v. Morris*, 76 Kans. 836, 93 Pac. 153, 13 L. R. A. (N. S.) 1100 (1907); *Anderson v. Pitt Min. Co.*, 103 Minn. 252, 114 N. W. 953 (1908); *Marshall v. St. Louis, etc. Ry. Co.*, 107 S. W. (Tex. App.) 883 (1908); *Rogers v. South, etc. Ry. Co.*, 33 Ky. L. Rep. 1067, 112 S. W. 630; (1908); *Mattoon City Ry. Co. v. Graham*, 138 Ill. App. 70, aff'd, 234 Ill. 483, 84 N. E. 1070 (1908); *Chicago, etc. Ry. Co. v. Yarber*, 137 Ill. App. 486 (1907); *Mellette v. Indianapolis, etc. Trac. Co.*, 86 N. E. (Ind.) 432 (1908); *Jellow v. Fore River, etc. Co.*, 201 Mass. 464, 87 N. E. 906 (1909); *Burkard v. Leschen, etc. Co.*, 217 Mo. 466, 117 S. W. 35 (1909); *Pulley v. Standard Oil Co.*, 136 Mo. App. 172, 116 S. W. 430 (1909); *Shirk v. Chicago, etc. Ry. Co.*, 235 Ill. 315, 85 N. E. 262 (1908); *Kennedy v. Swift & Co.*, 140 Ill. App. 141, aff'd, 234 Ill. 606, 85 N. E. 287 (1908); *Heywood, etc. Co. v. Jacobson*, 140 Ill. App. 319, aff'd, 236 Ill. 570, 86 N. E. 110 (1908); *Shannon v. Shaw*, 201 Mass. 393, 87 N. E. 748 (1909); *Louisville, etc. Ry. Co. v. Armstrong*, 125 S. W. (Ky.) 276 (1910); rule exempting employee on promise of master to repair, applies only where special skill is required to determine whether defect is dangerous (*Kistner v. Am. Steel Foundry*, 233 Ill. 35, 84 N. E. 44 (1907); does not apply to simple appliance, *Ibid*, *Douchy Iron Works v. Nevin*, 130 Ill. App. 475 (1906); *Rahm v. Chicago, etc. Ry. Co.*, 129 Mo. App. 679, 108 S. W. 570 (1908); does not apply where employee knows as well or better than the master the danger incurred (*Conklin Constr. Co. v. Walsh*, 131 Ill. App. 600 (1907); *Gilmartin v. Kilgore*, 114 S. W. (Tex. App.) 398 (1908); *Evans v. Kodak Co.*, 113 N. Y. Supp. 986, 129 App. Div. 768 (1909); *McGill v. Cleveland, etc. Tr. Co.*, 79 Ohio St. 203, 86 N. E. 989, 19 L. R. A. (N. S.) 793 (1909); *Slavik v. Hirsh, et al.*, 143 Ill. App. 509 (1908); servant is not justified in continuing three weeks where promise might have been complied with in a day (*Samuel Cupples, etc. Co. v. Walins*, 140 Ill. App. 624 (1908); a lumber mill foreman's promise to remedy defect as soon as he could, is not too indefinite to relieve servant (*Cook v. Pittock, etc. Co.*, 51 Wash. 316, 98 Pac. 1130 (1909). See monographic notes to *Rice v. Eureka Paper Co.*, 70 App. Div. 336, 75 N. Y. Supp. 49, rev'd, 174 N. Y. 385, 66 N. E. 979, 95 Am. St. Rep. 585, 62 L. R. A. 611 (1903); *Citrone v. O'Rourke Constr. Co.*, 113 App. Div. 518, 99 N. Y. Supp. 241, rev'd, 188 N. Y. 339, 19 L. R. A. (N. S.) 340 (1906); *St. Louis, etc. Ry. Co. v. Phillips*, 51 So. (Ala.) 638 (1910); *Scott v. Parlin, etc. Co.*, 245 Ill. 460, 92 N. E. 318, aff'g, 146 Ill. App. 92 (1910); *Schultz v. Chicago, etc. Ry. Co.*, 129 S. W. (Mo. App.) 1051 (1910); *Schmidt v. Southwestern Brewery, etc. Co.*,

promise might be kept.⁵³¹ And the same principle applies to a case where the master promises to a servant to discharge an incompetent fellow servant, but fails to do so, and the former servant is thereby injured,⁵³² or where a

107 Pac. (N. M.) 677 (1910); Carron v. Standard Refrigerator Co., 138 App. Div. 723, 123 N. Y. Supp. 682 (1910); Medlin Milling Co. v. Schmidt, 126 S. W. (Tex. App.) 689 (1910); Poli v. Numa Block Coal Co., 127 N. W. (Ia.) 1105 (1910); Long v. Fulton Contr. Co., 140 App. Div. 685, 125 N. Y. Supp. 542 (1910); Toye v. United Dressed Beef Co., 141 App. Div. 332, 125 N. Y. Supp. 1061 (1910); Starck v. Washington Union Coal Co., 112 Pac. (Wash.) 235 (1910); Clark Lbr. Co. v. Johns, 135 S. W. (Ark.) 892 (1911); Bruns v. North Iowa, etc. Co., 130 N. W. (Ia.) 1083 (1911); Holman v. Souther, etc. Co., 152 Mo. App. 672, 133 S. W. 379 (1911); Lynn v. Omaha Pkg. Co., 130 N. W. (Neb.) 425 (1911); Pavan v. Worthen, etc. Co., 78 Atl. (N. J.) 658 (1911); Parfitt v. Sterling Veneer, etc. Co., 69 S. E. (W. Va.) 985 (1910).

⁵³¹ The whole of this sentence from our old section 96 (in its original form), was quoted and adopted in Hough v. Texas, etc. R. Co., 100 U. S. 213, 225 [engineer and defective engine]; and also in Missouri Furnace Co. v. Abend, 107 Ill. 44 [similar facts]. So held in Conroy v. Vulcan Iron Works, 62 Mo. 35 [boards of platform insecure]; Greene v. Minneapolis, etc. R. Co., 31 Minn. 248, 17 N. W. 378 [broken "chafing irons"]; Manufacturing Co. v. Morrissey, 40 Ohio St. 148 [defective lathe]; Belair v. Chicago, etc. R. Co., 43 Iowa, 662 [defective draw bar]; Parody v. Chicago, etc. R. Co., 15 Fed. 205 [defective draw

bar]; Roux v. Blodgett Lumber Co., 94 Mich. 607, 54 N. W. 492 [uncovered gearing]; Sioux City, etc. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860 [engine]; Clarke v. Holmes, 7 Hurlst. & N. 937, aff'g, s. c., 6 Id. 349 [unfenced machinery]. Where plaintiff's intestate remonstrated with defendant's agent in charge of the mine, on account of the dangerous position of a large stone, and the agent sent persons to remove it, but, before they began work, it fell upon the deceased, held, that plaintiff could recover (Pater-son v. Wallace, 1 Macq. H. L. 748 [unfenced machinery]). Where a servant was injured because of defective lights, of which he had frequently complained, and the master had repeatedly promised that the defect should be remedied, the servant did not assume the risk, in continuing in the employment in expectation that the lights would be properly fixed (Smith v. Backus Lumber Co., 64 Minn. 447, 67 N. W. 358).

⁵³² Laming v. N. Y. Central R. Co., 49 N. Y. 521. Where plaintiff, a blacksmith was assigned an incompetent helper, and the latter was changed on plaintiff's complaint, but reassigned May 4th, and plaintiff again complained on the 6th, and was promised another helper, and was injured on the 10th, a verdict holding plaintiff free from negligence sustained (Lyberg v. Northern Pac. R. Co., 39 Minn. 15, 38 N. W. 632; Allcot v. Kirkham, 101 App. Div. 77, 91 N. Y. Supp. 775 (1905), (plaintiff, a carpenter, on turning

servant, apprehending a particular danger, makes it known to the master, who assures him that he will provide against it.⁵³³ Nor, indeed, is any express promise or assurance from the master necessary. It is sufficient if the servant may reasonably infer that the matter will be attended to.⁵³⁴ So a servant may rely upon the master's assurance that there is no real danger,⁵³⁵ or that he will

around discovered that a fellow workman, S, was working immediately behind him and was struck in the eye by a flying rail S was trying to drive; he had complained to the master that S was a careless workman, that he did not want to work with him, and the master had told him, "all right, you go ahead where you are," held, sufficient to support a verdict on the ground that plaintiff did not continue to assume the risk and had a right to rely on the statement of the master as to assurance that S would not be put to work near him); *Gray v. Red Lake Falls Lbr. Co.*, 85 Minn. 24, 88 N. W. 24 (1901).

⁵³³ *Hyatt v. Hannibal, etc. R. Co.*, 19 Mo. App. 287 [employee, sent out to shovel snow drifts, was frozen in consequence of non-fulfillment of a promise to provide a car in which he could warm himself.

⁵³⁴ *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 S. Ct. 978 [justifiable impression that repair would be made]. So, where by the master's conduct, the servant is lulled into a sense of security (*Graham v. Newburg Coal Co.*, 38 W. Va. 273, 18 S. E. 584). Where a driver of a wagon notifies his employer of its dangerous condition, and is induced to use it for a short time, the servant does not assume the risk (*Schlitz v. Pabst Brewing Co.*, 57 Minn. 303, 59 N. W. 188; *S. P., Eddy v. Bodkin* (Tex. Civ.

App.), 28 S. W. 54). *Contra*, *Gulf, etc. Ry. Co. v. Garren*, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939 (1903); (where the reply to the complaint by one assumed to have had authority to make the promise, "I will have it fixed," was held, strangely enough, insufficient to support a verdict); *Texas, etc. Ry. Co. v. Nichols*, 41 Tex. App. 119 (1905). See note 525, *ante*.

⁵³⁵ Where a master directs his servant to work in a certain dangerous place, and, in reply to the servant's expressions of fear, assures him that there is no danger, the servant is not guilty of negligence in going to work there, unless the danger is so imminent that no prudent person would undertake to perform the service (*Chicago Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572). To same effect, *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475, 23 Atl. 772 [fumes of nitric acid assured not be injurious]; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53 [chain; assurance no danger]; *Stephens v. Hudson Knitting Co.*, 69 Hun, 375, 23 N. Y. Supp. 656; *Schlacker v. Ashland Min. Co.*, 89 Mich. 253, 50 N. W. 839; *O'Driscoll v. Faxon*, 156 Mass. 527, 31 N. E. 685; *Burgess v. Davis Sulphur Co.*, 165 Mass. 71, 42 N. E. 501. If the master has superior knowledge, or means of knowledge, and assures a servant that he can safely undertake a given work, such an assurance may justify

explain the points of danger,⁵³⁶ or that he will see that there is no danger.⁵³⁷ Much more may he rely without inquiry upon an assurance that repairs have actually been made.⁵³⁸ If, however, he knows that such assurances are false,⁵³⁹ or if the danger is so palpable, immediate and constant that none but an utterly reckless person would expose himself to it, even after receiving any or all of these assurances,⁵⁴⁰ the servant may be debarred from

the servant in undertaking the work, without being liable to the charge of negligence, unless the danger is imminent or manifest (*Haas v. Balch*, 56 Fed. 984, 6 C. C. A. 201). See note 530, *ante*.

⁵³⁶ The rule that a servant assumes the risks of the business does not apply where the servant is required by his master to enter upon a hazardous task under an unfulfilled promise to point out its hazards to him (*McCormick Mach. Co. v. Burandt*, 136 Ill. 170, 26 N. E. 588).

⁵³⁷ Defendant had told plaintiff that he would see that no cartridge was left in any revolver returned to plaintiff for alteration. Held, that it was a question for the jury whether, by continuing in defendant's employ after he had once discovered a cartridge in a revolver, plaintiff assumed the risk of such an accident (*Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510).

⁵³⁸ *Lawrence v. Hagemeyer*, 93 Ky. 591, 20 S. W. 704; *Atchison, etc. R. Co. v. McKee*, 37 Kans. 592, 15 Pac. 484.

⁵³⁹ This is on the general principle of estoppel.

⁵⁴⁰ *Dist. Columbia v. McElligott*, 117 U. S. 632, 6 S. Ct. 884; *McKelvey v. Chesapeake, etc. R. Co.*, 35 W. Va. 500, 14 S. E. 261. So held as to promises to supply a better ladder (*Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Corcoran*

v. Gas Co., 81 Wis. 191, 51 N. W. 328; *Meador v. Lake Shore, etc. R. Co.*, 138 Ind. 290, 37 N. E. 721; *St. Louis, etc. R. Co. v. Kelton*, 55 Ark. 483, 18 S. W. 933; *Showalter v. Fairbanks*, 88 Wis. 376, 60 N. W. 257 [assurances of no danger]; *McAndrews v. Montana Union R. Co.*, 15 Mont. 290, 39 Pac. 85 [orders to go on "with great care"])). This limitation is recognized in all the cases cited in the last note. The servant cannot "rely" upon an assurance which he does not believe. These decisions, however, need to be reviewed in the light of the more modern and humane cases cited under § 211a, *ante*. The night watchman of a freight yard, after twice applying for a lantern as necessary to his safety, and receiving promises of one, was told that he would be lucky if he got one in a month. He resumed work not expecting to get one within a month. Held, that his employment being immediately and constantly dangerous, he could not recover (*Indianapolis, etc. R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 Id. 824). "Utterly reckless" is the phrase used in *Hough v. Texas, etc. R. Co.*, 100 U. S. 213; *Chicago Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Indianapolis R. Co. v. Ott*, 11 Ind. App. 564, 38 N. E. 842; *Cincinnati R. Co. v. Grames*, 136 Ind. 39, 34 N. E. 714. "No prudent

recovery, not because he "assumed the risk," but on the ground of his contributory negligence. For the master's duty to repair is a continuing one, and servants do *not* "assume the risk" of his faults.⁵⁴¹ In several cases, however, that phrase is used by the courts. After the prescribed period has elapsed without change, or if the master has refused to remedy the defect, the servant cannot rely upon his expectation of a remedy as an excuse for remaining, whatever rights he may have upon other grounds; and in many cases it has been held that he "assumed the risk."⁵⁴² It may seem presumptuous on our part to differ from so many learned judges; but we think that all these decisions are wrong. They entirely ignore the master's gross breach of his express contract to repair. Why is not the servant entitled to recover upon that ground, entirely irrespective of the ordinary issue of negligence? To an action upon breach of express contract, contributory negligence is no defense. If the master expressly promises to "take all the risks," the servant may recover upon this promise, no matter how obvious the risk may be.⁵⁴³

person" is the language of *Indianapolis, etc. R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721; *Chicago Forge Co. v. Van Dam*, 149 Ill. 337, 36 N. E. 1024; *Rothenberger v. Northwestern Milling Co.*, 57 Minn. 461, 59 N. W. 531.

⁵⁴¹ *Settle v. St. Louis, etc. R. Co.*, 127 Mo. 336, 30 S. W. 125; *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 447, 4 S. W. 937; *Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389.

⁵⁴² *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337; *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530; *Morbach v. Home Min. Co.*, 53 Kans. 731, 37 Pac. 122; *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216 [defective fuse]; *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007. These

were all cases in which so long a time had elapsed without repair that the servant could not have believed that it would be made. It must be admitted, however, that the current of authority since the last edition of this work has become so strong as to be irresistible (*Andresik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913 (1906); *Trotter v. Chattanooga Furniture Co.*, 101 Tenn. 257, 47 S. W. 425 (1898); *Citrone v. O'Rourke Eng. Constr. Co.*, 113 App. Div. 518, 99 N. Y. Supp. 241, rev'd, 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340 (1907).

⁵⁴³ *Phillips v. Michaels*, 11 Ind. App. 672, 39 N. E. 669.

§ 216. Presumption as to servant's knowledge.—It may fairly be presumed that a servant knows the condition of materials, machinery or appliances, which he has a constant opportunity to inspect, and which his regular duties bring under his notice;⁵⁴⁴ but no such presumption arises where he has no such opportunity.⁵⁴⁵ A locomotive

⁵⁴⁴ The servant is presumed to know of the ordinary dangers and risks of the service, and cannot recover for an injury which he might have avoided by using such knowledge (St. Louis, etc. R. Co. v. Marker, 41 Ark. 542); where a laborer had his leg broken in consequence of needlessly sitting on the edge of a flat car, while in motion, with his feet dangling down. *s. p.*, Shaw v. Sheldon, 103 N. Y. 667, 9 N. E. 183; Brossman v. Lehigh Valley R. Co., 113 Pa. St. 490, 6 Atl. 226. Compare Hoffman v. Clough, 124 Pa. St. 505, 17 Atl. 19. Four years' service, never being warned of a constant danger, implied notice of master's habitual failure to warn, and assumption of risk (Flynn v. Campbell, 160 Mass. 128, 35 N. E. 453). So after one year's service (Kennedy v. Pennsylvania Co. (Pa.), 17 Atl. 7). So after servant had been using machine for three weeks, where neither party knew of the defect, and both had the same opportunity of discovering it (Rietman v. Stolte, 120 Ind. 314, 22 N. E. 304). It will be so presumed where the defect is obvious (Goltz v. Milwaukee, etc. Ry. Co., 76 Wis. 136, 44 N. W. 752, 41 Am. & Eng. Ry. cases 282 (1890); or where such knowledge would necessarily be acquired in the proper discharge of the servant's own duties (Missouri, etc. Ry. Co. v. Hannig, 91 Tex. 347, 43 S. W. 508 (1897); the true question generally is whether he should have

known and understood the danger under the circumstances of the case (Baltimore, etc. Ry. Co. v. Welch, 17 Ind. App. 505, 47 N. E. 182 (1897); Klatt v. N. C. Foster, etc. Co., 92 Wis. 622, 66 N. W. 791 (1896); it is ordinarily one for the jury (De la Vergne, etc. Co. v. Stahl, 24 Tex. App. 471, 60 S. W. 319 (1900); Valley Ry. Co. v. Keigan, 87 Fed. 849, 31 C. C. A. 225 (1898), (to justify the presumption of the plaintiff's knowledge of a defect in the roadbed it must appear that the defect and danger were obvious to one situated as he was if at all attentive to his duties); Lehman v. Bagley, 82 Ill. App. 197 (1899), (the servant is presumed to know the condition of machinery, materials and appliances he has constant opportunity to inspect and which his regular duties bring under his notice); Pre v. Standard, etc. Co., 9 Cal. App. 591, 100 Pac. 122 (1908), (chargeable with notice of such facts as existed where he worked and would have been known to one so situated of ordinary intelligence); Lake Shore, etc. Ry. Co. v. Johnson, 172 Ind. 548, 88 N. E. 849 (1909), (where employees are accustomed to use a path alongside the track they are presumed to know of its unsafe condition).

⁵⁴⁵ Chicago R. Co. v. Jackson, 55 Ill. 492; Mickee v. Wood Mach. Co., 70 Hun, 456, 24 N. Y. Supp. 501; Alexander v. Central Lumber Co.,

engineer, conductor or train servant of any kind is not presumed to be familiar with the condition of the track; and therefore he does not, as matter of law, assume risks arising from a defective or negligent construction of the track,⁵⁴⁶ or of ties under the track,⁵⁴⁷ even though such defects existed when he entered upon his employment. And no servant is presumptively chargeable with notice of a peculiar and unusual state of things.⁵⁴⁸ Reasonable time must be allowed to a new servant to become acquainted with his surroundings,⁵⁴⁹ and to an old servant to learn of changes in the situation.⁵⁵⁰ Servants are pre-

104 Cal. 532, 38 Pac. 410 [few opportunities].

⁵⁴⁶ Louisville, etc. R. Co. v. Miller, 140 Ind. 685, 40 N. E. 116 [conductor]; Bean v. Western N. C. R. Co., 107 N. C. 731, 12 S. E. 600; Little Rock, etc. R. Co. v. Duffey, 35 Ark. 602; Sweeney v. Central Pacific R. Co., 57 Cal. 15; Trask v. California, etc. R. Co., 63 Cal. 96. See Lovell v. Howell, L. R. 1 C. P. Div. 161; Lopez v. Central Ariz. Mine Co., 1 Ariz. 464, 2 Pac. 748; Mich. Central R. Co. v. Austin, 40 Mich. 247 [worm rail]; Jackson Lbr. Co. v. Cunningham, 141 Ala. 206, 37 So. 445 (1904), (locomotive engineer); Chicago, etc. Ry. Co. v. Lee, 29 Ind. App. 480, 64 N. E. 675 (1902), (brakeman).

⁵⁴⁷ Houston, etc. R. Co. v. McNamara, 59 Tex. 255.

⁵⁴⁸ Whalen v. Illinois, etc. R. Co., 16 Ill. App. 320 [switchman's knowledge of dangerous proximity of a scale shed to the track, question for jury]. Where a brakeman was injured by contact with a post, erected near the track, by a station agent, *for his own purposes*, held, that plaintiff was authorized to presume that no such obstruction existed (Kearns v. Chicago, etc. R. Co., 66 Iowa, 599, 24 N. W. 231).

⁵⁴⁹ Northern Pac. R. Co. v. Mares, 123 U. S. 710, 8 S. Ct. 321 [one week not necessarily enough].

⁵⁵⁰ Nelson v. Chicago, etc. R. Co., 60 Wis. 320, 19 N. W. 52 [locomotive engineer not bound to understand, immediately, changes in time table]. A baggage master is not presumed to be aware of ambiguities in the rules for running the trains (Georgia, R. etc. Co. v. Rhodes, 56 Ga. 645); the servant must have an opportunity to discover the defect or danger (Sparks v. River, etc. Improvement Co., 74 N. J. L. 818, 67 Atl. 600 (1907), (the plaintiff, fireman and oiler on a mud scow, was injured by a defective valve, he had no knowledge of steam valves or of the manner of constructing or operating steam engines, held, the servant "does not assume the risk of injury from defects or dangers which are not obvious and of which he had no knowledge, and could not observe and know by the use of ordinary care"); Nicholds v. Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991 (1894), (Where the injury was caused by a defect in the chain used to support a heavy bar while being hammered on an anvil, the defect being one not discoverable from use,

sumed to be aware of defects which are perfectly obvious to their sight,⁵⁵¹ and the danger of which is obvious to

but one that could have been discovered by inspection by a competent inspector, held that the defendant was liable); *Spencer v. Albert Lea Brick, etc. Co.*, 107 Minn. 403, 120 N. W. 370, 687 (1909), (an experienced and educated mechanic of full age, having general supervision of machinery, held to have assumed the risk, on account of his knowledge and means of knowledge); *Welch v. Waterbury*, 136 App. Div. 315, 120 N. Y. Supp. 1059; *Reinsertsen v. Railway Co.*, 142 App. Div. 31, 126 N. Y. Supp. 745; *Southern Ry. Co. v. Lyons*, 169 Fed. 557, 95 C. C. A. 55, 25 L. R. A. (N. S.) 335 (1909), (an experienced railroad fireman was injured while assisting in taking a wrecked engine to the machine shop by grasping for a handhold, where there was none, the cab to which they are attached having been taken off, held that the rule requiring the master to furnish safe appliances does not apply to one whose business it is to work with defective cars, engines, etc., and it is the duty of the servant so engaged to take notice of such defects as may affect his safety and open to observation); *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136 (1908).

⁵⁵¹ For instances of denial of recovery, irrespective of actual knowledge, where defects in appliances were obvious, see *McC Campbell v. Cunard Steamship Co.*, 144 N. Y. 552, 39 N. E. 637 [truck and skid]; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648 [planing machine]; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119 [long experience; "must have

known"]; *Cassady v. Boston & Albany R. Co.*, 164 Mass. 168, 41 N. E. 129 [door of grain car]; *Goodridge v. Washington Mills Co.*, 160 Mass. 234, 35 N. E. 484 [uncovered gearing]; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860 [master failed to warn, yet not liable]; *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, 39 N. E. 787; *Appel v. Buffalo, etc. R. Co.*, 111 N. Y. 550, 19 N. E. 93; *McNeil v. N. Y., Lake Erie, etc. R. Co.*, 142 N. Y. 631, 37 N. E. 566 [unblocked guard rails]; where a longshoreman can see that a place is dark, the foreman, who is loading a ship, does not represent the master in failing to direct the longshoreman to go ashore and get a lantern (*Tully v. N. Y. & Texas S. S. Co.*, 10 N. Y. App. Div. 463, 42 N. Y. Supp. 29; *Foley v. Jersey City Electric Co.*, 54 N. J. Law, 411, 24 Atl. 487; *Yates v. McCullough Iron Co.*, 69 Md. 370, 16 Atl. 280; *Richmond, etc. R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786 [unblocked frog]; *Adkins v. Atlantic, etc. R. Co.*, 27 S. C. 71, 2 S. E. 849; *Hazlehurst v. Brunswick Lumber Co.*, 94 Ga. 535, 19 S. E. 756 [no necessity for exposure to danger]; *Hoyle v. Excelsior Steam Laundry Co.*, 95 Ga. 34, 21 S. E. 1001; *Smart v. Louisiana Electric Co.*, 47 La. Ann. 869, 17 So. 346 [insulating gloves]; *Fordyce v. Edwards*, 60 Ark. 438, 30 S. W. 758 [locomotive]; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517 [ladder and post]; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337 [projecting saw]; *Petersen v. Sherry Lumber Co.*, 90 Wis. 83, 62 N. W. 948 [saw mill]; *Quick v. Minnesota Iron Co.*, 47 Minn. 361, 50 N. W.

any person of their mental capacity.⁵⁵² But to charge them with notice on this ground, the defect and danger must be unquestionably plain and clear, so that, if they did not see it, they must necessarily have been in fault.⁵⁵³

244 [mining elevator]; *Bennett v. Atl.* 818 (1909), (a car repairer, Northern Pac. R. Co., 2 N. Dak. 112, fully acquainted with the manner of doing the business, assumed the risk of injury from working under the cars, when the accident was caused by the neglect of fellow servants to signal the movement of the engine).

49 N. W. 408 [insufficient space between cars]; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. St. 500, 37 Pac. 679 [saw mill machinery]; *Hogele v. Wilson*, 5 Wash. St. 160, 31 Pac. 469 [same]; *Week v. Fremont Mill Co.*, 3 Wash. St. 629, 29 Pac. 215 [defective wire]; *Bonnet v. Galveston, etc. R. Co.* (Tex. Civ. App.), 31 S. W. 525). So, where the place of work was obviously dangerous (*McGrath v. Texas, etc. R. Co.*, 60 Fed. 555, 9 C. C. A. 133 [bridge]; *Texas, etc. R. Co. v. French*, 86 Tex. 96, 23 S. W. 642 [earth bank]; *Larich v. Moies*, 18 R. I. 513, 28 Atl. 661 [same]; *Batterson v. Chicago, etc. R. Co.*, 53 Mich. 125 [track]; *Diamond Glue Co. v. Wietzychowski*, 227 Ill. 338, 81 N. E. 392 (1907), (where the operator of an elevator was injured by the fall of the cage, caused by a defective cable, which, though apparent and known to others, was unknown to plaintiff, who testified that he had no time to examine it, held to sustain a verdict for the plaintiff); *Kath v. St. Louis, etc. Ry. Co.*, 232 Ill. 126, 83 N. E. 533 (1907), (where a crooked electric pole had been set nearer the track than others, and from the swaying of the cars at the point owing to a defective track, no recovery could be had for death of the conductor caused by striking the pole, the conditions having long existed, the conductor is presumed to have been aware of them); *Smith v. Philadelphia Ry. Co.*, 111 Md. 274, 73

⁵⁵² In most of the cases cited, it will be found that weight was laid upon the capacity of the servant to appreciate the danger, and the rule is fully stated in §§ 203, 214, *ante*, 218, 219, 219a, *post*.

⁵⁵³ A master is liable for defective appliances, unless the defect is so glaringly obvious that there can be no doubt as to whether a prudent man would have assumed the risk (*Jones v. St. Louis Packet Co.*, 43 Mo. App. 398). So, also, as to the danger of particular work (*Kerns v. Chicago, etc. R. Co.*, 94 Iowa, 121, 62 N. W. 692). If by reason of darkness, the defect could not possibly have been seen, the servant is free from fault (*Bright v. Barnett Co.*, 88 Wis. 299, 60 N. W. 418). For cases in which the question of notice was for the jury, see *Walker v. Lake Shore, etc. R. Co.*, 104 Mich. 606, 62 N. W. 1032 [workman inexperienced; no warning]; *Oregon, etc. R. Co. v. Tracy*, 66 Fed. 931, 14 C. C. A. 199 [view obscured]; *Smith v. Occidental Steamship Co.*, 99 Cal. 462, 34 Pac. 84; *Gaul v. Rochester Paper Co.*, 72 Hun, 485, 25 N. Y. Supp. 443; *Colf v. Chicago, etc. R. Co.*, 87 Wis. 273, 58 N. W. 408 [work done at night]; *Marshall v. St. Louis, etc. Ry. Co.*, 78 Ark. 213, 94 S. W. 56, 115 Am. St. Rep. 27 (1906), (a brakeman coupling a de-

§ 217. **Means of knowledge; duty to investigate.**— It has been often said that the master is not liable for defects in instrumentalities to a servant whose means of knowledge were equal to those of the master.⁵⁵⁴ But this is much too broad a statement; and in later and better considered cases, it has been very properly repudiated.⁵⁵⁵ It is not the law. Such a rule certainly has no application to latent defects; as to which servants are not bound to inquire or inspect.⁵⁵⁶ The true rule as to “equal

fective car on to a train for the purpose of taking it to the repair shop assumes the risk, although he did not examine the car to ascertain wherein it was defective); *Montgomery Coal Co. v. Barringer*, 218 Ill. 327, 75 N. E. 900 (1905), (where a servant goes underneath a coal chute knowing there is a hole in it from which lumps of coal are liable to drop, notwithstanding he had not noticed particularly where the hole was); *San Antonio, etc. Ry. Co. v. Engelhorn*, 24 Tex. App. 324, 62 S. W. 561, 65 S. W. 68 (1900), (because a railway employee had reason to believe that a cattle guard was so near the track that it was only possible and not probable he might be struck by it while using the ladder on the side of the car, does not assume the risk); *Brotzki v. Wisconsin Granite Co.*, 142 Wis. 380, 125 N. W. 916, 27 L. R. A. (N. S.) 982 (1910), (an experienced employee using a steel rod in loading blast holes assumes the risk of a premature explosion from a spark being struck by such rod).

⁵⁵⁴ *Nashville, etc. R. Co. v. Handman*, 13 Lea, 423; *Lumley v. Caswell*, 47 Iowa, 159; *Moulton v. Gage*, 138 Mass. 390; *Malone v. Hawley*, 46 Cal. 409; *Salem Stone Co. v. Hobbs*, 11 Ind. App. 27, 38 N. E. 538 [no latent defects]; *Clark v.*

Missouri Pac. R. Co., 48 Kans. 654, 29 Pac. 1138 [equal knowledge a bar]. Plaintiff, having better knowledge of the danger than defendant, not entitled to recover (*Fairmount Cemetery v. Davis*, 4 Colo. App. 570, 36 Pac. 911; *Evansville Gas, etc. Co. v. Raley*, 38 Ill. App. 342, 76 N. E. 548 (1905); *Walker v. Scott*, 67 Kans. 814, 64 Pac. 615 (1901); *Stewart v. Seaboard Air Line Ry. Co.*, 115 Ga. 624, 41 S. E. 981 (1902)).

⁵⁵⁵ *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955; *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. 1098; *Dickson v. Omaha, etc. R. Co.*, 124 Mo. 140, 27 S. W. 476 [fence]; *Salem Stone & Lime Co. v. Tepps*, 10 Ind. App. 516, 38 N. E. 229 [latent defect in machinery]; *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340, 9 S. W. 262; *Detroit Crude Oil Co. v. Grable*, 94 Fed. 73, 36 C. C. A. 94 (1896), (qualified by the conditions that there is no question of the intricate character of the appliance or of the imperfect intelligence of the employee).

⁵⁵⁶ Servants are not, as a rule, bound to inspect instrumentalities or to look for latent defects (*Snow v. Housatonic R. Co.*, 8 Allen, 441; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938 [machinery]; *Chicago, etc. R. Co. v. Hines*, 132

knowledge " is that, when the means of knowledge and the *duty to use those means* are equal, between master and servant, and neither uses those means, both are equally at fault. And this is all which was really intended by the courts in the loose *dicta* referred to.⁵⁵⁷ As

Ill. 161, 23 N. E. 1021 [approving our text]; Porter v. Hannibal, etc. R. Co., 71 Mo. 66; Harr v. N. Y. Central R. Co., 114 N. Y. 623, 21 N. E. 425 [track in large yard]; Pennsylvania Co. v. McCormack, 131 Ind. 250, 30 N. E. 27 [brakeman; roadway and switches]; Pennsylvania Co. v. Brush, 130 Ind. 347, 28 N. E. 615 [switchman; broken tie in track]; Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 38 N. E. 67 [section man; absence of necessary hands from train]; Morton v. Detroit, etc. R. Co., 81 Mich. 423, 46 N. W. 111 [brakeman; brake chain]; Nicholds v. Crystal Plate Glass Co., 126 Mo. 55, 27 S. W. 516 [chain]; Little Rock, etc. R. Co. v. Voss (Ark.), 18 S. W. 172 [roadbed]; Missouri Pac. R. Co. v. Crenshaw, 71 Tex. 340, 9 S. W. 262; Zintek v. Stimson Mill Co., 9 Wash. St. 395, 37 Pac. 340 [lumber pile]; Victor Coal Co. v. Muir, 20 Colo. 320, 38 Pac. 378 [mine roof]; Little Rock, etc. R. Co. v. Moseley, 56 Fed. 1009, 6 C. C. A. 225 [switchman; tracks in yard]; Carpenter v. Mexican Nat. R. Co., 39 Fed. 315 [brakes]; Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 S. E. 524 (1907); Hubbard v. Macon Ry. & L. Co., 5 Ga. App. 223, 62 S. E. 1018 (1908); Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 N. E. 239 (1908); Mitchell Lime Co. v. Nickless, 85 N. E. (Ind. App.) 728 (1908); Finley v. Louisville Ry. Co., 103 S. W. 343, 31 Ky. L. R. 740 (1907); Smith & Son v. Garri-son, 108 S. W. 293, 32 Ky. L. R. 1278 (1908); Rowden v. Schoenherr-Walton Min. Co., 136 Mo. App. 376, 117 S. W. 695 (1909); Texas Short Line Ry. Co. v. Waymire (Tex. App.), 89 S. W. 452 (1905); Duerler Mfg. Co. v. Eichhorn, 44 Tex. App. 638, 99 S. W. 715 (1907); St. Louis, etc. Ry. Co. v. Schuler, 46 Tex. App. 356, 102 S. W. 783 (1907); Missouri, etc. Ry. Co. v. Blachley, 109 S. W. (Tex. App.) 995 (1908); El. Paso, etc. Ry. Co. v. O'Keefe, 110 S. W. (Tex. App.) 1002 (1908); Waggoner v. Sneed, 118 S. W. (Tex. App.) 547 (1909); Amer. Smelting, etc. Co. v. McGee, 157 Fed. 69, 84 C. C. A. 573 (1907); Bolen-Darball Coal Co. v. Williams, 164 Fed. 665, 90 C. C. A. 481 (1908).

⁵⁵⁷ See Wells v. Coe, 9 Colo. 159, 11 Pac. 50, in which the facts were as above stated, but the usual broad language was used. So in Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747. While it has been held that where the master and servant have equal knowledge, or means of knowledge, of defects and dangers, the servant assumes the risk (Wright v. Pacific Coast Oil Co., 53 Pac. (Cal.) 1086 (1898); Cartledge v. Pierpont Mfg. Co., 120 Ga. 221, 47 S. E. 586 (1904); Stalder v. Huntington, 153 Ind. 354, 55 N. E. 88 (1900); Walker v. Scott, 64 Pac. (Kans.) 615 (1901); Davis v. Forbes, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170 (1898); Hart v. Naumburg, 123 N. Y. 641, 25 N. E. 385 (1891); Baltimore, etc.

the master is always bound to use due care in the selection

Ry. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772; Detroit Crude Oil Co. v. Grable, 94 Fed. 73, 36 C. C. A. 94 (1899) (such rule is nevertheless not applicable where the master's duty requires him to know of dangers that the servant is ignorant of and which he is not under obligation to know); St. Louis, etc. Ry. Co. v. Irwin, 37 Kans. 701, 16 Pac. 146, 1 Amer. S. R. 266 (1888); Pfisterer v. Peter, etc. Co., 117 Ky. 501, 78 S. W. 450, 25 Amer. S. R. 1905; Nicholds v. Crystal Plate Glass Co., 126 Mo. 55, 28 S. W. 991 (1895); Davidson v. Southern Pac. Co., 44 Fed. 476 (1891); Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 S. E. 249 (1907); King v. King, 79 Kans. 584, 100 Pac. 503 (1909); the servant is not under the same duty as the master to inspect to ascertain the risks of the service McDonald v. Chicago, etc. Ry. Co., 41 Minn. 439, 43 N. W. 380 (1889); Bland v. Shreveport, etc. Ry. Co., 48 La. Ann. 1057, 20 So. 284, 4 Am. & Eng. R. Cases (N. S.) 349 (1897); Barto v. Iowa Tel. Co., 126 Ia. 241, 101 N. W. 876, 106 Am. St. Rep. 347 (1904), (one employed as a telephone lineman, not required to inspect wires or furnished with tools to discover defects or live wires, injured by a wire that had become charged by contact with a defectively insulated electric light wire, is not chargeable with knowledge of its condition and does not assume the risk); Liedke v. Moran, 43 Wash. 428, 86 Pac. 646, 117 Am. St. Rep. 1058 (1906), (one employed as a laborer in taking down a scaffold was under no duty to examine the scaffolding and did not assume the risk of defective construction); Northern Pac. Ry. Co. v. Wendel, 156 Fed. 336, 84 C. C. A. 232 (1907), (one working with a machine run by a belt cannot be held to have assumed the risk of its breaking from age and weakness caused by splicing where it is not shown that he knew its age or that splicing had a tendency to weaken it); Receivers of Kirby Lbr. Co. v. Poindexter, 103 S. W. (Tex. App.) 439, rev'd, 107 S. W. (Sup. Ct.) 42 (1908), (one working with a defective belt and chargeable with knowledge of its condition and danger therefrom does not assume the risk of the belt's breaking being caused by a pulley being negligently allowed to remain in defective condition, which he neither knew nor was chargeable with knowing); Chesapeake, etc. Ry. Co. v. Cowley, 166 Fed. 283, 92 C. C. A. 201 (1908), (a trainman knowing the general location of a structure near the track but not knowing that it was dangerously close, does not assume the risk of being struck thereby while using the ladder at side of the car); O'Toole v. New England Gas, etc. Co., 210 Mass. 126, 87 N. 608 (1909), (where an employee is injured from the defective construction of a wheel barrow the mere fact that he knew it was a little shaky does not charge him with notice of such defective construction; held, that though a servant may be precluded from recovery if he appreciates the character and extent of the danger, without understanding the precise manifestation of its condition that causes the injury, yet he cannot be so precluded without he does understand the nature and extent of the risk); Rase v. Minneapolis, etc. Ry. Co., 107 Minn. 260, 120 N. W. 300 (1909); Schroeder v. Montana Iron Wks., 38 Mont. 474,

of servants and instrumentalities,⁵⁵⁸ his servants may rely upon his having done so; and as, in the ordinary course of affairs, such care would result in a proper selection, servants have a right, in all cases, to assume, without inspection, that instrumentalities are safe,⁵⁵⁹ and, without inquiry, that their fellow servants are competent and careful.⁵⁶⁰ In like manner, servants may assume that all instrumentalities are fit and suitable for the use to which the master applies them,⁵⁶¹ and that they are properly adjusted to each other.⁵⁶² It is only when special circumstances make it the duty of the servant to inquire that it is contributory negligence on his part not to in-

100 Pac. 619 (1909); *Rankel v. Buckstaff, etc. Co.*, 138 Wis. 442, 120 N. W. 269, 20 L. R. A. (N. S.) 1180 (1909).

⁵⁵⁸ See § 192, *ante*, and notes; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56.

⁵⁵⁹ § 207g, *ante*, *Chicago, etc. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021 [machinery]; *Bannon v. Lutz*, 158 Pa. St. 166, 27 Atl. 890; *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213; *Baldwin v. St. Louis, etc. R. Co.*, 72 Ia. 45, 33 N. W. 356. A servant may assume that his master's premises and appliances are safe, and need not actively inspect them (*Rigdon v. Allegheny Lumber Co.*, 59 Hun, 627, 13 N. Y. Supp. 871; *Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700; *Banks v. Wabash W. R. Co.*, 40 Mo. App. 458; *Dillingham v. Harden*, 6 Tex. Civ. App. 474, 26 S. W. 914 [tool]; see *Powers v. N. Y., Lake Erie, etc. R. Co.*, 98 N. Y. 274, 280). Brakeman not bound to inspect coupling appliances of cars (*Goodrich v. N. Y. Central R. Co.*, 116 N. Y. 398, 22 N. E. 397; *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866; *Sabine, etc. R. Co. v. Ewing*, 1 Tex. Civ. App. 531,

21 S. W. 700), or brakes, nor to examine brakes before using them (*Ohio, etc. R. Co. v. Percy*, 128 Ind. 197, 27 N. E. 479); much less is a yard workman bound to do so (*Chicago, etc. R. Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324), nor, as a matter of law, the track (*Cleveland, etc. R. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174). A brakeman cannot, as matter of law, be held negligent in failing to discover that bumpers on cars he is about to couple were rotten, and so defective as to permit the cars to come almost together (*Chesapeake, etc. R. Co. v. Lash* [Va.], 24 S. E. 385).

⁵⁶⁰ § 207g, *ante*; *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100, 5 N. E. 92; *Chicago, etc. R. Co. v. Beatty*, 13 Ind. App. 604, 40 N. E. 753.

⁵⁶¹ This is well stated in *Porter v. Hannibal, etc. R. Co.*, 71 Mo. 66 [brakeman thrown from car by defect in track]. See *Mulodwney v. Illinois, etc. R. Co.*, 36 Ia. 462 [brakeman, coupling cars, injured through difference in height of buffers].

⁵⁶² Thus, it may be assumed that a car has been properly loaded (North-

quire. The duty of inspection and inquiry may be cast upon the servant by special contract,⁵⁶³ or by general rules⁵⁶⁴ or special orders,⁵⁶⁵ brought home to his notice and giving him reasonable opportunity for compliance,⁵⁶⁶ and to the extent to which such investigation is within his reasonable capacity.⁵⁶⁷ And it is cast upon him by actual knowledge of any fact, which would suffice to put every person, in his circumstances and of his capacity, using ordinary prudence, upon inquiry.⁵⁶⁸ Therefore, if, in the ordinary course of his service, exercising ordinary care, he would necessarily⁵⁶⁹ become familiar with certain de-

ern Pac. R. Co. v. Everett, 152 U. S. 107; Haugh v. Chicago, etc. R. Co., 73 Ia. 66, 35 N. W. 116).

⁵⁶³ See Pratt v. Lake Shore, etc. R. Co., 63 Hun, 616, 18 N. Y. Supp. 682.

⁵⁶⁴ La Croy v. N. Y., Lake Erie, etc. R. Co., 132 N. Y. 570, 30 N. E. 391; Richmond, etc. R. Co. v. Dudley, 90 Va. 304, 18 S. E. 274; Fort Wayne, etc. R. Co. v. Gruff, 132 Ind. 13, 31 N. E. 460; Alexander v. Louisville, etc. R. Co., 83 Ky. 589.

⁵⁶⁵ Thus, one employed to select materials is necessarily bound to inspect them (Boettger v. Scherpe Iron Co., 124 Mo. 87, 27 S. W. 466).

⁵⁶⁶ See O'Malley v. N. Y., Lake Erie, etc. R. Co., 67 Hun, 130, 22 N. Y. Supp. 48 [insufficient time].

⁵⁶⁷ Question of negligence properly submitted to jury, since evidence tended to show that it would have required an expert to discover the defects in the brake (Pratt v. Lake Shore, etc. R. Co., 63 Hun, 616, 18 N. Y. Supp. 682 [express contract]). "As a general rule, the servant is not required to inspect the tools or other instrumentalities furnished by the master for the performance of his duties. We think he does assume the risk of such defects as fall under his observation and of such patent defects as a man of ordinary capacity

and prudence would necessarily observe in them in using them to do their work. Can the master by a mere notice or contract absolve himself from the primary duty of furnishing safe instrumentalities in the first instance? We doubt it. We think, however, that it is not unreasonable to require his servants to examine instrumentalities already in use in order to ascertain whether they are in good order. Hence, we think a rule to require servants to inspect their tools, etc., ought to be construed as applying only to those already in use. But in any event, in order to make a rule binding upon a servant, it should be brought to his knowledge" (Adams v. Gulf, etc. Ry. Co., 101 Tex. 5, 102 S. W. 96 (1907)).

⁵⁶⁸ Servant, knowing that many cars had defective brakes, put upon inquiry as to brakes on his car (Roddy v. Missouri Pac. R. Co., 104 Mo. 234, 15 S. W. 1112). He must look for obvious defects (Guinard v. Knapp Co., 90 Wis. 123, 62 N. W. 625). "He must use his eyes, and make such inspection as ordinary care would require" for obvious defects (Fordyce v. Edwards, 60 Ark. 438, 30 S. W. 758).

⁵⁶⁹ It cannot be held that deceased

fects, he is charged, not only with notice of them,⁵⁷⁰ but with the duty of making reasonable investigation into such further dangers as they would reasonably suggest to him.⁵⁷¹ A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire;⁵⁷² and especially

was bound to know the unsafe condition of the track, the defect not being so palpable that he must necessarily have known of it (*Pennsylvania R. Co. v. Zink*, 126 Pa. St. 288, 17 Atl. 614).

⁵⁷⁰ *Ryan v. Porter Mfg. Co.*, 57 Hun, 253, 10 N. Y. Supp. 774 [flooring, used eight months]; *Goltz v. Milwaukee, etc. R. Co.*, 76 Wis. 136, 44 N. W. 752 [cracked track]; *Schulz v. Johnson*, 7 Wash. St. 403, 35 Pac. 130 [rope]; *Ragon v. Toledo, etc. R. Co.*, 97 Mich. 265, 56 N. W. 612 [hole readily visible].

⁵⁷¹ *Flood v. Western U. Tel. Co.*, 131 N. Y. 603, 30 N. E. 196 [cross bars notoriously not strong enough to bear man's weight]; *Missouri Pac. R. Co. v. Somers*, 71 Tex. 700, 9 S. W. 741. A brakeman coupling a flat car is entitled to assume that it is properly loaded, but is nevertheless bound to use proper diligence to discover any negligent loading which renders the coupling dangerous, and then to desist from the effort, or employ some method of avoiding the danger (*Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 14 S. Ct. 474). The omission of employer to supply proper light does not excuse employee for exposing himself to unseen and unknown danger in the dark, which he ought to have discovered, had he made proper use of daylight (*Stubbs v. Atlanta Oil Mills*, 92 Ga. 495, 17 S. E. 746; *Norfolk & W. R. Co. v. Emmert*, 83 Va. 640, 3

S. E. 145 [couplings]; *Gulf, etc. R. Co. v. Kizziah*, 86 Tex. 81, 23 S. W. 578 [cars and brakes]; *Pre v. Standard Portland Cement Co.*, 9 Cal. App. 591, 100 Pac. 122 (1909); *Coughlan v. Philadelphia, etc. Ry. Co.*, 67 Atl. (Del.) 148 (1907); *Smith's Admr. v. North Jellico Coal Co.*, 114 S. W. (Ky.) 785 (1908); *Rowden v. Schönherr-Walton Min. Co.*, 136 Mo. App. 695, 117 S. W. 695 (1907); *Demato v. Hudson County Gas Co.*, 74 N. J. Law, 793, 67 Atl. 28 (1907); *McClellon v. Gerrick*, 44 Wash. 524, 93 Pac. 1087 (1908); see *Stewart v. Harmon*, 108 Md. 446, 70 Atl. 333, 20 L. R. A. (N. S.) 228 (1908).

⁵⁷² *Duffy v. Upton*, 113 Mass. 544 [breaking of derrick-spar]. See *De Graff v. N. Y. Central, etc. R. Co.*, 76 N. Y. 125 [car-brakes of old pattern, on wrong side of car]; *Perigo v. Chicago, etc. R. Co.*, 52 Ia. 276; *Mayes v. Chicago, etc. R. Co.*, 63 Ia. 562 [obvious defect]. In many cases, the qualifying clause as to duty to inquire is not stated (*Nix v. Texas, etc. R. Co.*, 82 Tex. 473, 18 S. W. 571 ["knew or might have known"]; *Gulf, etc. R. Co. v. Williams*, 72 Tex. 159, 12 S. W. 172 [should have known]; *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436 ["should have known"]; *Nelling v. Industrial Mfg. Co.*, 78 Ga. 260 ["might, by ordinary care"]; *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321,

should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he did not actually know.⁵⁷³ A servant is certainly not chargeable with notice of that which he neither knew nor was bound to know.⁵⁷⁴

§ 218. Application of rule to minors. — It is now well settled that the general rule, limiting the liability of a master to his servant, applies to minor servants, as well as to others; no distinction being made on account of their incapacity to contract for the assumption of such perils.⁵⁷⁵ Thus, where a servant is set at dangerous

956 [same]; *Union Pac. R. Co. v. Iledo, etc. R. Co.*, 67 Ill. 498; *Houston, etc. R. Co. v. Miller*, 51 Tex. 270; *Pittsburgh, etc. R. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *King v. Boston, etc. R. Co.*, 9 Cush. 112; *Zurn v. Tetlow*, 134 Pa. St. 213, 19 Atl. 504; *Alabama Min. Ry. Co. v. Marcus*, 115 Ala. 389, 22 So. 185 (1898); *Decatur Car Wheel Co. v. Terry*, 41 So. (Ala.) 839 (1896); *Allen v. Elec. Co.*, 131 Ill. App. 118; *Evansville, etc. Ry. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021 (1893); *Freebourn v. Chamberlain Medicine Co.*, 136 Ia. 434, 113 N. W. 918 (1907); *Union, etc. Ry. Co. v. Estes*, 37 Kans. 715, 16 Pac. 131 (1888); *Carrierre v. McWilliams*, 104 La. 678, 29 So. 333 (1901); *Carter v. Baldwin*, 107 Mo. App. 217, 81 S. W. 204 (1904); but see *Bellamy v. Whitsell*, 123 Mo. App. 610, 100 S. W. 514 (1907); *Evans Laundry Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814 (1903); *Carrington v. Mueller*, 65 N. J. Law, 244, 47 Atl. 564 (1901); *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 57 Atl. 910 (1904); *Alexander v. Carolina Mills*, 64 S. E. (S. C.) 914 (1909); *Cooperage Co. v. Abernathy*, 116

573 *Lumley v. Caswell*, 47 Ia. 159 [explosion of a boiler]; *Cooper v. Butler*, 103 Pa. St. 412; *Malone v. Hawley*, 46 Cal. 409; see Ill. Central R. Co. v. Jewell, 46 Ill. 99.

574 *Louisville, etc. R. Co. v. Ward*, 10 C. C. A. 166, 61 Fed. 927; *McNamara v. Logan*, 100 Ala. 187, 14 So. 175; *Wells, etc. Co. v. Miskowicz*, 50 Ill. App. 452 [no reason to suspect]; *Cielfield v. Browning*, 29 N. Y. Supp. 710, 9 N. Y. Misc. 98.

575 *Buckley v. Gutta Percha Mfg. Co.*, 113 N. Y. 540, 21 N. E. 717; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Gartland v. To-*

work, the *mere* fact of his minority does not render the master liable for the risk, if the servant has sufficient capacity to take care of himself, and knows and can properly appreciate the risk.⁵⁷⁶ Therefore, if the risk is obvious to him, and fully appreciated by him, and he has entire liberty of action, the usual rules are held to apply.⁵⁷⁷ But, while the mere fact of minority is deemed

S. W. (Tex. App.) 869 (1909); Texas, etc. Ry. Co. v. Brick, 83 Tex. 598, 20 S. W. 511 (1893); Loevtry v. Hambrick, 61 W. Va. 687, 57 S. E. 240 (1901); Casey v. Chicago, etc. Ry. Co., 90 Wis. 113 62 N. W. 624 (1895); Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258 (1902).

⁵⁷⁶ Where a minor is of sufficient age and discretion to comprehend the dangers of an employment, the fact that he is a minor cannot exercise a controlling influence (Evansville, etc. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021). The fact that an employee, injured by the alleged negligence of his employer, is a minor, does not require the question of his assumption of risk to be submitted to the jury, where it plainly appears from undisputed evidence (Herold v. Pfister, 92 Wis. 417, 66 N. W. 356). The mother of a minor cannot recover for injuries received by her child by running a machine which was safe when properly operated, in the absence of evidence that the employer failed to give warning of the dangers of operation (Davis v. Augusta Factory, 62 Ga. 712, 18 S. E. 974); Arkansas, etc. Ry. Co. v. Worden, 90 Ark. 407, 119 S. W. 828 (1909); Martin v. Detroit Lbr. Co., 141 Mich. 363, 104 N. W. 692 (1905); Forquer v. Slater Brick Co., 37 Mont. 426, 97 Pac. 843 (1908); Umsted v. Colgate, etc. Elev. Co., 18 N. D. 309, 122

N. W. 390 (1909); Ferrari v. Beaver Hill Coal Co., 54 Ore. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016 (1908); Gulf, etc. Ry. Co. v. Jackson, 49 Tex. App. 573, 109 S. W. 478 (1908); Wiggins v. E. Z. Waist Co., 83 Vt. 365, 76 Atl. 36 (1910).

⁵⁷⁷ Ogley v. Miles, 139 N. Y. 458, 34 N. E. 1059 [boy 16: buzz-saw; experience; no instructions; non-suit]; Ekendahl v. Hayes, 10 N. Y. App. Div. 487, 42 N. Y. Supp. 226 [boy of 16: disobedience of instructions; cog wheels]; Oszkoscil v. Eagle Pencil Co., 57 N. Y. Super. 217, 6 N. Y. Supp. 501; Williamson v. Sheldon Marble Co., 66 Vt. 427, 29 Atl. 669 [boy 16: "danger perfectly apparent"]; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654 [boy 16: dreaded the work; non-suit; no point of coercion raised]; Probert v. Phipps, 149 Mass. 258, 21 N. E. 370; Curran v. Merchants' Mfg. Co., 130 Mass. 374 [boy over 14]; Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692 [boy 14: warned]; McMellen v. Union News Co., 144 Pa. St. 332, 22 Atl. 706 [intelligent boy: jumping off train; non-suit]; Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795 [age 18: three months' experience]; Phillips v. Michael, 11 Ind. App. 672, 39 N. E. 669 [girl nearly 16 presumed to appreciate extremely obvious dangers]; Casey v. Chicago, etc. R. Co., 90 Wis. 113, 62 N. W. 624 [age 18;

immaterial, it is also settled that any actual or presumptive incapacity of a minor to understand and appreciate the perils to which he is exposed is to be fully considered, and that he can recover from his master for injuries suffered from any perils, the nature of which he did not know, or could not properly appreciate, if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed.⁵⁷⁸ In

assumed risk]; *Hefferen v. Northern* (plaintiff, a boy 16 years old, *Pac. R. Co.*, 45 Minn. 471, 48 N. W. 1, 526 [17 years: obvious danger; non-suit]; *Anderson v. Morrison*, 22 Minn. 274. A number of similar Massachusetts decisions are well stated in *Patnode v. Warren Mills*, 157 Mass. 283, 32 N. E. 161. A minor servant, old enough and sensible enough to use his eyes, and to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly, acts at his own peril in failing so to do (*Kelly v. Barber Asphalt Co.*, 93 Ky. 363, 20 S. W. 271 [boy 17]). *Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900, 25 C. C. A. 220 (1897); *O'Connor v. Whittall*, 169 Mass. 367, 48 N. E. 844 (1897); *Cohen v. Hamblin, etc. Mfg. Co.*, 186 Mass. 544, 71 N. E. 948 (1904); *Carrington v. Mueller*, 65 N. J. Law, 244, 47 Atl. 564 (1900); *Bender v. New York Glucose Co.*, 72 N. J. Law, 218, 61 Atl. 388 (1905); *Sheitran v. Treeler Stave, etc. Co.*, 13 Pa. Super. Ct. 219 (1900), (a boy 16 or 17 years old assumes the risk of the obvious danger of feeding billets to a circular saw, and it makes no difference that the employment is hazardous, the risk being obvious); *Williams v. Belmont, etc. Co.*, 55 W. Va. 84, 46 S. E. 802 (1904); *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360 (1900), who had worked about a paper mill two years, while changing his clothes to go out was caught in a machine, the danger being obvious, so clearly assumes the risk that the court should so instruct the jury as matter of law); *Mundhenke v. Oregon City Mfg. Co.*, 47 Ore. 127, 81 Pac. 977, 1 L. R. A. (N. S.) 278 (1905); *Cronin v. Columbian Mfg. Co.*, 75 N. H. 319, 74 Atl. 180 (1909); *Miller v. Wing*, 133 App. Div. 453, 117 N. Y. Supp. 1070 (1909); *Umsted v. Colgate, etc. Co.*, 122 N. W. (N. D.) 390 (1909); *Ferrari v. Beaver Hill Coal Co.*, 102 Pac. (Ore.) 1016 (1909); *Mengel Box Co. v. Dulin*, 174 Fed. 647, 98 C. C. A. 401 (1909); *Scanlan v. Page Box Co.*, 205 Mass. 12, 90 N. E. 1146 (1910); *Fisher v. Prairie*, 109 Pac. (Okla.) 574 (1910); *Wiggins v. E. Z. Waist Co.*, 83 Vt. 365, 76 Atl. 36 (1910); *Schumacher v. Tuttle Press Co.*, 142 Wis. 631, 126 N. W. 46 (1910); *Kuphal v. Western Montana, etc. Co.*, 114 Pac. (Mont.) 122 (1911).

⁵⁷⁸ *Union Pacific R. Co. v. Fort*, 17 Wall. 553; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Mfg. Co.*, 113 Id. 396; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Hickey v. Taaffe*, 105 N. Y. 26, 36, 12 N. E. 286; *Patnode v. Warren Mills*, 157 Mass. 283, 32

effect, the weight of authority is in favor of applying the same principles to the case of a young person in service as to that of a child charged with contributory negligence.⁵⁷⁹ He is held responsible for the exercise of that degree of care and discretion which is usual among young persons of his age and circumstances, and for the use of

N. E. 161 [boy of 14: dull of intellect]; Bartonshill Coal Co. v. McGuire, 3 Macq. 300, 4 Jur. (N. S.) 772; Turner v. Norfolk, etc. R. Co., 40 W. Va. 675, 22 S. E. 83 [boy 16]; Thompson v. Johnston Co., 86 Wis. 576, 57 N. W. 298 [boy 16: little experience; risk not assumed as matter of law]; Sprague v. Atlee, 81 Ia. 1, 46 N. W. 756 [boy 13: verdict stands]; Northern Pac. Coal Co. v. Richmond, 58 Fed. 756, 7 C. C. A. 485 [for jury]. The language of this paragraph was quoted, approved and adopted in *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421. *Arkadelphia Lbr. Co. v. Whitted*, 81 Ark. 247, 98 S. W. 697 (1906); *Baldwin v. Amer. Paper Co.*, 196 Mass. 402, 82 N. E. 1 (1907); *Walton v. Burchel*, 121 S. W. (Tenn.) 391 (1907); *Commerce Milling Co. v. Gowan*, 104 S. W. (Tex. App.) 916 (1907); *Johnson v. Motor Shingle Co.*, 59 Wash. 154, 96 Pac. 962 (1908); *Owensboro Stove Co. v. Dougherty*, 110 S. W. 319, 33 Ky. L. R. 328 (1908); *Saller v. Friedman Shoe Co.*, 130 Mo. App. 712, 109 S. W. 794 (1908); *Magone v. Portland Mfg. Co.*, 51 Ore. 21, 93 Pac. 450 (1908); *Missouri, etc. Ry. Co. v. Smith*, 45 Tex. App. 128, 99 S. W. 743 (1907); *Bartley v. Boston, etc. Ry. Co.*, 198 Mass. 163, 83 N. E. 1093 (1908); *Galloway v. Chicago, etc. Ry. Co.*, 234 Ill. 474, 84 N. E. 106 (1908); but see *Allen v. Elec. Co.*, 131 Ill. App. 118; *Ferreri v. Beaver Coal Co.*, 102 Pac. (Ore.) 1016 (1909); *Goodwin v. Columbia Mills Co.*, 80 S. C. 349, 61 S. E. 390 (1908); *Federal Lead Co. v. Sawyers*, 161 Fed. 687, 88 C. C. A. 547 (1908).

⁵⁷⁹ Compare §§ 70, 73, *ante*. *Atlas Engine Works v. Randall*, 100 Ind. 293. The negligence of the parent or guardian in permitting the employment of a minor in the use of dangerous machinery cannot be imputed to the latter (*Huff v. Ames*, 16 Neb. 139 [boy of 11]). But a father who allows his boy to be employed in a coal mine without stipulating for such employment as will not expose him to danger disproportioned to his years and discretion is negligent, and cannot recover for injuries to him (*Weaver v. Iselin*, 161 Pa. St. 386, 29 Atl. 49). *Western Coal, etc. Co. v. Burns*, 84 Ark. 74, 104 S. W. 535 (1907), (a boy, 14 years old, had notified the boss of a defect in the machine and was ordered to go ahead and told it would be repaired, is not barred from recovery, if one of his age and experience would have continued in the service, and if by reason of his youth he did not appreciate the risk, he did not assume it); *Beckwith Organ Co. v. Malone*, 32 Ky. L. Rep. 596, 106 S. W. 809 (1908), (where an infant employee in a hazardous business has not been sufficiently warned to comprehend the risk, he will be treated as if he did not know the danger).

such knowledge as he actually has,⁵⁸⁰ but for nothing more.⁵⁸¹ And great allowance is made in favor of a minor rendering obedience to a superior servant, where a servant of full age might have been required to refuse such obedience⁵⁸² on account of obvious danger. In general, these questions are to be left to the jury, especially

⁵⁸⁰ *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Chicago R. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899; *Evans v. American Iron Co.*, 42 Fed. 519. Minor servants are held to assume those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to their youth and inexperience (*Smith v. Irwin*, 51 N. J. Law, 507, 18 Atl. 852).

⁵⁸¹ *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548; *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421; *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455, 21 N. E. 1102 [boy 10, coupling coal cars]; *Luebke v. Berlin Mach. Works*, 88 Wis. 442, 60 N. W. 711 [age 16: for jury]. A boy of 14, presumed to be capable of appreciating danger, yet he is not to be held to the same degree of prudence as a man of mature years (*Kehler v. Schwenk*, 144 Pa. St. 348; 22 Atl. 910). See *Texas, etc. R. Co. v. Brick*, 83 Tex. 598, 20 S. W. 511 [boy 19, with experience, not presumed to be equally responsible with adult]; *Evans v. American Iron & Tube Co.*, 42 Fed. 519; *Norton v. Volzke*, 54 Ill. App. 545. All cases cited in note 578 are to the same effect. *Henderson v. Kansas City*, 177 Mo. 477, 76 S. W. 1045 (1903); *Pursley v. Edge Moor Bridge Works*, 168 N. Y. 589, 60 N. E. 1119 (1900); *Barrow v. Lewis Lbr. Co.*, 14 Ida. 698, 95 Pac. 682 (1908); *Di Bari v. Bishop*, 199 Mass. 254, 85 N. E. 89 (1908); *Naughton v. Laclede Gaslight Co.*, 123 Mo. App. 192, 100 S. W. 1104 (1907); *Shirley v. Abbeville Furniture Co.*, 76 S. C. 452, 57 S. E. 178, 121 Am. S. R. 952 (1907); *Texas, etc. Ry. Co. v. McCoy*, 117 S. W. (Tex. App.) 446 (1909).

⁵⁸² *Turner v. Norfolk, etc. R. Co.*, 40 W. Va. 675, 22 S. E. 83 [wrongful orders of foreman: boy 16]; *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421 [boy 12: obvious danger, ordered outside regular employment]; *Neilon v. Marinette, etc. Paper Co.*, 75 Wis. 579, 44 N. W. 772 [ditto: boy 14]; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140 [boy 13]; *Robertson v. Cornelson*, 34 Fed. 716. See *Gartside Coal Co. v. Turk*, 147 Ill. 120, 35 N. E. 467 [age 18: only three days at work; express orders]. *Texas, etc. Ry. Co. v. Sherman*, 87 S. W. (Tex. App.) 887, rev'd, 99 Tex. 571, 91 S. W. 561 (1906), (a machinist's helper, 17 years old, injured by overexertion in lifting a heavy piece of iron onto a lathe by order of experienced workman, whom he was under obligation to obey, is not precluded, as matter of law, from recovery; the law does not require him in doubtful matters, at the peril of his discharge, to assume the risk by disobeying an order, it not appearing that he could tell by inspection it was too heavy or that he was capable of understanding the danger. *Contra*, in case of an experienced adult, by the same court, *Haywood v. Railroad Co.*, 12 Tex.

as to mere children.⁵⁸³ The rule holding masters responsible for risks assumed under their coercion is peculiarly applicable in favor of minors, and especially young children.⁵⁸⁴ Moreover (although we do not find that the point has been judicially determined), we entertain no doubt that the coercion of a parent or guardian, exercised in favor of the master, has the same effect, in the case of a minor, as the coercion of the master himself. The master of a minor servant is charged with notice of such lack of capacity as is usual among minors of the same age,⁵⁸⁵ so far as his age is or ought to be known by the master,⁵⁸⁶ and the burden of proving that the minor

Ct. Rep. 295 (not officially reported); *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490 (1890).

⁵⁸³ *McCarragher v. Rogers*, 120 N. Y. 526, 24 N. E. 812 [boy 13]; *Heavey v. Hudson*, etc. Paper Co., 57 Hun, 339, 10 N. Y. Supp. 585 [boy 15].

⁵⁸⁴ *Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535 [ditto: boy 16, obeying unwillingly]; *Kehler v. Scwenk*, 151 Pa. St. 505, 25 Atl. 130 [boy 14: unwilling; urged; for jury]. Where a boy of 10 is under control of full-grown men, jury may infer compulsion (*Brazil Coal Co. v. Gaffney*, 119 Ind. 445, 21 N. E. 1102). See also *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152, 23 N. E. 829 [boy 12: dull; ordered to be quick].

⁵⁸⁵ In an action by an infant for personal injuries received in the course of an employment necessarily attended with danger, instructions should be given to find in his favor, on the ground that he had not assumed the risks so as to require him to exercise ordinary care and caution, unless his age, intelligence and experience were such as to in-

duce a man of ordinary care and prudence to believe him qualified for the employment (*De Lozier v. Kentucky Lumber Co.* [Ky.], 18 S. W. 451; s. p., *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502). Substantially the same rule is stated or implied in all the cases cited under this section.

⁵⁸⁶ *Leistriz v. American Zylonite Co.*, 154 Mass. 382, 28 N. E. 294; *Goff v. Norfolk*, etc. R. Co., 36 Fed. 299. *Jones v. Florence Min. Co.*, 66 Wis. 277, 57 Am. Rep. 269 ("We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of knowledge of the subject, yet if the servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and to do his

servant had any greater capacity than this rests upon the master,⁵⁸⁷ while the burden of proving that he had less, and that the master had notice of the fact, rests upon the servant.

§ 219. Special duties of masters to minors. — It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed.⁵⁸⁸ This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant.⁵⁸⁹ For this purpose, the master must instruct such young servants in their work⁵⁹⁰ and

work with proper care on his part"); 102 Mass. 572; *Sullivan v. India Ryan v. Los Angeles Ice, etc. Co.*, Mfg. Co., 113 Id. 396; *Nashville, etc. R. Co. v. Elliot*, 1 Coldw. 612; *Lynch v. Nurdin*, 1 Q. B. 29. Where the servant is a child of tender years, the master is bound to a high degree of care (*Augusta Factory v. Barnes*, 72 Ga. 217).

⁵⁸⁷ *Gulf, etc. R. Co. v. Jones*, 76 Tex. 350, 13 S. W. 374 [boy 16: brakeman]. Where a child 12 or 13 years of age is employed to do work requiring the exercise of great care and judgment, the employer assumes the burden of proving that the child was in fact competent, if sued for injuries alleged to have resulted from his negligence (*Molaske v. Ohio Coal Co.*, 86 Wis. 220, 56 N. W. 475. See *Wynne v. Conklin*, 86 Ga. 40, 12 S. E. 183 [boy 13: nonsuit error]).

⁵⁸⁸ *Dowling v. Allen*, 74 Mo. 13; *Coombs v. New Bedford Cordage Co.*,

⁵⁸⁹ *Chicago, etc. R. Co. v. Bayfield*, 37 Mich. 205 [minor, hired as common laborer, and ordered to act as brakeman]; followed in *Jones v. Lake Shore R. Co.*, 49 Mich. 573.

⁵⁹⁰ *Hill v. Gust*, 55 Ind. 45; *Keller v. Gaskill*, 9 Ind. App. 670, 36 N. E. 303; *Glover v. Dwight Mfg. Co.*, 148 Mass. 22, 18 N. E. 597 [girl 13, cleaning wheel]; *Sciolina v. Erie Preserving Co.*, 7 N. Y. App. Div. 417, 39 N. Y. Supp. 916. Plaintiff having been injured in cleaning a wheel, to which, in order to clean it, it was necessary to impart a peculiar motion, the question of her due care is for the jury, she having testified that she attempted to clean the wheel, and give the required movement, as she had seen her fellow servants do (*Glover v. Dwight Mfg. Co.*, 148

warn them against the dangers to which it exposes them,⁵⁹¹ and he must put this warning in such plain lan-

Mass. 22, 18 N. E. 597). The obligation to instruct does not necessarily follow, as matter of law, from his minority inexperience; it is for the jury (*Atlanta, etc. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763).

⁵⁹¹ *Tagg v. McGeorge*, 155 Pa. St. 368, 26 Atl. 671; *Smith v. Irwin*, 51 N. J. Law, 507, 18 Atl. 852; *Buckley v. Gutta Percha Mfg. Co.*, 41 Hun, 450; *Gamble v. Hine*, 50 Hun, 604, 2 N. Y. Supp. 778; *Louisville, etc. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Hoffman v. Adams*, 106 Mich. 111, 64 N. W. 7 [dangerous horse; no warning]; *May v. Smith*, 92 Ga. 95, 18 S. E. 360 [boy 17: dangerous machinery]; *Nadau v. White River Lumber Co.*, 76 Wis. 120, 43 N. W. 1135 [cog-wheels: boy 19]; *Kaillen v. Northwestern Bedding Co.*, 46 Minn. 187, 48 N. W. 779 [inexperienced by 14: rollers; spikes]; *Wallace v. Standard Oil Co.*, 66 Fed. 260 [inflammable oils: boy 17]. Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment and discretion as is usual among children of the same age, under similar circumstances; and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed; and it is the duty of the employer to so instruct such employees concerning the dangers connected with their employment, which, from their youth and inexperience, they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be

expected of them, avoid injuries (*Cleveland Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466). It is proper to charge that it is the duty of the employer of an ignorant and inexperienced boy of tender years to warn him of all dangers incident to his employment (*Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015). The master is not bound to instruct what to do in case fellow servant is guilty of negligence (*Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969). Compare *Wilson v. Steel-Edge Co.*, 163 Mass. 315, 39 N. E. 1039, where no instruction were asked by servant, nearly 21. Master held not in fault. In *Wolski v. Knapp Co.*, 90 Wis. 178, 63 N. W. 87, there was evidence that the employment was attended by danger not obvious to one unaccustomed to the work, and that deceased, a minor, had no experience, and was not warned of the danger, though testimony for defendant tended to show that he had been cautioned. Held, that the question of defendant's liability was for the jury. *S. P.*, *Armstrong v. Forg*, 162 Mass. 544, 39 N. E. 190. In an action involving the question of negligence in setting an inexperienced person to work on a dangerous machine, a witness, familiar with the working of the machine, may describe what dangers there were about it, and what precautions were necessary to avoid them; may testify that the men usually employed upon it were of mature age, the plaintiff being a young lad; and that, before being set to work, such men were carefully instructed in the use of the machine (*N. Y. Biscuit Co. v. Rouss*, 20 C.

guage as to be sure that they understand it and appreciate the danger.⁵⁹² For it is not enough that he should do his best to make children understand. They must not be exposed to dangers which they do not fully understand in fact.⁵⁹³ Bearing in mind the natural forgetfulness of youth, he must renew this warning from time to time, as may be reasonably necessary.⁵⁹⁴ And if the servant has not capacity enough to understand the warning and appreciate the danger,⁵⁹⁵ or for any other reason does not in

- C. A. 555, 74 Fed. 608). Woodstock 218 Pa. 594, 67 Atl. 867 (1907); Iron Works v. Kline, 149 Ala. 391, 43 So. 362 (1906); Reaves v. An-niston Knitting Mills, 154 Ala. 565, 45 So. 702 (1907); Arkadelphia Lbr. Co. v. Henderson, 84 Ark. 382, 105 S. W. 882 (1907); St. Louis Stove Co. v. Sawyers, 119 S. W. (Ark.) 830 (1909); Florola Sawmill Co. v. Smith, 55 Fla. 447, 46 So. 332 (1908); Railway Co. v. Dangourd, 118 Ill. App. 67; Inland Steel Co. Yedinak, 87 N. E. (Ind.) 229 (1909); Hardy v. Chicago, etc. Ry. Co., 139 Ia. 314, 115 N. W. 8, 19 L. R. A. (N. S.) 997 (1908); Chess, etc. Co. v. Gohagan, 32 Ky. L. Rep. 372, 105 S. W. 890 (1907); Rossey v. Lawrence *et al.*, 123 La. 1053, 49 So. 704 (1909); Chambers v. Wood-bury Mfg. Co., 106 Md. 496, 68 Atl. 290, 14 L. R. A. (N. S.) 383 (1907); Donovan v. Chase-Shawmut Co., 201 Mass. 357, 87 N. E. 580 (1909); Marklewitz v. Olds Motor Works, 152 Mich. 113, 115 N. W. 999 (1908); Pinney v. King, 98 Minn. 160, 107 N. W. 1127 (1906); Disalets v. International Paper Co., 74 N. H. 440, 69 Atl. 263 (1908); Stolarz v. Algonquin Co., 71 Atl. (N. J.) 57 (1908); Pelow v. Oil Well Supply Co., 194 N. Y. 64, 86 N. E. 812 (1909); Westman v. Wind R. Lbr. Co., 50 Ore. 137, 91 Pac. 478 (1908); Zearfoss v. Norway Iron, etc. Co., 218 Pa. 594, 67 Atl. 867 (1907); Monzi v. Washburn Wire Co., 72 Atl. (R. I.) 394 (1909); Leopard v. Laurens, etc. Mills, 81 S. C. 15, 61 S. E. 1029 (1908); Gulf, etc. Ry. Co. v. Jackson, 109 S. W. (Tex. App.) 478 (1908); Wikstrom v. Preston Mill Co., 48 Wash. 164, 93 Pac. 213 (1908); Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S. E. 200 (1909); Rahles v. Thompson Mfg. Co., 137 Wis. 506, 118 N. W. 350, 119 N. W. 289 (1908); Railway Co. v. Hartell, 157 Fed. 667, 85 C. C. A. 335 (1907).⁵⁹² Honlahan v. New American File Co., 17 R. I. 141, 20 Atl. 268; Reisert v. Williams, 51 Mo. App. 13; see Coombs v. New Bedford Cordage Co., 102 Mass. 572 [boy, less than 14, set to work near unguarded cogs]. Sufficiency of warning; held, for the jury to decide (Rummell v. Dilworth, 131 Pa. St. 509, 19 Atl. 346). Warning held sufficient (Pratt v. Prouty, 153 Mass. 333, 26 N. E. 1002).
- ⁵⁹³ Instructions alone are not enough. The child "must understand, in fact" (Hickey v. Taaffe, 105 N. Y. 26, 36, 12 N. E. 286).
- ⁵⁹⁴ Repeated warnings held sufficient (Tinkham v. Sawyer, 153 Mass. 485, 27 N. E. 6; Chess, etc. Mfg. Co. v. Gohagan, *supra*).
- ⁵⁹⁵ Taylor v. Wootan, 1 Ind. App. 188, 27 N. E. 502.

fact understand it,⁵⁹⁶ the master will be liable for any injury which such servant may suffer in consequence, if continued at such work. But the master is not required to point out dangers which are known or must be obvious to and fully appreciated by the servant, after making due allowance for his youth.⁵⁹⁷ Generally, this question is for the jury.⁵⁹⁸ When, by statute, the employment of

⁵⁹⁶ *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Chicago Brick Co. v. Reinneiger*, 140 Ill. 334, 29 N. E. 1106.

⁵⁹⁷ *Ogley v. Miles*, 139 N. Y. 458, 34 N. E. 1059 [buzz-saw: nonsuit]; *Buckley v. Gutta-Percha Mfg. Co.*, 113 N. Y. 540, 21 N. E. 717 [boy of 12]; *Gordon v. Reynolds' Card Co.*, 47 Hun, 278 [boy 18: several months' experience]; *Mackin v. Alaska Refrigerator Co.*, 100 Mich. 276, 58 N. W. 999; *Prentiss v. Kent Mfg. Co.*, 63 Mich. 478, 30 N. W. 109. Master need not point out wholly improbable dangers (*Briggs v. Newport News & M. V. Co.* [Ky.], 24 S. W. 1069). *Cronin v. Columbia Mfg. Co.*, 75 N. H. 319, 74 Atl. 180, 29 L. R. A. (N. S.) 111, annotated (1909), (a boy 14 years old, of average intelligence, whose duties required him to ride in an elevator, may be presumed by the master to know of the danger of his body being caught between the elevator and a floor if he put his body partly out of the cage, and therefore is not required to warn him of such danger). The cases are practically unanimous on the point that if the minor knows of the risk, and appreciates the danger, the master is not required to instruct him (*Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 201 (1902); *Beghold v. Auto Body Co.*, 149 Mich. 14, 14 L. R. A. (N. S.) 14, 112 N. W. 601, 14 L. R. A. (N. S.) 609 (1907);

Welsh v. Butz, 202 Pa. 59, 51 Atl. 599 (1902); *Ryon v. Northern Pac. Ry. Co.*, 53 Wash. 279, 100 Pac. 880 (1909). Where the minor states that he understands the work, and there is no reason apparent for doubting that he does (*King v. Woodstock Iron Co.*, 143 Ala. 632, 42 So. 27; s. c., 149 Ala. 391, 43 So. 362 (1906); *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566, 66 N. E. 414 (1902). Nor where the work is of a common character familiar to all, and without complexity (*Whalen v. Rosnosky*, 195 Mass. 545, 81 N. E. 282, 122 Am. St. Rep. 271 (1907). Nor where obvious to one of his age and experience (*Seller v. Friedman, etc. Co.*, 130 Mo. App. 712, 109 S. W. 794 (1908); *Bollington v. Louisville, etc. Ry. Co.*, 30 Ky. Law Rep. 1260, 100 S. W. 850, 8 L. R. A. (N. S.) 850 (1907). But to relieve the master, the minor must not only know of, but appreciate the danger (*Louisiana, etc. Ry. Co. v. Miles*, 82 Ark. 535, 103 S. W. 158, 11 L. R. A. (N. S.) 720 (1906); *Fletcher v. Hyde*, 36 Ind. App. 96, 75 N. E. 9 (1905); *Magone v. Portland Mfg. Co.*, 51 Ore. 21, 93 Pac. 150 (1907)). *Fries v. Am. Lead Pen-cil Co.*, 2 Cal. App. 148, 83 Pac. 173 (1906). See note 29, L. R. A. (N. S.) 111.

⁵⁹⁸ The question whether, from previous experience, he should have comprehended the danger, so that neither warning nor instruction was

young persons in certain dangerous work is prohibited, a person under the prescribed age, who is thus employed, and suffers injury in consequence thereof, cannot be held to have assumed the risk of the master's negligence.⁵⁹⁹ A minor must not be employed in dangerous work against the will of his parent or guardian.⁶⁰⁰

§ 219a. Inexperienced servants, etc. — The principles governing the employment of minors are, to a large degree, also applicable to the employment of inexperienced, ignorant, feeble or incompetent servants.⁶⁰¹ A master

necessary, is for the jury (*Chopin v. Badger Paper Co.*, 83 Wis. 192, 53 N. W. 452).

⁵⁹⁹ *Hickey v. Taafe*, 32 Hun, 7; reversed only on the ground that the statute did not apply to that particular business, 99 N. Y. 204. An employee in a factory may waive the protection afforded by L. 1892, c. 673, § 8, which provides that "no woman under 21 years of age shall be allowed to clean machinery while in motion" (*De Young v. Irving*, 5 N. Y. App. Div. 499, 38 N. Y. Supp. 1089). *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 801 (1903), (there can be no assumption of risk by a child for whose protection a statute was designed); *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755 (1905). But see *Fitzgerald v. Elsas Paper Co.*, 30 Misc. 438, 62 N. Y. Supp. 597 (1900); *Inland Steel Co. v. Yedinak*, 87 N. E. (Ind.) 229 (1909); *Madden v. Wilcox*, 91 N. E. (Ind.) 933, rev'g 88 N. E. (Ind.) 871 (1910).

⁶⁰⁰ *Hamilton v. Galveston, etc. R. Co.*, 54 Tex. 556; *Goff v. Norfolk, etc. R. Co.*, 36 Fed. 299. Where a party knowingly engages a minor in a dangerous employment, against the known will of the father, and

the minor is injured in such employment, such party is responsible to the father for the consequent loss of the services of the minor (*Taylor v. Chesapeake, etc. R. Co.*, 41 W. Va. 704, 24 S. E. 631). Where a minor is killed in a dangerous employment, the mere fact that he was employed without his father's consent does not render the master liable to the father for the loss of the minor's services, but the employment must have been against the will of the father (*Toledo, etc. R. Co. v. Trimble*, 8 Ind. App. 333, 35 N. E. 716). *Gulf, etc. Ry. Co. v. Redeker*, 67 Tex. 190, 2 S. W. 527, 60 Am. Rep. 20 (1886), ("We are of the opinion that where one knowingly engages a minor in a dangerous employment without the father's consent, and the minor is injured in such employment, he is responsible to the father for any consequent loss of the son's services to him"); *Texas, etc. Ry. Co. v. Brick*, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675 (1892).

⁶⁰¹ Where a servant is warned of the dangerous character of machinery, and understands the danger, he cannot recover for any injury; but, in determining his understanding, matters of youth, intelligence, inexperience, and the like, are to be

having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced⁶⁰² or ignorant,⁶⁰³ to avoid putting the feeble to work too heavy for their strength,⁶⁰⁴ and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance or inexperience on the part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant explicit warning of the danger, and not allow him to undertake the work without a full explanation of its perils.⁶⁰⁵ Especially is this duty of warning incum-

considered (*King v. Ford River Lumber Co.*, 93 Mich. 172, 53 N. W. 10). 72 Miss. 862, 18 So. 415).

See § 218, note 578, *ante*.

⁶⁰² *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810 [use of elevator]; *Campbell v. Eveleth*, 83 Me. 50, 21 Atl. 784 [lath saw]; *Cartter v. Cotter*, 88 Ga. 286, 14 S. E. 476 [unsafe machinery]; *Jones v. Florence Mining Co.*, 66 Wis. 268; *Greenberg v. Whitcomb Co.*, 90 Wis. 225, 63 N. W. 93; *Reynolds v. Boston & M. R. Co.*, 64 Vt. 66, 24 Atl. 134 [brakeman: double deadwoods]; *Louisville, etc. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594 [same]; *Hungerford v. Chicago, etc. R. Co.*, 41 Minn. 444, 43 N. W. 324 [brakeman coupling with improper draft-iron]; *Missouri Pac. R. Co. v. White*, 76 Tex. 102, 13 S. W. 65 [peculiar couplings]; *Texas Mex. R. Co. v. Douglas*, 73 Tex. 325, 11 S. W. 333. A railroad company is bound to instruct a brakeman, whose experience in the business has been only five days, as to the proper mode to make the coupling of foreign cars supplied with coupling apparatus unlike its own, in using which the danger is greater than in using its own, and which cannot with safety be coupled in the same man-

ner (Illinois Cent. R. Co. v. Price, 72 Miss. 862, 18 So. 415).

⁶⁰³ *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941 [common laborer at excavation not instructed to erect supports to tunnel]; *Roth v. Northern Pac. Lumber Co.*, 18 Ore. 205, 22 Pac. 842 [unskilled servant]; *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306 [concealed danger]; *Whitelaw v. Memphis, etc. R. Co.*, 16 Lea, 391, 1 S. W. 37 [young man 19].

⁶⁰⁴ Defendant guilty of negligence in setting plaintiff to work at the special task, knowing that he lacked the strength and skill necessary to do it safely (*Yeaman v. Noblesville Foundry Co.*, 3 Ind. App. 521, 30 N. E. 10).

⁶⁰⁵ *Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464 [dynamite]; *Rummell v. Dillworth*, 111 Pa. St. 343, 2 Atl. 355; *Gates v. State*, 128 N. Y. 221, 28 N. E. 373; *Louisville, etc. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Davies v. England*, 10 Jur. (N. S.) 1235 [cutting diseased flesh]; *Spelman v. Fisher Iron Co.*, 56 Barb. 151 [new explosive]; *Smith v. Oxford Iron Works*, 42 N. J. Law, 467; *Lofrano v. N. Y. & Mt. Vernon*

bent upon the master when the risks to be encountered are unusual or special.⁶⁰⁶ These obligations are personal to the master.⁶⁰⁷ On the other hand, the master is not charged with these duties, without proof of notice of the facts;⁶⁰⁸ nor if the risks are known or perfectly obvious

Water Co., 55 Hun, 452, 8 N. Y. Supp. 717 [dynamite]; Evansville, etc. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 Id. 511 [unsafe condition of road]; Pullman Palace Car Co. v. Harkins, 5 C. C. A. 326, 55 Fed. 932; see Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368. See Ryan v. Los Angeles Storage Co., 112 Cal. 244, 44 Pac. 471, for example of sufficient evidence. Nor to undertake it at all if he is too young to realize the danger. Compare Mitchell v. Comanche Cotton Oil Co., 113 S. W. (Tex. App.) 158 (1908), and Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 S. E. 998 (1907).

⁶⁰⁶ A railroad company which continues to use a brake which is dangerous because it is liable to throw off suddenly, after a safer one is discovered, is bound to warn an inexperienced brakeman of its danger (Louisville, etc. R. Co. v. Binion, 107 Ala. 645, 18 So. 75). An inexperienced brakeman will not be held guilty of contributory negligence in obeying an order to couple cars supplied with coupling appliances different from those he had been instructed in regard to, on the theory that he must have seen the difference, and that their difference was sufficient warning of the increased danger (Illinois Cent. R. Co. v. Price, 72 Miss. 862, 18 So. 415). And see further, § 203, *ante*. Young or inexperienced servant, unless instructed, does not assume the risks of the service (Fries v. Am., etc. Pencil Co., 2 Cal. App. 148, 83 Pac. 173 (1905);

Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 S. E. 998 (1907); James v. Rapids Lbr. Co., 50 La. Ann. 717, 23 So. 469, 44 L. R. A. 69 (1898); Drapeau v. Inter. Paper Co., 96 Me. 299, 52 Atl. 647 (1902); Lehto v. Atlantic Min. Co., 152 Mich. 412, 116 N. W. 405, 117 N. W. 187 (1908); Coleman v. Perry *et al.*, 28 Mont. 1, 72 Pac. 42 (1903); Welsh v. Butz, 202 Pa. St. 59, 51 Atl. 591 (1902); Texas, etc. Ry. Co. v. Geiger, 118 S. W. (Tex. App.) 179 (1909); Producers' Oil Co. v. Barnes, 120 S. W. (Tex. App.) 1023 (1909). A young or inexperienced servant who acts under compulsion, as of commands or threats, does not ordinarily assume the risk (Hinckley v. Horazdowsky, 133 Ill. 359, 24 N. E. 421, 23 Am. St. Rep. 618, 8 L. R. A. 490 (1890); Beardsley v. Murray Iron Wks. Co., 129 Ia. 675, 106 N. W. 180 (1906). There can be no assumption of risk by a child for whose protection a statute was designed (Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 801 (1903); Sterling v. Union Carbide Co., 142 Mich. 284, 105 N. W. 755 (1905); Nairn v. National Biscuit Co., 120 Mo. App. 144, 96 S. W. 679 (1906).

⁶⁰⁷ Master personally bound to instruct, in use of dangerous machinery, servant known to him to be unskilled; and everyone giving such instruction is a vice-principal (Brennan v. Gordon, 118 N. Y. 489 [elevator]).

⁶⁰⁸ Gorman v. Minneapolis, etc. R. Co., 78 Iowa, 509, 43 N. W. 303.

to the servant,⁶⁰⁹ and he is capable of appreciating them; nor is he bound to give a detailed description of the risks to be encountered or to anticipate every possible risk.⁶¹⁰ The master is not liable for injuries caused *solely* by the inexperience or ignorance of the servant since it is not culpable to employ such a servant.⁶¹¹

§ 220. Servant's knowledge of master's personal defects. — A servant's knowledge of his master's character and habits does not protect the master from liability for the *direct* consequences of his own negligence. For these he is liable, no matter how well he is known by his servants to be of negligent habits. Nor, indeed, does any knowledge of his general negligence deprive his servants

Whether the master, at the time of engaging a servant to work on dangerous machinery, or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts of the probability that he was not, nothing being said on the subject by either party, is a question for the jury (May v. Smith, 92 Ga. 95, 18 S. E. 360). Ignorance by a servant of a malady which he had, and which rendered certain labor dangerous, and knowledge of it by his master, is not sufficient to entitle the servant to recover where the master places him at such labor; it being necessary to show further that the master did not know that the servant was ignorant of it (Crowley v. Appleton, 148 Mass. 98, 18 N. E. 675).

McCue v. National Starch Co., 142 N. Y. 106, 36 N. E. 809 [undirected use of machinery where danger was obvious]; Melzer v. Peninsular Car Co., 76 Mich. 94, 42 N. W. 1078; Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; Townsend v. Langles, 41 Fed. 919; International, etc. R. Co. v. Arias, 10 Tex. Civ. App. 190, 30 S. W. 446; Dickenson v. Vernon, 77 Conn. 537, 60 Atl. 270 (1905); Cons. Stone Co. v. Summit, 152 Ind. 297, 53 N. E. 235 (1899); Fisher v. Prairie, 109 Pac. (Okla.) 514 (1910); Rice v. Van Why, 111 Pac. (Colo.) 599 (1910); McMann v. Illinois, etc. Co., 140 Ill. App. 427 (1909); L. T. Dickason Coal Co. v. Liddil, 94 N. E. (Ind. App.) 411 (1911).

⁶¹⁰ Thompson v. Allis Co., 89 Wis. 523, 62 N. W. 527; Foster v. Pusey, 8 Del. 168, 14 Atl. 545.

⁶⁰⁹ So held where servant knew (White v. Wittmann Lithographic Co., 131 N. Y. 631, 30 N. E. 236; Coullard v. Tecumseh Mills, 151 Mass. 85, 23 N. E. 731 [servant familiar]; Yeager v. Burlington, etc. R. Co., 93 Iowa, 1, 61 N. W. 215;

⁶¹¹ Where an inexperienced man enters on the duties of a conductor of a railroad train, he cannot recover for damages resulting *merely* from his inexperience, though the company knew of his want of skill when

of remedy for the proximate, though indirect, results of his negligence in particular things. It is only where a servant knows that a particular duty has not been performed, has no reason to expect that it will be, and does not insist that it shall be, that he can be deprived of the right to complain of its neglect; and even this is usually a question of fact, not of law.⁶¹² Therefore a servant is not affected in his rights by his knowledge that his master is in the habit of employing incompetent servants, or of furnishing dangerous materials to his workmen, or of omitting to provide adequate safeguards, or of neglecting that part of the work to which he personally attends. He has, none the less, a right to presume that the master will act prudently in his own case.⁶¹³

§ 221. Servant's duty to warn and complain. — As a general rule, servants owe to their masters the duty of

it employed him (*Alexander v. Louisville, etc. R. Co.*, 83 Ky. 589). See also §§ 218, 219, *ante*.

⁶¹² *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 275.

⁶¹³ "The brakeman was in the employ of the Texas and Pacific Railway Co. at Shreveport, Louisiana, which company habitually received from the Cotton Belt Railroad Company, without inspecting them, cars to be handled in the yard of the Texas and Pacific Company. In the course of his employment the plaintiff undertook to uncouple two oil tank cars, received from the Cotton Belt Railroad, then standing in the yard of the Texas & Pacific Company, and, on account of a defect in the coupling of the cars he was injured. To his claim for damages the railroad company pleaded that he had assumed the risk of injury from such cause because of the fact that it habitually received such cars without inspection." In disposing of the

question the court said: "Indeed the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employee to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employee knew or by diligence would have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated, the trial court not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles" (*Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665; *contra*, but unsound, *Gulf, etc. Ry. Co. v. Turner*, 99 Tex. 548, 91 S. W. 562 (1906)).

giving notice of circumstances which endanger their own safety; and they ought to complain of defects in materials and instrumentalities of their work,⁶¹⁴ defects in their fellow servants⁶¹⁵ or insufficiency of their numbers.⁶¹⁶ They should ask that these defects be remedied. And if they fail to do so, they are usually considered to be guilty of contributory negligence,⁶¹⁷ or of having assumed the risk. This duty of warning, however, does not extend to

⁶¹⁴ *Watts v. Boston Towboat Co.*, 161 Mass. 378, 37 N. E. 197 [grating and cover badly worn]; *Keenan v. Edison Electric Co.*, 159 Mass. 379, 34 N. E. 366 [no guard, as required by statute; no complaint for two months]; *N. Y., Lake Erie, etc. R. Co. v. Lyons*, 119 Pa. St. 324, 13 Atl. 205; *Patterson v. Pittsburgh, etc. R. Co.*, 76 Pa. St. 389; *Illinois Central R. Co. v. Jewell*, 46 Ill. 99; *Toledo, etc. R. Co. v. Eddy*, 72 Id. 138; *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Consol. Mining Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610; *Chicago Coal Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Hewitt v. Flint, etc. R. Co.*, 67 Mich. 61; *Kroy v. Chicago, etc. R. Co.*, 32 Iowa, 357; *Muldowney v. Ill. Central R. Co.*, 39 Id. 615; *Youll v. Sioux, etc. R. Co.*, 66 Id. 346, 23 N. W. 736.

⁶¹⁵ *Kansas Pac. R. Co. v. Peavey*, 29 Kans. 169; *Hatt v. Nay*, 144 Mass. 186; approving *Davis v. Detroit, etc. R. Co.*, 20 Mich. 105 [conductor injured through carelessness of engineer, who became careless and incompetent, and conductor knowing it did not report him]; and see other cases to same effect, § 209, *ante*. A servant assumes all dangers arising from the known incompetency or unskillfulness of a fellow servant, which he does not complain of or make known to his master (*Latre-*

mouille v. Bennington, etc. R. Co., 63 Vt. 336, 22 Atl. 656). *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185, rev'd, 215 Ill. 327, 75 N. E. 900 (1905), (servant is only bound to consider defects and dangers discovered with reference to his own safety, he must give notice to the master); *Louisville, etc. Ry. Co. v. Kempner*, 147 Ind. 561, 47 N. E. 214 (1897); *Wexler v. Salisbury*, 91 Minn. 308, 98 N. W. 95 (1904); *Johnson v. Devoe Snuff Co.*, 62 N. J. L. 417, 41 Atl. 936 (1898); *Cerrillos Coal Co. v. Deserant*, 9 N. M. 49, 49 Pac. 807 (1897); *Fritz v. Salt Lake, etc. Co.*, 18 Utah, 493, 56 Pac. 90 (1899); *Roth v. Eccles*, 28 Utah, 456, 79 Pac. 918 (1905); *Oliver v. Ohio, etc. Ry. Co.*, 42 W. Va. 703, 26 S. E. 444 (1896); *Evans v. Eastman Kodak Co.*, 129 App. Div. 768, 113 N. Y. Supp. 986 (1909); *Whilsett v. Wellington Starch Co.*, 145 Ill. App. 631 (1908).

⁶¹⁶ A railroad employee assumes the risk of collisions at a crossing having no watchman, and knowing its dangers, if he makes no complaint in regard to its dangers and the necessity of keeping a watchman there (*Rumsey v. Delaware, etc. R. Co.*, 151 Pa. St. 74, 25 Atl. 37).

⁶¹⁷ *Williams v. St. Louis, etc. R. Co.*, 119 Mo. 316, 24 S. W. 782 [spiral spring, concealed in grass, grown over track; no complaint].

defects and dangers of which the master is already well aware,⁶¹⁸ unless they are of such a nature that, in the absence of complaint, the master may reasonably assume that the servant is content to take the risk of them.⁶¹⁹ They also owe a duty of warning their masters of defects in themselves, which make the work dangerous to them.⁶²⁰ Thus, a servant who is set to do work to which he is unaccustomed, and which he does not understand, ought to inform his master of the fact;⁶²¹ and if, for want of such warning, he is kept at work for which he is unfit, and suffers injury thereby, he is himself in fault, and cannot generally recover damages. Still more is this proper, where the servant assures the master that he is competent, when he is not.⁶²² But, in a few large establishments (it is commonly reported) it is the rule to discharge forthwith any employee who makes a complaint. On proof of such a practice we cannot doubt that every court would hold an injured servant relieved from the duty of complaint, and, furthermore, that such employers

⁶¹⁸ Where servants of railroad company superior to plaintiff knew of defects in the engine, it is no defense that plaintiff, though knowing of them, failed to inform the company (*Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 So. 733).

⁶¹⁹ See § 211, *ante*.

⁶²⁰ It is one of the general implied conditions of every contract for service with an adult person that the servant is competent to discharge the duties for which he is employed (*Union Pac. R. Co. v. Estes*, 37 Kans. 715, 16 Pac. 131).

⁶²¹ *Whittaker v. Coombs*, 14 Ill. App. 498. But the general rule must be born in mind that the master and not the servant assumes any new or additional risk, not obvious, when the servant is put to work outside his employment and has no knowl-

edge of such risks and has given his employer no adequate cause to believe he has, unless he is duly warned. See § 201, and notes.

⁶²² Plaintiff represented to defendant that he was acquainted with and skilled in the use of giant powder in blasting, and was employed to use the same in his work at an increased price. Held, that plaintiff from his own negligence in undertaking to stir the material in the cap, without first informing himself if it could safely be done, was not entitled to recover (*Ray v. Jeffries*, 86 Ky. 367, 5 S. W. 867). An untruthful statement, made by a servant when he enters upon employment, that he is accustomed to such work, relieves the master from the duty of explaining the dangers ordinarily incident, but does not qualify his obligation

would be charged with personal notice of all defects which, but for this tyrannous rule, would probably have come to their knowledge. Failure to give warning of dangers unknown to the master, which he could have guarded against if warned, is contributory negligence.⁶²³ Warnings should be given or complaints made to some superior officer, and not to a mere fellow servant on an equal footing, nor to one known not to have charge of such matters.⁶²⁴ But they may be given to any superior whose duty it is to receive and forward such warnings to the master; although he is not empowered to repair.⁶²⁵ In cases of extreme danger, when the complaining servant knows that his complaint has not been attended to, he

to furnish reasonably safe appliances (Steen v. St. Paul, etc., R. Co., 37 Minn. 310, 34 N. W. 113).

⁶²³ Harrison v. Detroit, etc. R. Co., 79 Mich. 409, 44 N. W. 1034.

⁶²⁴ Chesapeake, etc. R. Co. v. McDowell (Ky.), 24 S. W. 607.

⁶²⁵ Pieart v. Chicago, etc. R. Co., 82 Iowa, 148, 47 N. W. 1017 [brakeman to yardmaster]; Louisville, etc. R. Co. v. Kenley, 92 Tenn. 207, 21 S. W. 326 [brakeman to conductor]. See Burch v. Southern Pac. Co., 104 Pac. (Nev.) 225 (1909); Berglund v. Ill., etc. Ry. Co., 109 Minn. 317, 123 N. W. 928 (1908), *contra*, United Zinc Co. v. Wright, 156 Fed. 571, 84 C. C. A. 337 (1907); Burgess v. Humphrey Book Case Co., 156 Mich. 345, 120 N. W. 790 (1909); Cicalese v. Lehigh Valley Ry. Co., 69 Atl. (N. J.) 166 (1908); Thomas v. Bellamy, 126 Ala. 253, 28 So. 707 (1900), (notice by servant to his foreman, not charged with making repairs, held insufficient); Odin Coal Co. v. Tadlock, 119 Ill. App. 319, *aff'd*, 216 Ill. 624, 75 N. E. 332 (1905), (notice need not be by direct communication to the master

but may be through intermediate servants whose duty it is to communicate it to the one authorized to make or order repairs); Gulf, etc. Ry. Co. v. Garren, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939 (1903), (notice by fireman to engineer of loose step on the engine not sufficient, in absence of evidence that he had the power to employ and discharge); Industrial Lbr. Co. v. Bivens, 105 S. W. (Tex. App.) 831 (1907), (notice to foreman held sufficient); Stokes v. Barber Asphalt Pav. Co., 134 App. Div. 363, 119 N. Y. Supp. 37 (1909), (where the superintendent had authority to stop, start and repair machine, and to hire and discharge employees, his authority to receive notice of defects and promise to repair the same may be inferred); Ligon v. John A. Beek Salt Co., 43 Pa. Super. Ct. 583 (1910), (complaint of elevator being out of order is sufficiently made if given to general superintendent of plant); Poli v. Numa Block Coal Co., 127 N. W. (Ia.) 1105 (1910), (notice by miner to pit boss of insufficient covering to cage held sufficient).

should renew it to the master or to the highest agent that he can conveniently reach.⁶²⁶

§ 222. Burden of proof. — The servant must affirmatively prove the master's negligence, and that it was the proximate cause of the injury.⁶²⁷ The burden of proving that the master had failed to establish or enforce proper rules,⁶²⁸ or that instrumentalities were defective in quality or quantity,⁶²⁹ or that a fellow servant was incompetent,⁶³⁰ or that the force of servants was inadequate,⁶³¹ and that the master is chargeable with notice of such defects,⁶³²

⁶²⁶ *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577.

⁶²⁷ A master is liable for an injury to his servant caused by the master's negligence and the concurrent negligence of a fellow servant, but the burden is on the plaintiff to show that the master's negligence is the proximate cause of the injury (*Union Pac. R. Co. v. Callaghan*, 56 Fed. 988, 6 C. C. A. 205).

⁶²⁸ *Potter v. N. Y. Central, etc. R. Co.*, 136 N. Y. 77, 32 N. E. 603.

⁶²⁹ So held as to defects in materials (*Chicago, etc. R. Co. v. Howard*, 45 Neb. 570, 63 N. W. 872; *Mulligan v. Crimmins*, 75 Hun, 578, 27 N. Y. Supp. 819). In an action by a servant for injuries caused by the breaking of a defective machine, the refusal of the court to instruct, as requested by defendant, that he was not bound to explain the cause of the accident, is not ground for complaint, when it does instruct that the breaking of the machine was no evidence of neglect on the part of the defendant (*Ouillette v. Overman Wheel Co.*, 162 Mass. 305, 38 N. E. 511). So as to insufficiency of supply (*Potter v. N. Y. Central R. Co.*, 136 N. Y. 77, 32 N. E. 603).

⁶³⁰ § 190, *ante*. A brakeman injured in coupling cars has the burden of

proving that the person in charge of the switch engine was incompetent as an engineer (*Ohio, etc. R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702, 37 Id. 546).

⁶³¹ *Potter v. N. Y. Central R. Co.*, 136 N. Y. 77, 32 N. E. 603.

⁶³² So held as to appliances (*Beaulieu v. Portland, etc. Co.*, 48 Me. 291; *Columbus, etc. R. Co. v. Webb*, 12 Ohio St. 475; *Mansfield Coal, etc. Co. v. McEnery*, 91 Pa. St. 185; *Allen v. New Gas Co.*, L. R. 1 Ex. Div. 251; *State v. Malster*, 57 Md. 287; *East Tenn., etc. R. Co. v. Stewart*, 13 Lea, 432; *Nelson v. Du Bois*, 11 Daly, 127; *Evansville, etc. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355 [defective engine]; *Deane v. Roaring Fork Light Co.*, 5 Colo. App. 521, 39 Pac. 346 [water valve]). But in Alabama, the burden is not on plaintiff to prove that defendant had knowledge of the imperfection of brakes on a train, whose defects, he alleges, caused his accident (*Louisville, etc. R. Co. v. Coulton*, 86 Ala. 129, 5 So. 458. The burden is on plaintiff of showing that his employer was negligent in hiring a fellow servant whose incompetency caused plaintiff's injuries (*Roblin v. Kansas City, etc. R. Co.*, 119 Mo. 476, 24 S. W. 1011; *St. Louis Press*

rests upon the servant. In most American courts it is held that, the plaintiff having proved the master to be in fault, the burden of proving that the plaintiff also had notice of such defect, and commenced or continued his service with such notice, rests upon the defendant.⁶³³ This fact being proved, it is then for the plaintiff to show, if he can, that the defendant induced him to continue his work by promising to remedy the defect,⁶³⁴ or, in some other way, to excuse his continuance without assuming the risk. In England,⁶³⁵ it is held that the servant must affirmatively prove that he did not himself know of the

Brick Co. v. Kenyon, 57 Ill. App. 640; Southern Cotton Oil Co. v. De Vond (Tex. Civ. App.), 25 S. W. 43; McCharles v. Horne Silver Co., 10 Utah, 470, 37 Pac. 733). See more fully on this point § 190, *ante*.

⁶³³ Cowles v. Richmond & D. R. Co., 84 N. C. 309 [brakeman]. So in Massachusetts, under "Employers' Liability Act" (Connolly v. Waltham, 156 Mass. 368, 31 N. E. 302). So under N. Y. statute requiring fire escapes (Gorman v. McArdle, 67 Hun, 484, 22 N. Y. Supp. 479).

⁶³⁴ This (which was part of our old section 99) was accepted as sound law in Greenleaf v. Ill. Central R. Co., 29 Iowa, 14; and yet, in Belair v. Chicago, etc. R. Co., 43 Id. 662, the court seems to have held that it was incumbent on the plaintiff to show by a preponderance of testimony, his want of knowledge and of means of knowledge, of the defect.

⁶³⁵ In Griffiths v. London, etc. Docks Co. (L. R. 12 Q. B. Div. 493, *aff'd*, 13 Id. 259), the "statement of claim" was held insufficient for want of an allegation that the danger was known to the master and unknown to the servant. On this ground, Seymour v. Maddox (16 Q. B. 326) may be sustained in Eng-

land. On the merits, we think it could not be. It was questioned in Ryan v. Fowler, 24 N. Y. 410. Neither case is good law in the United States, except in Indiana. See also Chicago, etc. Coal Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857; Buzzell v. Laconia Mfg. Co., 48 Me. 113; Louisville, etc. R. Co. v. Orr, 84 Ind. 50. Mr. Beven, page 623, cites the case of Griffiths v. London, etc. Docks Co., as authority for the proposition that the statement of the plaintiff's claim must contain averments of two facts: "That the danger which caused the accident was known to the master and unknown to the servant," without which there could be no cause of action for "wrongful condition of machinery on the premises on which the defendant is to act." But the learned writer adds: "If, however, the actionable wrong is the personal negligence of the master, or may be so construed, there is nothing to prevent the servant from recovering as if he were a stranger; and knowledge of the servant of the danger he incurs by working with a personally negligent master must be set up by pleading contributory negligence."

defect, or, if he did, that some fact existed which would justify him in going on with the work at the risk of the master. In courts adhering to the general American rule, which puts the burden of proving contributory fault upon the defence, the servant is not required to prove affirmatively his freedom from fault; but the master must prove that the servant was in fault if he relies upon this as a defence;⁶³⁶ and it is for the master to prove, if he can, that the servant understood and appreciated extraordinary risks, due to the master's negligence.⁶³⁷ In the minority of States the burden of proof is upon the servant.⁶³⁸ But everywhere it is for the master to prove

⁶³⁶ Thus it is held in a majority of the states that in an action by a servant against his master, the burden of proving contributory negligence is on defendant (*Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745; *Johnston v. Richmond, etc. R. Co.*, 95 Ga. 685, 22 S. E. 694; *Jones v. Malvern Lumber Co.*, 58 Ark. 125, 23 S. W. 679; *Comer v. Consol. Mining Co.*, 34 W. Va. 533, 12 S. E. 476; *Buckner v. Richmond, etc. R. Co.*, 72 Miss. 873, 18 So. 449; *Missouri, etc. R. Co. v. Hogan*, 88 Tex. 679, 32 S. W. 1035; *Houston, etc. Ry. Co. v. Anglin*, 99 Tex. 350, 86 S. W. 708, 122 Am. St. Rep. 597 (1905).

⁶³⁷ When the servant shows that his injury was in consequence of an increased risk, not incident to his ordinary employment, but growing out of the master's negligence, the burden of proof is on the master to show that the servant understood the increased dangers (*Norfolk, etc. R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849; *Mobile, etc. Ry. Co. v. George*, 94 Ala. 199, 10 So. 145 (1891); *Magee v. North Pac., etc. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69 (1889); *Preston v. Central, etc. Ry. Co.*, 84 Ga. 588, 11 S. E.

143 (1890); *Chicago, etc. Ry. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515 (1890); *Cristinelli v. Saginaw Min. Co.*, 154 Mich. 423, 117 N. W. 910 (1908); *Rolseth v. Smith*, 38 Minn. 14, 35 N. W. 565, 8 Am. St. Rep. 567 (1887); *Johnson v. Oregon Short L. Ry. Co.*, 23 Ore. 94, 31 Pac. 283 (1892); *Galveston Rope, etc. Co. v. Burkett*, 2 Tex. App. 308, 21 S. W. 958 (1893), and see *Houston, etc. Ry. Co. v. Anglin*, 99 Tex. 350 (1905); *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53 (1888); *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243 (1888); *Railway Co. v. Forstall*, 159 Fed. 893, 87 C. C. A. 73 (1905).

⁶³⁸ *Gayette v. Fitchburg R. Co.*, 162 Mass. 549, 39 N. E. 188; *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655; *Reardon v. N. Y. Card Co.*, 51 N. Y. Super. 134; *Keller v. Gaskill*, 9 Ind. App. 670, 36 N. E. 303; *Baker v. Chicago, etc. R. Co.*, 95 Iowa, 163, 63 N. W. 667; *Musick v. Dold Packing Co.*, 58 Mo. App. 232; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548 (1891); *Walsh v. Western Ry. Co.*, 34 Fla. 1, 15 So. 686

that he gave such warning of danger as the law requires him to give. It will not be presumed that he did so.⁶³⁹

§ 223. What is sufficient proof. — As in other cases, it is not enough for the servant to prove an accident causing him injury, while in service,⁶⁴⁰ unless there is something in the very nature of the accident which affords evidence of the master's fault.⁶⁴¹ The proper evidence

(1894); *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133, 20 L. R. A. (N. S.) 354 (1908); *Indianapolis Rapid Trans. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185 (1904); *Reliance Mfg. Co. v. Langley*, 41 Ind. App. 175, 82 N. E. 114 (1907); *Grover v. New York, etc. Ry. Co.*, 76 N. J. L. 237, 69 Atl. 1082 (1908); *Elliff v. Oregon, etc. Ry. Co.*, 99 Pac. (Ore.) 76 (1909); *Manzi v. Washburn Wire Co.*, 72 Atl. (R. I.) 394 (1909). See *Iron, etc. Co. v. Yanuska*, 166 Fed. 684 (1907).

⁶³⁹ *Grimmelman v. Union Pac. R. Co.*, 101 Iowa, 74, 70 N. W. 90.

⁶⁴⁰ Proof that machinery fell upon the servant and broke is not sufficient proof of negligence, in the absence of any direct evidence that the machinery was insecure or unsafe (*Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537). To the same effect, *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Latremouille v. Bennington, etc. R. Co.*, 63 Vt. 336, 22 Atl. 656; *Murphy v. Greeley*, 146 Mass. 196, 15 N. E. 654; *Bahr v. Lombard (Ct. Errors)*, 53 N. J. Law, 233, 21 Atl. 190; *Fenderson v. Atlantic City R. Co. (Ct. Errors)*, 56 N. J. Law, 708, 31 Atl. 767; *Stewart v. Ohio River R. Co.*, 38 W. Va. 438, 18 S. E. 604, 20 S. E. 922; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864 [explosion of boiler, not enough]; *Jones v. Alabama Mineral R. Co.*, 107 Ala. 400,

18 So. 30 [servant thrown off hand car; not enough]; *Mobile, etc. R. Co. v. Godfrey*, 155 Ill. 78, 39 N. E. 590 [collision]; *Wintuska v. Louisville, etc. R. Co. (Ky.)*, 20 S. W. 819 [cause in doubt]; *Redmond v. Delta Lumber Co.*, 96 Mich. 545, 55 N. W. 1004; *Murray v. Denver, etc. R. Co.*, 11 Colo. 124, 17 Pac. 484; *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 27 Pac. 371; *Madden v. Occidental & Oriental S. S. Co.*, 86 Cal. 445, 25 Pac. 5; *Lindall v. Bode*, 72 Cal. 245, 13 Pac. 660. The mere fact of a collision does not establish a presumption of negligence on the part of a railway company in favor of its employees, such a presumption existing only in favor of passengers (*Smith v. Missouri Pac. R. Co.*, 113 Mo. 70, 20 S. W. 896). The mere fact that the body of a track walker was found near his employer's track, in such a position as to indicate that he was struck by one of its trains, does not impute negligence to the company (*Johnston v. East Tennessee, etc. R. Co. (Ky.)*, 30 S. W. 415).

⁶⁴¹ Such is sometimes the case, as in *Transportation Co. v. Downer*, 11 Wall. 129; *Washington v. Missouri, etc. R. Co.*, 90 Tex. 314, 38 S. W. 764. Where a servant is injured by the defective manner in which a wheel in the tackle block of a derrick was held in place, and it appears

of a fellow servant's incompetency and notice thereof has been already sufficiently discussed.⁶⁴² Proof of an error of judgment on the part of a competent servant will not sustain a verdict for a fellow servant.⁶⁴³ Proof of defects, without proof also of notice to the master, is, of course, insufficient.⁶⁴⁴ If the ground of complaint is the failure to keep a path in order, it must be shown that the master had notice of the servant's proper use of that path.⁶⁴⁵ Proof that the place or materials of work were defective, in such respect that, if a proper inspection had been maintained, the defects would probably have been ascertained in time to prevent the injury complained of, is sufficient.⁶⁴⁶ But it is not enough to prove a defect

that the pin holding the wheel in place would not have worked out if it had been securely fastened into the block, and had been kept in that condition; the working out of the pin is presumptive evidence that the master failed to exercise ordinary care (*Houston v. Brush*, 66 Vt. 331, 29 Atl. 380). A lineman was putting up a telegraph wire, when both the wire and the cross-arm broke, and the lineman was thrown to the ground and killed. Held, in the absence of positive evidence that the materials were carefully selected by the company, and the evidence as to their actual soundness being conflicting, that their breaking showed them inadequate, and a judgment against the company was sustained (*Clairain v. Western Union Tel. Co.*, 40 La. Ann. 178, 3 So. 625. For application of the doctrine of *res ipsa* in actions by the servant see § 184 and notes, *ante*).

⁶⁴² See § 190, *ante*.

⁶⁴³ *Keith v. Walker Iron Co.*, 81 Ga. 49, 7 S. E. 166.

⁶⁴⁴ Proof that the brake on defendant's car was out of order at the time of the accident, and that plain-

tiff was thereby unable to control the car, so that it ran away with him, is not sufficient to establish the negligence for which a master is responsible to his servant (*Mixter v. Imperial Coal Co.*, 152 Pa. St. 395, 25 Atl. 587). But it is sufficient if the evidence shows the defect would have been discovered by proper inspection. See § 193, *ante*.

⁶⁴⁵ There were three other routes from deceased's work to his home, some of which he sometimes took. There was no evidence of defendant's knowledge that the deceased ever took this route. Held, that plaintiff could not recover (*O'Donnell v. Duluth, etc. R. Co.*, 89 Mich. 174, 50 N. W. 801).

⁶⁴⁶ *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 14 S. Ct. 756; *Bailey v. Rome, etc. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Babcock v. Old Colony R. Co.*, 150 Mass. 467, 23 N. E. 325; and many other cases, cited under § 194a, *ante*. *Blazenic v. Iowa, etc. Coal Co.*, 102 Ia. 706, 72 N. W. 292 (1897), (where the allegation was of actual knowledge by the master, evidence that he would have known if he had exercised ordinary care in

which may have been beyond the reach of inspection.⁶⁴⁷ Evidence of long neglect to repair,⁶⁴⁸ and of frequent

making inspection is admissible); Thayer v. Smoky Hollow Coal Co., 121 Ia. 121, 96 N. W. 718 (1903), (evidence of a custom to inspect whereby injury to a miner by fall of slate from the roof would have been avoided, held admissible); Choctaw, etc. Ry. Co. v. O'Nesky, 6 Ind. Ter. 180, 90 S. W. 300 (1905); Norfolk, etc. Ry. Co. v. Phillips' Admr., 100 Va. 362, 41 S. E. 726 (1902). But see Mikula v. Delaware, etc. Ry. Co., 73 Atl. (N. J.) 507 (1909); St. Louis, etc. Ry. Co. v. Reed, 92 Ark. 350, 122 S. W. 645 (1909), (the master's negligence may be shown by proof that the defect was discoverable by ordinary care, hence that he was negligent either in failing to exercise such care in making inspection, or in not making repairs after discovery (Tyma v. Tarrant Foundry Co., 144 Ill. App. 454 (1908), (the plaintiff must show, first, the existence of the defect; second, that the master had knowledge or notice or would have had if he had exercised ordinary care; third, that the servant did not know of the defect or have equal means of knowledge with the master).

⁶⁴⁷ Grant v. Pennsylvania, etc. Canal Co., 133 N. Y. 657, 31 N. E. 220.

⁶⁴⁸ Evidence that the defective conditions existed more than a year before the accident, is relevant (Nichols v. Brush, etc. Mfg. Co., 53 Hun, 137, 6 N. Y. Supp. 601). Evidence that a brakeman, while about to make a coupling between moving cars, stepped into a ditch, and was injured; that he was not aware of the existence of said ditch; that a rule of defendant permitted couplings

to be made when the cars were moving at a safe rate of speed; and that defendant's foreman, who had charge of the roadbed, knew of the ditch for several months before the accident,—established a *prima facie* case of negligence (Hollenbeck v. Missouri Pac. R. Co. (Mo.), 34 S. W. 494; Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. 972 (1903); Shea v. Pacific Power Co., 145 Cal. 680, 79 Pac. 373 (1905); Pioneer Cooperage Co. v. Romonowicz, 85 Ill. App. 407, aff'd, 186 Ill. 9, 57 N. E. 864 (1900); Illinois, etc. Ry. Co. v. Prichett, 109 Ill. App. 468, 210 Ill. 140, 71 N. E. 435 (1903); Terre Haute Elec. Co. v. Kiely, 35 Ind. App. 180, 72 N. E. 658 (1904); Dunekake v. Beyer, 25 Ky. Law Rep. 2001, 79 S. W. 209 (1904); Andrieus' Admr. v. Pineville Coal Co., 121 Ky. 724, 90 S. W. 233 (1906); National Enameling Co. v. Cornell, 95 Md. 524, 52 Atl. 588 (1902); Burgess v. Davis Sulphur & Ore Co., 165 Mass. 71, 42 N. E. 501 (1896); Casterton v. Amer. Blower Co., 142 Mich. 407, 106 N. W. 61 (1905); Pauck v. St. Louis Dressed Beef, etc. Co., 166 Mo. 639, 66 S. W. 1070 (1902); Nelson v. Young, 91 App. Div. 457, 87 N. Y. Supp. 69, aff'd, 180 N. Y. 523, 72 N. E. 1146 (1904); Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. Supp. 635 (1904); Bowers v. Star Logging, etc. Co., 41 Ore. 301, 68 Pac. 516 (1902); Sofferstein v. Bertels, 178 Pa. St. 401, 35 Atl. 1000 (1896); Davis v. Holy Terror Min. Co., 20 S. D. 399, 107 N. W. 374 (1906); The Oriental v. Barclay, 16 Tex. App. 193, 41 S. W. 117 (1897); Johnson v. Union Pac. Coal Co., 28 Utah, 46, 67, 76

complaints,⁶⁴⁹ is entirely proper. Proof of defects in the place of work, though not originally due to negligence, is proper, to show neglect to put it in order, sufficient time having elapsed.⁶⁵⁰ Proof that a machine has acted badly before is competent to prove notice of the defect and negligence in failing to repair.⁶⁵¹ The servant is not

Pac. 1089, 67 L. R. A. 506 (1904); *Revolinsky v. Adams Coal Co.*, 118 Wis. 324, 95 N. W. 122 (1903).

⁶⁴⁹ To show that the defective condition of the still in which the employee was required to work was known to the employer, evidence that another employee had, prior to the accident, repeatedly complained of it to the superintendent, is admissible (*Nichols v. Brush, etc. Mfg. Co.*, 53 Hun, 137, 6 N. Y. Supp. 601).

⁶⁵⁰ Where part of the roof of a mine, from which rock fell and injured plaintiff, was known to the officers to consist of treacherous rock, needing constant watching, and liable to be loosened if wet; and where it appears that it had not been properly tested for weeks; that it had long been wet; that similar rock near by had been supported or removed — it is a question for the jury whether the failure to support or remove such rock was a lack of ordinary care in providing a safe place for the miners to work in (*Union Pac. R. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433, 10 U. S. App. 439). To same effect, *Atchison, etc. R. Co. v. Wilson*, 48 Fed. 57, 4 U. S. App. 25, 1 C. C. A. 25 [flooded track]; *Davis v. N. Y., Lake Erie, etc. R. Co.*, 78 Hun, 235, 28 N. Y. Supp. 819 [walls weakened by dynamite explosion]; *Perry v. Rogers*, 91 Hun, 243, 36 N. Y. Supp. 208 [rock loosened by blasting].

⁶⁵¹ *McCarragher v. Rogers*, 120 N.

Y. 526, 24 N. E. 812 [machinery not guarded by netting]. When an elevator fell a second time and injured a servant, proof of the former fall was admissible to show notice to the master (*Malone v. Hawley*, 46 Cal. 409). For drawing down to its proper position a heavy spring in a locomotive, a railroad company provided a jack-screw and chain. The spring was unusually strong, and the chain broke without apparent cause, and an employee was injured by the recoil of the spring. The chain had broken before when used for the same purpose. Held, sufficient evidence of negligence (*Krogstad v. Northern Pac. R. Co.*, 46 Minn. 18, 48 N. W. 409). But compare *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. 35, where belt shifting itself three times, held, by a divided court, no evidence of negligence. *Brunger v. Pioneer Roll Paper Co.*, 92 Pac. (Cal. App.) 1043 (1907); *Donovan v. Chase, etc. Co.*, 201 Mass. 357, 87 N. E. 580 (1909); *Blerins v. Erwin Cotton Mills Co.*, 150 N. C. 493, 64 S. E. 428 (1909); *Louisville, etc. Ry. Co. v. Wilson*, 50 So. (Ala.) 88 (1909); *Galvin v. Brown*, 101 Pac. (Ore.) 671 (1909); *Houston v. Budke Stamping Co.*, 38 Pa. Super. Ct. 93 (1909); *Van Doorn v. Heap*, 160 Mich. 199, 125 N. W. 11 (1910); *Izydoreczyk v. Reading Car Wheel Co.*, 225 Pa. 533, 74 Atl. 428 (1909); *Rondeau v. Sayles*, 74 Atl. (R. I.) 785 (1910); *Alabama, etc. Ry. Co. v. Yount*, 51 So. (Ala.)

bound to show the precise nature of a defect in appliances;⁶⁵² but he must so far prove the nature of the defect as not to leave a fair mind unable to decide whether the injury was caused by it or not.^{652a} Proof of a dangerous variation in appliances from what is usual and safe, combined with due proof of notice, is sufficient evidence of negligence.^{652b} Proof that a machine acted in an unusual and dangerous manner calls for explanation from the master.^{652c} When the absence of peculiar precautions is complained of, it must be shown that such are

737 (1910), (after the accident); *Federal Lead Co. v. Lohr*, 179 Fed. N. E. 352).
 692, 103 C. C. A. 238 (1910); *Boyd v. Taylor*, 93 N. E. (Mass.) 589 (1911); *Turner v. Cocheco Mfg. Co.*, 77 Atl. (N. H.) 999 (1910); *Deninger v. Amer. Locomotive Co.*, 185 Fed. 22, 107 C. C. A. 126 (1911); *Mrozevich v. Western Steel Corp.*, 112 Pac. (Wash.) 925 (1911), (after the accident); *Fonder v. General Constr. Co.*, 130 N. W. (Wis.) 884 (1911).

⁶⁵² Where an employee is injured by defective machinery, it is not necessary to his recovery therefor that he should be able to show the precise nature of the defect (*Nelson v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868). While plaintiff was engaged in changing a saw in defendant's mill, a log carriage, which had been left at rest, with the steam shut off, and the lever locked, suddenly started, and injured plaintiff. Held, proper to refuse instructions that plaintiff cannot recover if it does not appear what was the real cause of the starting of the machine, since he was only required to furnish evidence from which defendant's negligence might be inferred, and was not bound to point out the particular act or omission which caused the accident (*Mooney v. Connecticut*

River Lumber Co., 154 Mass. 407, 28 N. E. 352).
^{652a} *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. 35. If the injury may be inferred to have arisen from either of two causes, equally probable, one of which is attributable to the employee, a nonsuit is proper (*Id.*).

^{652b} *Bennett v. Northern Pac. R. Co.*, 2 N. D. 112, 49 N. W. 408 [coupling; drawbars]; *Texas, etc. R. Co. v. White*, 82 Tex. 543, 18 S. W. 478 [brake]. A brakeman, while coupling a flat car and coach, where it appeared that the bumpers were broken from the flat car; that the drawheads on the cars were of a different make, so that they did not come together evenly; that a spring on the coach drawhead used to keep it in position had been removed for repairs; and that the brakeman knew of the condition of the cars,—the question of whether the appliances furnished by the company were sufficient was for the jury (*White v. Louisville, etc. R. Co.*, 72 Miss. 12, 16 So. 248; *McGehehan v. Hughes*, 223 Pa. 524, 72 Atl. 856 (1909); *Rice v. Van Why*, 111 Pac. (Colo.) 599 (1910)).

^{652c} While plaintiff failed to specifically assign a cause for the sudden movement of the machinery, yet,

in use elsewhere, or that in some other way prudence dictated them.⁶⁵³ Evidence of precautions taken in other establishments is competent.⁶⁵⁴ Failure to supply an ap-

such movement being entirely out of the usual manner of its operation, it afforded *prima facie* evidence of some want of care in its construction or condition (*Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149).

⁶⁵³ A declaration alleging that defendants had hired plaintiff to run a lath machine, but failed to keep it safe by providing a pit and carrier for refuse, is fatally defective, as not alleging a custom to provide such pit or carrier, what means were proper to guard the saw while removing debris, that the plaintiff could not stop the saw, or that it was necessarily unsafe to remove the debris while it was moving, or that plaintiff was inexperienced, how long he had been at said work, or that he had ever told defendants of the defect, or that they had failed to instruct him (*Torongo v. Salliotte*, 99 Mich. 41, 57 N. W. 1042). Where one oiling a machine is injured by its starting up by a belt working from the loose pulley to the tight pulley, the employer is not liable, though the accident could not have happened had there been something with which to lock the lever used in shifting the belt from the tight pulley to the loose pulley, and back again, there being no evidence that the machinery was defective, or different from that in use elsewhere (*Ross v. Pearson Cordage Co.*, 164 Mass. 257, 41 N. E. 284).

⁶⁵⁴ *Bannon v. Lutz*, 158 Pa. St. 166, 27 Atl. 890 (oil refinery; precautions not used); *Northern Alabama Ry. Co. v. Mansel*, 138 Ala. 548, 36 So. 459 (1903), (it is competent to consider the usage prevailing on other

well regulated railroads in the construction of stock gaps); *Illinois, etc. Ry. Co. v. Prickett*, 109 Ill. App. 468, aff'd, 210 Ill. 140, 71 N. E. 435 (1904) (inspection of engines and boilers; limited to the custom of well regulated and prudently managed railroads); *Wabash R. Co. v. Farrell*, 79 Ill. App. 509 (1898), (standard height of draw bars); *Stover Mfg. Co. v. Millane*, 89 Ill. App. 532 (1900), (equipment of elevators with safety device to prevent fall); *Schroeder v. Chicago, etc. Ry. Co.*, 128 Ia. 365, 103 N. W. 985 (1905), (blocking switch frogs); *McMahon v. McHale*, 174 Mass. 320, 54 N. E. 854 (1899), (vertical play of goose-neck and plate in setting up a derrick); *Jones v. Kansas City, etc. Ry. Co.*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434 (1903), (existence and use of derailing switches); *Lee v. Missouri Pac. Ry. Co.*, 195 Mo. 400, 92 S. W. 614 (1906), (blocking rails); *Belleville Stone Co. v. Comben*, 62 N. J. Law, 449, 45 Atl. 1090 (1898), (support a swinging drag rope in quarry by hangers); *Deveney v. Degnone, etc. Co.*, 178 N. Y. 620, 70 N. E. 1098 (1904), (ordinary way of doing the same work under similar conditions); *Anderson v. New York, etc. Ry. Co.*, 13 App. Div. 218, 43 N. Y. Supp. 213 (1897), (custom of keeping hatches open at night where vessel has not finished discharging cargo); *Bell v. Consol. Gas, etc. Co.*, 36 App. Div. 242, 56 N. Y. Supp. 780 (1899), (where there is evidence that alleged defect causing explosion of boiler could have been discovered by applying hydrostatic test, it is admissible

pliance, asked for on the mere ground of convenience, the servant himself not thinking it needed for safety, is no evidence of negligence.⁶⁵⁵ Where negligent omission of warning against danger is proved, it is not necessary to prove also that the master foresaw the consequences.⁶⁵⁶ Evidence that a machine, while in the same condition as at the time of the accident, worked well, both before and after that, is competent in disproof of negligence.⁶⁵⁷ Oaths and violent language, in giving orders, are held to be no evidence of negligence by themselves.⁶⁵⁸ Contributory negligence, in courts where it is held a matter of

to show that it was the practice to make such tests); *Jones v. Reynolds Tobacco Co.*, 141 N. C. 202, 53 S. E. 849 (1906), (shield or covering for circular saw); *Crooker v. Pacific Lounge, etc. Co.*, 34 Wash. 191, 75 Pac. 632 (1904), (custom of placing guards or spreaders on rip saws); *Berg v. United States Lbr. Co.*, 125 Wis. 262, 104 N. W. 60 (1905), (defective bolt fastening); *Warren's Admr. v. Jeunesse*, 122 S. W. (Ky.) 862 (1909), (the fact that an appliance is customary is not the correct test, but it may be given in evidence as bearing on the issue of negligence); *Van Doorn v. Heap*, 160 Mich. 199, 125 N. W. 11 (1910); *Shohoney v. Quincy, etc. Ry. Co.*, 223 Mo. 649, 122 S. W. 1025 (1909); *McMichael v. Federal Printing Co.*, 139 App. Div. 225, 123 N. Y. Supp. 998 (1910); *Rice v. Van Why*, 111 Pac. (Colo.) 599 (1910); *Scott v. Nauss*, 141 App. Div. 255, 126 N. Y. Supp. 17 (1910), (in an action against the master for injury caused by his neglect in not supplying power to an elevator by reasonably safe means, where no attempt was made to prove that the hand-power elevator was not in common use and suited for the purposes of its use, evidence that a

gas engine to furnish power was safer, is inadmissible).

⁶⁵⁵ Plaintiff had asked for and been promised skids whereon to slide the box from one car to the other, but he made request merely from considerations of convenience, and not because he thought any other method of moving the box dangerous. Held, that the failure of the master to furnish skids was not negligence (*Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190). *Tex., etc. Ry. Co. v. Nichols*, 41 Tex. App. 119, 92 S. W. 411 (1905); *St. Louis, etc. Ry. Co. v. Mealman*, 97 Pac. (Kans.) 381 (1908); *Primely v. Elbe Lbr., etc. Co.*, 53 Wash. 687, 102 Pac. 763 (1909).

⁶⁵⁶ Where defendant employed an inexperienced man to do work which was unsafe unless performed by a skilled workman, without cautioning him expressly as to the danger, it was not necessary to show further that defendant should have foreseen that an accident would probably occur, in order to hold him liable (*Ryan v. Los Angeles Storage Co.*, 112 Cal. 244, 44 Pac. 471).

⁶⁵⁷ *Tremblay v. Harnden*, 162 Mass. 383, 38 N. E. 972.

⁶⁵⁸ *Coyne v. Union Pac. R. Co.*, 133

defence, cannot be inferred from the mere accident any more than the master's negligence could be.⁶⁵⁹

§ 223a. Assumption of risk by servant of neglect by the master to comply with statutory duties imposed on him for the servant's protection. — Whether the servant, though he may not be contributorily negligent, who, knowing the master's neglect to comply with a specific duty imposed on him by statute for the servant's protection and comprehending or appreciating the risk, voluntarily encounters it, thereby waives his right of recovery for injury arising therefrom, is a question upon which there is respectable difference of opinion. Unhappily the line of cleavage has come to be known as one existing between the Federal and State courts. Though, while it is true that the greater number of the decisions of the inferior Federal courts (there is none by the Supreme Court of the United States) hold the affirmative of the proposition and those of the State courts of last resort the negative, yet the decisions of the former are not uniform and when rendered have not been without vigorous dissent from the same bench by judges of the very highest rank.^{659a}

U. S. 370, 10 S. Ct. 382. See also (1904); *Hailey v. Texas & Pac. Ry. Co.*, 113 La. 530, 37 So. 131 (1904); *Williams v. Churchill*, 137 Mass. 243. *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 100 N. W. 447 (1904); *Pennsylvania R. Co. v. Middleton* [Ct. Errors], 57 N. J. Law, 154, 31 Atl. 616. *Murphy v. Grand Rapids Veneer Wks.*, 142 Mich. 677, 106 N. W. 211 (1906); *Bair v. Heibel*, 103 Mo. App. 621, 77 S. W. 1017 (1903); *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887 (1902); *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089 (1905); *Hoveland v. Hall Bros. R. etc. Co.*, 41 Wash. 164, 82 Pac. 1090 (1905); *Whelan v. Washington Lbr. Co.*, 41 Wash. 153, 83 Pac. 98, 11 Am. St. Rep. 1006 (1905); *Welsh v. Barber Asphalt Co.* (C. C. A.), 167 Fed.

^{659a} Defense of assumed risk not available in an action for injury caused by the non-observance of a statutory duty (*Baltimore, etc. Ry. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044 (1901); *Inland Coal Co. v. Swaggerty*, 159 Ind. 664, 65 N. E. 1026 (1903); *Brower v. Locke*, 31 Ind. App. 353, 67 N. E. 1015 (1903); *Chamberlain v. Waymire*, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81 (1903); *Amer. Car. etc. Co. v. Clark*, 32 Ind. App. 644, 70 N. E. 828,

Courts and writers adopting the view that the defence is available where the plaintiff knows of the failure of another to comply with the statute, appreciates the danger and voluntarily encounters it, argue that if the legislature had intended to preclude the defence of assumed risk it would have so declared. To this class of cases belong *St. Louis Cordage Co. v. Miller*, 126 Fed. (C. C. A.) 495, opinion by Sanborn, C. J., Judge Thayer dissenting in an opinion both able and thorough; and the very elaborate opinion of Carland, D. J., in *Denver Ry. Co. v. Norgate*, 141 Fed. (C. C. A.) 247 (1905), where the authorities to the same effect are collected.

Other courts, on sounder views of public policy, hold that to permit the defence is, in effect, a judicial repeal of the statute, and to say that parties may be permitted to violate express statutory provisions by agreement. The leading case in this country maintaining that such a defence is unavailable is *Narramore v. Railway Co.*, 96 Fed. (C. C. A.) 298, opinion by Taft, C. J.

In England it is said by Mr. Beven, after reviewing the expressions used in a number of cases where the point was not directly presented, "The reasonable conclusion from these *dicta* is that, where a statutory duty exists, the maxim *volenti non fit injuria* is not to be presumed to

465 (1909); *Moore v. Centralia Coal Co.*, 140 Ill. App. 291 (1908); *Cleveland, etc. Ry. Co. v. Gosset*, 87 N. E. (Ind.) 723 (1909); *Galveston, etc. Ry. Co. v. Henefy*, 115 S. W. (Tex. App.) 57 (1909); *Lind v. Uniform State, etc. Co.*, 120 N. W. (Wis.) 839 (1909); *Kleinfelt v. J. H. Somers, etc. Co.*, 156 Mich. 473, 121 N. W. 118 (1909); *St. Louis, etc. Ry. Co. v. White*, 125 S. W. 120 (1910); *Muren Coal, etc. Co. v. Copeland*, 90 N. E. (Ind. App.) 489, 91 N. E. 508 (1910); *Waschow v. Kelly Coal Co.*, 245 Ill. 516, 92 N. E. 303 (1910); *Lewis v. Boston Salt Co.*, 82 Kans. 163, 107 Pac. 783 (1910); *Collins v. Star Paper Mills Co.*, 143 Mo. App. 333, 127 S. W. 641 (1910); *Valjago v. Carnegie Steel Co.*, 226 Pa. 514, 75 Atl. 728 (1910); *Lowe v. Southern Ry. Co.*, 85 S. C. 363, 67 S. E. 460 (1910). *Contra*, *Sitts v. Waiontha Knitting Co.*, 87 N. Y. Supp. 911, 94 App. Div. 38 (1904); *Stevens v. Gair*, 96 N. Y. Supp. 303, 109 App. Div. 621 (1905); *Langlois v. Dunn Worsted Mills*, 25 R. I. 645, 57 Atl. 910 (1904); *Simoneau v. Rice et al.*, 202 Mass. 82, 88 N. E.

avail,^{650b} or, as Willis, Jr., says in his judgment in *Badderly v. Earl of Granville*, "would not apply at all where the injury arose from a direct breach of a statutory obligation."

§ 224. Who are fellow servants. — We now approach a line of questions which have given rise to irreconcilable differences of opinion, and upon which the cases must be marshaled in divergent lines; although much progress has been made towards a solution upon principle. The master's exemption from his ordinary liability for the negligence of his servants only applies, where the servant in fault is a fellow servant, in the same common employment with the injured servant. Leaving the latter point for future consideration, it is needful to determine first: Who are fellow servants? To a certain extent, all the cases agree, and all rest upon an intelligible principle. Any person in the employment of the same master, and under his control, whether his position is equal, inferior or superior to that of the injured servant,⁶⁶⁰ so long as he

433 (1909); *Jackson v. Chicago*,
etc. Ry. Co., 178 Fed. 432, 102 C.
C. A. 159 (1910); *Osterman v. Bos-*
ton, etc. Co., 40 Mont. 508, 107 Pac.
499 (1910); *Stokes v. Barber*
Asphalt Pav. Co., 134 App. Div. 363,
119 N. Y. Supp. 37 (1909).

^{650b} 19 Q. B. D. 426.

⁶⁶⁰ *Kumler v. Junction R. Co.*, 33
Ohio St. 150 [engineer and laborer];
Randall v. Baltimore, etc. R. Co.,
109 U. S. 478 [engineer and brake-
man or switchman]; *Kimmer v.*
Weber, 151 N. Y. 417, 45 N. E. 860.
For illustrations, see § 241, *post*.
Kenefick-Hammond Co. v. Rohr, 77
Ark. 290, 91 S. W. 179 (1905); *Ga.*
Coal, etc. Co. v. Bradford, 131 Ga.
289, 62 S. E. 193, 127 Am. St. Rep.
228 (1908); *Stevens v. Bunn*
(App.), 64 S. E. (Ga.) 1002 (1909);
Standard Mills v. Collum (App.),
65 S. E. (Ga.) 195 (1909); *Van*

Dyke v. Fruit Co., 129 Ga. 532, 59
S. E. 215 (1909); *Donk, etc. Coal*
Co. v. Thil, 228 Ill. 233, 81 N. E.
857, 19 L. R. A. (N. S.) 1178
(1907); *Southern Ry. Co. v. Elliott*,
170 Ind. 273, 82 N. E. 1051 (1907);
Atchison, etc. Ry. Co. v. Dickens, 7
Ind. Ter. 16, 103 S. W. 750 (1907);
Matthews v. Louisville Ry. Co., 113
S. W. (Ky.) 459 (1908); *Eastern*
Ky., etc. Tel. Co. v. Mellon, 116
S. W. (Ky.) 709 (1909); *Martin v.*
Mason-Hoge Co., 28 Ky. L. Rep. 1333,
91 S. W. 1146 (1906); *Loud v.*
Lane, 103 Me. 309, 69 Atl. 270, 10
L. R. A. (N. S.) 680 (1907);
Schneider v. Mo., etc. Ry. Co., 117
Mo. App. 129, 94 S. W. 730 (1906);
Harris v. Dampskibsselskab, 75 N. J.
Law, 861, 70 Atl. 155 (1908); *Lara-*
gay v. East Jersey Pipe Co., 72 Atl.
57 (1909); *Chesson v. Walker*, 146
N. C. 511, 60 S. E. 422 (1908);

is not entrusted with a power of control over that servant,⁶⁶¹ is a fellow servant with him. No extent of difference in their wages, social position, or work, affects the question.⁶⁶² Thus, a merchant's clerk, although (as is frequently the case) the equal of his employer in social position, is, in the eye of the law, a fellow servant with the boy who sweeps out the store and lights the fires. And a servant who was formerly employed by the same master is, with respect to his negligence while so employed, to be considered the fellow servant of another, who, being subsequently engaged, is injured by the after-effects of such negligence, if they would have been considered fellow servants, had the former remained in the same service.⁶⁶³

§ 225. Who are not fellow servants. — Mere co-operation, or community of labor and ultimate purpose, is not enough to make men fellow servants. They are not fellow servants unless they are all under the control and direction of a common master.⁶⁶⁴ Therefore, where a servant

Wilson v. Virginia, etc. Chemical Co., 78 S. C. 381, 58 S. E. 1019 (1907); *Mo., etc. Ry. Co. v. Hendricks* (Civ. App.) 108 S. W. (Tex.) 745 (1908); *Grim v. Olympia, etc. Light Co.*, 42 Wash. 119, 84 Pac. 635 (1906); *Jock v. Columbia Ry. Co.*, 102 Pac. (Wash.) 405 (1909); *Rankel v. Buckstaff-Edwards Co.*, 138 Wis. 442, 120 N. W. 269 (1909); *Westinghouse v. Callaghan*, 155 Fed. 397, 83 C. C. A. 669 (1907); *Nelson v. Railway Co.*, 158 Fed. 92, 85 C. C. A. 560 (1908); *Hastings v. Le Roi*, 34 Can. S. Ct. 177; *Hastings v. Le Roi*, 10 Brit. Col. 9; *Fairweather v. Quarry Co.*, 26 Ont. 604; *Allen v. Standard Box, etc. Co.*, 96 Pac. (Ore.) 1109 (1908).

⁶⁶¹ This is the test under the Ohio rule (*Chicago, etc. R. Co. v. Ross*, 112 U. S. 377; *Little Miami R. Co.*

v. Stevens, 20 Ohio, 415; *Pittsburgh, etc. R. Co. v. Devinney*, 17 Ohio St. 198).

⁶⁶² See cases cited under § 241, *post*.

⁶⁶³ *Wilson v. Merry*, L. R. 1 Sc. App. 326 (the only point rightly decided in that case); *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Haley v. Keim*, 151 Pa. St. 117, 25 Atl. 98; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916.

⁶⁶⁴ Cited and approved (*Svenson v. Atlantic, etc. S. S. Co.*, 57 N. Y. 108); where a servant of owners of a barge, engaged in lightening a steamship, was injured by negligence of steamship crew. To same effect, *Johnson v. Lindsay*, 1891, Eng. App. Cas. 371; *Central R. Co. v. Stoermer*, 1 U. S. App. 276, 51 Fed. 518; *Kilroy v. Delaware, etc. Canal Co.*, 121 N. Y. 22, 24 N. E. 192 [captain and

works side by side with one employed by his master as an independent contractor,⁶⁶⁵ or with a servant of such contractor,⁶⁶⁶ or the servant of a contractor works with the servants of a subcontractor⁶⁶⁷ or with the servants of another independent contractor,⁶⁶⁸ they are not fellow

servants of consignee] Louisville, Wadsworth v. Duke, 50 Ga. 91); etc. R. Co. v. Hawthorn, 147 Ill. 226, 35 N. E. 534; Union Pac. R. Co. v. Billeter, 28 Neb. 422, 44 N. W. 483 [train, engineer and loaders]. To the contrary was Ewan v. Lippincott, 47 N. J. Law, 192; practically overruled in New Jersey (Hardy v. Delaware, etc. R. Co., 57 N. J. Law, 505, 31 Atl. 281) and certainly not law. An engine hostler, employed by a railroad company, taking a locomotive to the yards of a terminal company, and a car accountant employed by the terminal company, were not fellow servants (Northern Pac. R. Co. v. Craft, 16 C. C. A. 175, 69 Fed. 124). Donk, etc. Coal Co. v. Thil, 228 Ill. 233, 81 N. E. 857 (1907); Kelly v. Tyra, 103 Minn. 176, 114 N. W. 750, 115 N. W. 636 (1908); Driscoll v. Humes, etc. Co., 69 Atl. (R. I.) 766 (1908); Texas, etc. Ry. Co. v. Nichols, 41 Tex. Civ. App. 119, 92 S. W. 411 (1906); Gulf, etc. Ry. Co. v. Gaskill, 120 S. W. (Tex. App.) 557 (1909); Sufferling v. Heyl, 121 N. W. (Wis.) 251 (1909); Standard Oil Co. v. Anderson, 152 Fed. 166, 81 C. C. A. 147 (1909); Railway Co. v. Hurdman, 25 Can. Sup. Ct. 205.

⁶⁶⁵ Reagan v. Casey, 160 Mass. 374, 36 N. E. 58. Where a stevedore engaged in discharging cargo was injured by being struck by a sling which the winchman employed by the vessel started too rapidly, the doctrine of fellow servants did not apply, and the ship was liable (Davi v. The Victoria, 69 Fed. 160; s. p., Fletcher v. Peto, 3 Fost. & F. 368; Lookout, etc. Iron Co. v. Lea, 144 Ala. 169, 39 So. 1017 (1906); Louisville, etc. Ry. Co. v. Smith, 119 S. W. (Ky.) 241 (1906); Dale v. Hill, etc. Constr. Co., 108 Mo. App. 90, 82 S. W. 1092 (1904); Standard Oil Co. v. Anderson, 212 U. S. 215, 20 S. Ct. 252, 53 L. Ed. 480 (1908); Standard Oil Co. v. Anderson, 152 Fed. 166, 81 C. C. A. 399 (1907); Steel Co. v. Wingle, 152 Fed. 914, 82 C. C. A. 62 (1907).

⁶⁶⁶ Cunard S. S. Co. v. Carey, 119 U. S. 245 [longshoreman and boss of coal-heavers]; Goodfellow v. Boston, etc. R. Co., 106 Mass. 461; Abraham v. Reynolds, 5 Hurlst. & N. 143 [servant of cartman injured by servants of warehouseman]; Seybolt v. N. Y., Lake Erie, etc. R. Co., 95 N. Y. 562 [mail agent and railroad employee]; Pennsylvania R. Co. v. Price, 96 Pa. St. 256 [same]; Houston, etc. R. Co. v. Hampton, 64 Texas, 427 [same]; Sanford v. Standard Oil Co., 118 N. Y. 571, 24 N. E. 313 [stevedore and wharfinger's engineer]; Kane v. Mitchell Transp. Co., 90 Hun, 65, 35 N. Y. Supp. 581 [laborer and deck-hand].

⁶⁶⁷ Gerlach v. Edelmeyer, 88 N. Y. 645, 47 N. Y. Super. 292; Curley v. Harris, 11 Allen, 112; Johnson v. Lindsay, 1891, Eng. App. Cas. 371; overruling Wiggett v. Fox, 11 Exch. 832. See Necker v. Harvey, 49 Mich. 517.

⁶⁶⁸ Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Burrill v. Eddy, 160 Mass. 198, 35 N. E. 483.

servants, even though they help to do the same work, for the benefit of the same ultimate employer; and the master of either servant is, therefore, responsible for an injury caused by such servant's negligence in such work to the other servant. Still more clear is it that, where two or more employers use the same property for their respective purposes, the servants of one do not become fellow servants with the servants of the other, by their concurrent use of the same thing. Therefore, a servant of a railroad company, employed upon a section of road used by it in common with another corporation, may recover against that corporation, for the negligence of its servant.⁶⁶⁹ And where one corporation hires from another the use of its track, a servant of the former can recover from the latter for any injury caused by defects in the track,⁶⁷⁰ and a servant of the latter corporation may recover from the former for the negligent management of its trains,⁶⁷¹ in the same manner as a stranger; the servants of neither being fellow servants with those of the other.⁶⁷² It makes no difference that, for limited purposes, the two servants were for the time under the direc-

⁶⁶⁹ *Smith v. Harlem R. Co.*, 19 R. Co., 18 C. B. N. S. 229; *Philadelphia, etc. R. Co. v. State*, 58 Md. R. Co., 27 Vt. 370; *Warburton v. Augusta, etc. R. Co. v. Killian*, Great Western R. Co., L. R. 2 Ex. 30, 79 Ga. 234, 4 S. E. 165.

4 *Hurlst. & C.* 695; *Graham v. North* ⁶⁷¹ *Catawissa R. Co. v. Armstrong*, Eastern R. Co., 18 C. B. N. S. 229; 49 Pa. St. 186; *Sullivan v. Tioga R. Phillips v. Chicago, etc. R. Co.*, 64 Co., 112 N. Y. 643, 20 N. E. 569; Wis. 475, 25 N. W. 544. To same Texas, etc. R. Co. v. Easton, 2 Tex. effect, *Swainson v. North Eastern R. Civ. App. 378, 21 S. W. 575; Noon v. N. Y. Central R. Co.*, 62 Danbury, etc. R. Co., 52 Conn. 543; Hun, 618, 16 N. Y. Supp. 678, aff'd, Omaha, etc. R. Co. v. Morgan, 40 131 N. Y. 594.

Neb. 604, 59 N. W. 81 [joint use ⁶⁷² *Philadelphia, etc. R. Co. v. State*, station grounds]; *Central R. v. 58 Md. 372; Killea v. Faxon*, 125 Stoermer, 51 Fed. 518, 2 C. C. A. Mass. 485 (1877); *Ewan v. Lippincott*, 1 U. S. App. 276 [limiting cott, 47 N. J. Law, 192, 54 Am. Rep. Ewan v. Lippincott, 47 N. J. Law, 148 (1885); *McCafferty v. Dock Co.*, 192; *Johnson v. Boston*, 118 Mass. 11 Ohio Cir. Ct. 457, 5 Ohio Cir. Dec. 114]. 262; *Reading Iron Works v. Devine*,

⁶⁷⁰ *Snow v. Housatonic R. Co.*, 8 109 Pa. St. 246 (1909).
Allen, 441; *Graham v. Northeastern*

tion of a single superintending agent,⁶⁷³ or subject to the rules of a single corporation.⁶⁷⁴ Nor can contracts between masters, unknown to an injured servant, take away his rights in this respect.⁶⁷⁵

§ 226. American rule; vice-principals not fellow servants.—At an early day, American judges divided sharply upon the question of the liability of a master to his servants, for the negligence of a servant of superior grade and in control of other servants. The question was

⁶⁷³ *Johnson v. Netherlands Nav. Atl.* 462 (1885); *Killain v. Augusta, Co.*, 132 N. Y. 576, 30 N. E. 505 etc. Ry. 78 Ga. 749, 3 S. E. 621 [stevedore and winchman]; *Tierney* (1887); *Chicago, etc. Ry. Co. v. Syracuse, etc. R. Co.*, 85 Hun, O'Connor, 119 Ill. 586, 9 N. E. 263 146, 32 N. Y. Supp. 627 [common (1886); *Chicago Term. Co. v. Vandenberg*, 164 Ill. 470, 73 N. E. 990 superintendent]; *Noll v. Philadelphia, etc. R. Co.*, 163 Pa. St. 504, 30 (1905); *Martin v. Louisville, etc. Atl.* 157; *Coates v. Chapman*, 195 Ry. Co., 95 Ky. 612, 26 S. W. 801, Pa. St. 109, 45 Atl. 676 (1900); *The Slingsby*, 120 Fed. 748-753, 57 C. 16 Ky. L. R. 150 (1894); *Philadelphia, etc. Ry. Co. v. State*, 58 Md. C. A. 52 (1903), (where it is said, 372 (1882); *Kastl v. Wabash R. Co.*, 114 Mich. 53, 72 N. W. 28 "When * * * and not B., is the (1897); *Erickson v. Kansas City Ry. Co.*, 171 Mo. 647, 71 S. W. 1022 one who selects and retains the in- (1902); *Vannatta v. N. J., etc. Ry. Co.*, 154 Pa. St. 262, 26 Atl. 384, dividual at the particular piece of 35 Am. St. Rep. 823 (1893); *Louisville, etc. Ry. Co. v. Martin*, 113 Tenn. 266, 87 S. W. 418 (1905); work to which he is assigned, such individual does not become B.'s servant merely because the latter indirectly pays for his services and gives him his working orders").

⁶⁷⁴ *Jones v. St. Louis, etc. R. Co.*, 125 Mo. 666, 28 S. W. 883 [parlor car porter]; *Union Pac. R. Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923 [express agent subject to railroad rules].

⁶⁷⁵ *Robertson v. Boston, etc. R. Co.*, 160 Mass. 191, 35 N. E. 775; *Strader v. N. Y., Lake Erie, etc. R. Co.*, 86 Hun, 613, 33 N. Y. Supp. 761, aff'd in 157 N. Y. 708, 52 N. E. 1126 (1899). Traffic arrangements between railroads for use of track do not make servants of one fellow servants with those of the other [*Zeigler v. Danbury, etc. Ry. Co.*, 52 Conn. 543, 2 975, 27 C. C. A. 385 (1898)].

passed upon, almost at the same time, in the East and the West: the Massachusetts court holding strongly in favor of masters,⁶⁷⁶ and the Ohio court strongly against them.⁶⁷⁷ A long conflict of opinions followed; and when our fourth edition was prepared, in 1887, there was no general settled rule. Although entire unanimity has not yet been reached on some material points, several fundamental principles are fully agreed upon. It is now universally held, in American courts, that a master always *may* have, and sometimes *must* have, a servant, who acts as his representative or *alter ego* towards other servants; and that for the negligence of such representative, *while acting as such*, the master is responsible to the other servants, precisely as if it were his own.⁶⁷⁸ By general consent such representative, while acting as such, is called a "vice-principal." And a vice-principal is not a "fellow servant."

§ 227. British rule; no vice-principals.—In Great Britain, where the name of "vice-principal" was in-

⁶⁷⁶ *Albro v. Agawam Co.*, 6 Cush. 75.

⁶⁷⁷ *Little Miami R. Co. v. Stevens*, 20 Ohio 415.

⁶⁷⁸ So held in *Maine* (*Shanny v. Androscoggin Mills*, 66 Me. 420); *Rhode Island* (*Mann v. Oriental Print Works*, 11 R. I. 152; *Mulvey v. Rhode Island Works*, 14 Id. 204; *Brodeur v. Valley Falls Co.*, 16 Id. 448); *New York* (*Corcoran v. Holbrook*, 59 N. Y. 517; *Pantzar v. Tilly Iron Co.*, 99 Id. 368, 2 N. E. 24; compare *Malone v. Hathaway*, 64 N. Y. 5); *Michigan* (*Shumway v. Walworth Mfg. Co.*, 98 Mich. 411, 57 N. W. 251). Although in *Ryan v. Cumberland V. R. Co.*, 23 Pa. St. 384, the opinion of three judges against two strongly inclined towards the English rule; yet, in much more recent cases, it has been firmly

established in Pennsylvania that the chief manager of any separate department of a business is not a fellow servant of those who are under his absolute orders, with respect to those orders, and that, for his negligence in giving such orders, the master is responsible to a servant injured in consequence of his obedience (*Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Patterson v. Pittsburgh, etc. R. Co.*, 76 Id. 389; *Mullan v. Philadelphia S. S. Co.*, 78 Id. 25 [stevedore]). It is unnecessary to cite cases from other States, as all other courts holding the American doctrine at all, hold this and much more, as will be seen further on. Even Massachusetts is no exception; for although its courts persist in saying that *all* servants of a corporation are fellow servants (*Rogers v.*

vented,⁶⁷⁹ it is now settled that, as the result of the *obiter dicta* of two superannuated judges, in the famous case of *Wilson v. Merry*, the whole idea of liability for vice-principals "is exploded." The common master is not responsible to any of his servants for the negligence of any other, even though the negligent servant is in supreme and exclusive control over the entire business, the master being always absent or being a corporation.⁶⁸⁰ This monstrous and iniquitous ruling was not essential to the decision of that case. It was founded upon pretended inferences from decisions of inferior tribunals, in none of which was any such point clearly decided, and in the latest of which the whole court conceded that a master was liable for the negligence of his general representative.⁶⁸¹ As to the reasoning of the noble lords themselves,

Ludlow Mfg. Co., 144 Mass. 198, 11 N. E. 77; *Mackin v. Boston, etc. R. Co.*, 135 Mass. 201), they no longer mean anything more by that phrase than is implied by the New York rule or Webster's Dictionary. Mississippi decisions to the contrary (*Lagrone v. Mobile, etc. R. Co.*, 67 Miss. 592, 7 So. 432; *New Orleans, etc. R. Co. v. Hughes*, 49 Miss. 258; *Howd v. Miss. Central R. Co.*, 50 Id. 178) have been abrogated by the new Constitution and statutes. (See § 241a, *post*.)

⁶⁷⁹ *Murphy v. Smith*, 19 C. B. N. S. 361.

⁶⁸⁰ *Wilson v. Merry*, L. R. 1 Scotch App. 326; thus interpreted, with hardly a struggle by counsel, in *Howells v. Landore Co.*, L. R. 10 Q. B. 62. Limited to this, in *Johnson v. Lindsay* (1891), App. Cas. 371, 65 Law Times, 97; but followed as to this, in *Hedley v. Pinkney S. S. Co.* (1894), App. Cas. 222 [ship-master fellow servant with seamen].

⁶⁸¹ The history of the cases upon which the House of Lords rested their *dicta* is briefly as follows: In

Wigmore v. Jay, 5 Exch. 354, a master builder was held not responsible for original defects in a scaffold, which were known to his foreman in charge, but not known to a workman directed to work upon it nor to the master personally. It was supported by no argument, but simply referred to the opinion in another case, decided at the same time, which had no bearing on this question. But it was followed, with much hesitation, in *Gallagher v. Piper*, 16 C. B. N. S. 669, Byles, J., dissenting, and *Williams, J.*, doubting; while the other two judges simply held themselves bound by the previous case. In *Murphy v. Smith*, 19 C. B. N. S. 361, the same court agreed that the rule would not apply to a "vice-principal." In *Feltham v. England*, L. R. 2 Q. B. 33, it was held that a "foreman or manager" was not such a vice-principal, because, in that case "the master still retained control of the establishment," and the foreman "was not * * * the representative of the master." The court again simply

it is entirely beneath criticism. Had it been used as an argument at the bar, any court would have resented it, as an insult to the human understanding.

§ 228. **British rule criticised.** — The British rule has been justly condemned everywhere. Its only excuse is founded upon the assumption that a master owes to his servants no duty with respect to their management and control, that he is not bound to see that they receive reasonable orders, or are put at proper work, or not sent into places of danger. But this assumption is unfounded and unjust. No court has ever doubted that a master was liable to his servants, if he *personally* ordered his servants to encounter needless dangers, of which he was aware and they were not. Indeed, what is the special attribute of the master? What distinguishes him from any one else? Is it the mere fact that he provides materials for the work, or that he selects the servants? Is it not, more than anything else, that in him is vested the right and duty of *supervision*, of *giving orders*, of directing what work shall be done, and how it shall be done?⁶⁸² If the master chooses to delegate this authority to some one else, on what possible principle can he be allowed to relieve himself from the responsibility of having proper orders given? We cannot find that a single judge, in any part of the United States, has really followed either the decision or the *dicta* in *Wilson v. Merry*. Yet nothing is more common than to see that case cited in some American courts as an authority; while its very *dicta* are

followed *Wigmore v. Jay*, without a “disgrace to jurisprudence.” The independent reasoning. These are opinions so often quoted were delivered by Lord Cairns and Lord Lords, as conclusive of British law; Chelmsford, both of the most bigoted and they all rest upon one slipshod, and narrow type of politics; and the unreasoned decision of the Ex-latter, always a poor judge, all the chequer, in the time of Baron more because he was an able advocate. Parke; a court of which English cate.

critics have said that many of its decisions were so technical as to be

⁶⁸² Quoted and followed (*Bloyd v. St. Louis, etc. R. Co.*, 58 Ark. 66, 22

occasionally quoted, as at least worthy of great consideration.⁶⁸³ It is time to bring this mistaken policy to an end. So far as it is possible to ascertain the point actually decided, in *Wilson v. Merry*, it was that the master is not bound to use any further care to make or keep the place, on which his servants are required to do their work, safe for their use, than to select a competent servant to attend to that matter. This is exploded in every American court, including Massachusetts.⁶⁸⁴ The *dicta* so often quoted from that case, as interpreted by the English courts, are to the effect that no corporation, not even a railway company, is ever responsible to its servants for the negligence of its highest officers. This doctrine also is exploded in America.⁶⁸⁵ In short, the case of *Wilson v. Merry* is one not fit to be cited in any American court, on any point whatever.

§ 229. British rule condemned at home. — The decision in *Wilson v. Merry* was received with a storm of censure in Great Britain. All independent legal critics condemned it; and nobody ever defended it. It is well known that the British Parliament has always been composed almost exclusively of wealthy employers, for whose benefit the decisions of the British courts on this point were made. Yet a parliamentary committee reported in 1877 that these decisions were unjust and ought to be abrogated, saying, among other things: “Where the actual

S. W. 1089; also, substantially, in *Carlson v. Northwestern Tel. Co.*, 63 Minn. 428, 65 N. W. 914.

⁶⁸³ This is especially true of Massachusetts, New York and Maryland. In *Wilson v. Merry*, Lord Cairns said, “In the event of his — *i. e.*, the employer’s — not personally superintending and directing the work, (he) is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he

has done this he has, in my opinion, done all he is required to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master.” The case continues of undoubted authority in the English courts. See numerous references in *Beven on Negligence* (3d ed., 1908).

⁶⁸⁴ *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198, 11 N. E. 77; where *Wilson v. Merry* is expressly overruled.

⁶⁸⁵ See § 230, *post*.

employers cannot personally discharge the duties of masters, or where they deliberately abdicate their functions and delegate them to agents, the acts or defaults of the agents who thus discharge the duties and fulfill the functions of the masters should be considered as the personal acts or defaults of the principals and employers, and should impose the same liability on such principals and employers as they would have been subject to had they been acting personally in the conduct of their business, notwithstanding that such agents are technically in the employment of the principals; ”⁶⁸⁶ and in 1880 these principles were given partial effect by the Employers’ Liability Act, which we quote elsewhere. In 1893, the House of Commons passed a much broader measure, substantially abolishing the entire judge-made limitations on the liability of masters to servants for the negligence of fellow servants, and forbidding contracts for exemption from the new law. The House of Lords insisted on amendments permitting such contracts for exemption; to which the Commons refused to agree; and thus the entire bill fell through. The new government, although its members defeated the last bill, have pledged themselves to carry through something of the same general nature, which will at the very least consign “*Wilson v. Merry*” to that oblivion which alone it can adorn.^{686a}

§ 230. Who are vice-principals; general managers. — The master must either give a general management to his work or be responsible for the negligence of those to whom he delegates that management. He cannot efface himself, transfer all his powers to a substitute and relieve himself from all responsibility as to the mode in which those powers are exercised, even as to his servants. Where the master is a corporation, there must of necessity be at least one vice-principal; because the corporation

⁶⁸⁶ 11 Irish Law Times, 354; less fully, 21 Solicitors’ Journal, 754. ^{686a} These observations are retained as presenting an interesting review of

itself cannot perform any of the personal duties of a master.⁶⁸⁷ And where an individual master abdicates from control and puts the whole power of superintendence into other hands, he necessarily has one or more vice-principals.⁶⁸⁸ It is, therefore, universally agreed in America, that any person to whom is committed, under such circumstances, the entire control of all the servants, including the power to hire and discharge, is a vice-principal;⁶⁸⁹ for whose negligence, in all management of

the law's development, though the present status of English legislation on the subject is given elsewhere.

⁶⁸⁷ Duval v. Hunt, 34 Fla. 85, 15 So. 876, 887; Hunn v. Mich. Central R. Co., 78 Mich. 513, 44 N. W. 502. Corporations are responsible to servants for the negligence of their directors (Warner v. Erie R. Co., 49 Barb. 558; reversed on another ground, 39 N. Y. 468; Texas Mexican R. Co. v. Whitmore, 58 Tex. 276), general managers and managers of departments, etc. See subsequent notes, also, Malone v. Hathaway, 64 N. Y. 5, distinguishing corporations from other employers on this ground. This was said in order to let an *individual* master avoid liability. In Evansville, etc. R. Co. v. Baum, 26 Ind. 74, the court said that the mere suggestion of a distinction between corporations and individuals was "not fit to be made." But this was said to let a *corporate* master avoid liability.

⁶⁸⁸ Corcoran v. Holbrook, 59 N. Y. 517; Ryan v. Bagaley, 50 Mich. 179, 15 N. W. 172.

⁶⁸⁹ "When the general management and control of an industrial enterprise is delegated to a superintendent, with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the con-

duct of the business, such superintendent stands in the place of the master" (Pantzar v. Tilly Min. Co., 99 N. Y. 368, 2 N. E. 24; Hathaway v. Des Moines, 73 Ia. 133, 66 N. W. 188). So held, as to railroad superintendents (Patterson v. Pittsburgh, etc. R. Co., 76 Pa. St. 389; Huntington, etc. R. Co. v. Decker, 84 Id. 419; Laning v. N. Y. Central R. Co., 49 N. Y. 521; Cleghorn v. N. Y. Central R. Co., 56 Id. 44; Mann v. Delaware, etc. Canal Co., 91 Ind. 495; Pittsburgh, etc. R. Co. v. Henderson, 37 Ohio St. 549; Krogg v. Atlanta, etc. R. Co., 77 Ga. 202; Kansas Pac. R. Co. v. Little, 19 Kans. 267); mine superintendents (Pantzar v. Tilly Min. Co., *supra*; Chicago, etc. Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Ryan v. Bagaley, 50 Mich. 179, 15 N. W. 72), or "foremen" of mines, having entire control (Reddon v. Union Pac. R. Co., 5 Utah, 344, 15 Pac. 262; Trihay v. Brooklyn Lead Min. Co., 4 Utah, 468, 11 Pac. 612). The principle includes any person to whom the general superintendent, with the assent of the master, delegates his powers (Lasky v. Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367). "The agent who represents the corporation, as master over other employees for the time, is in the shoes of the corporation; and whether they fit him, and

the business, the master is liable to his servants.⁶⁹⁰ It is in like manner agreed that the manager of any distinct department of a varied or extended business, having such power in his department, is a vice-principal with respect thereto.⁶⁹¹ In all but a very few States, such as Texas,⁶⁹²

he wears them with propriety, or not, is their concern" (Atlantic Cotton Co. v. Speer, 69 Ga. 137). So held, as to *individual* employers: Corcoran v. Holbrook, *supra*; Mitchell v. Robinson, 80 Ind. 281, 41 Am. Rep. 812; Fort v. Whipple, 11 Hun, 586. This is especially the rule where the business managed is one entirely distinct from that which the master personally supervises (Id.; Cook v. St. Paul, etc. R. Co., 34 Minn. 45, 24 N. W. 311; Whaley v. Bartlett, 42 S. C. 454, 20 S. E. 745; conceded in Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573; Woodson v. Johnson, 109 Ga. 454, 34 S. E. 587 (1899); Beresford v. Am. Coal Co., 124 Ia. 34, 98 N. W. 902 (1904); Bailey v. Swallow, 98 Minn. 104, 107 N. W. 727 (1906); Hagan v. Gibson Min. Co., 131 Mo. App. 386, 111 S. W. 608 (1908); Gilbert v. Elk Tanning Co., 221 Pa. 176, 70 Atl. 719 (1908); Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081 (1906).

⁶⁹⁰ Limited to this, in most courts. See § 231, *post*.

⁶⁹¹ Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 S. Ct. 843; Chicago, etc. R. Co. v. Ross, 112 U. S. 377, 390 [approved on this point, in Baltimore, etc. R. Co. v. Baugh, 149 U. S. 368]; Mullan v. Phila. S. S. Co., 78 Pa. St. 25 [stevedore]; McGovern v. Central Vt. R. Co., 123

N. Y. 281, 29 N. E. 373 [entire charge of grain bin]; Kimmer v. Weber, 81 Hun, 599, 30 N. Y. Supp. 1103 [foreman in full charge; master sometimes visiting]; Davis v. Central R. Co., 55 Vt. 84; Harrison v. Detroit, etc. R. Co., 79 Mich. 409, 44 N. W. 1034; Ryan v. Bagaley, 50 Mich. 179, 15 N. W. 72 [mine boss]; Hunn v. Mich. Central R. Co., 78 Mich. 513, 44 N. W. 502; Baldwin v. St. Louis, etc. R. Co., 75 Ia. 297, 39 N. W. 507, 9 Am. St. Rep. 479; Dayharsh v. Hannibal, etc. R. Co., 103 Mo. 570, 15 S. W. 554; Galveston, etc. R. Co. v. Drew, 59 Tex. 11. So held as to foreman in charge of gang (Woods v. Lindvall, 48 Fed. 62, 4 U. S. App. 49, 1 C. C. A. 37; Cleveland, etc. R. Co. v. Brown, 56 Fed. 804, 6 C. C. A. 142; but these cases are limited, if not overruled, in the Peterson case, below. The boss of a separate "little job" is not necessarily a vice-principal (McDonald v. Eagle Mfg. Co., 68 Ga. 840; What Cheer Coal Co. v. Johnson, 56 Fed. 810, 6 C. C. A. 148 [foreman in part of mine, under superintendent]; see Thom v. Pitard, 62 Fed. 232, 10 C. C. A. 352, 8 U. S. App. 597). The foreman of an extra gang of track repairers, whose sole duty it was to supervise the work of track repairing over some eighteen or twenty miles of the road-bed of a railroad company, to hire

⁶⁹² In Texas the power to hire and discharge with superintendence and control, is decisive (Nix v. Texas, etc. Ry. Co., 82 Tex. 473, 18 S. W. 571). See appendix for statutory provisions.

although power to hire and discharge existed, and is referred to in most cases, yet the lack of power either to hire or discharge is not material;⁶⁹³ and the power of superintendence and control is the test.⁶⁹⁴ Even that is not necessary to prove vice-principalship in other matters than giving orders, as, for example, in providing or inspecting places or appliances for work.⁶⁹⁵ Where a general manager of a department is appointed in obedience to a statute, making such appointment compulsory, and making such manager personally responsible and independent of his employer's control, such employer is not responsible for anything more than due care in selecting him. He is not a vice-principal; because he is not really an agent of the principal.⁶⁹⁶

the men necessary to do that work, as a result of his orders, cannot re-
and to direct the operations of the cover against the company (North-
force so employed, is not a vice- ern Pac. R. Co. v. Peterson, 162
principal, and a workman in the U. S. 346, rev'g s. c., 51 Fed. 182,
gang, injured by his fault, but not 2 C. C. A. 157, 4 U. S. App. 574).

⁶⁹³ A master is liable for the negligence of a superintending employee in directing his subordinates, though he has no power to hire and discharge (*Foster v. Missouri Pac. Ry. Co.*, 115 Mo. 165, 21 S. W. 916; *Miller v. Mo. Pac. Ry. Co.*, 109 Mo. 350, 19 S. W. 58; *Dayharsh v. Hannibal, etc. R. Co.*, 103 Mo. 570, 15 S. W. 554; *Moore v. Wabash, etc. R. Co.*, 85 Mo. 588; *Dowling v. Allen*, 74 Id. 13; *Madden v. Chesapeake & O. R. Co.*, 28 W. Va. 610). A conductor is, in relation to those subject to his orders on the train, a vice-principal whether he has (*Shadd v. Georgia, etc. R. Co.*, 166 N. C. 968, 21 S. E. 554), or has not (*Mason v. Richmond, etc. R. Co.*, 114 N. C. 718, 19 S. E. 362; s. c., 111 N. C. 482, 16 S. E. 698) power to hire and discharge. "The power

to hire and discharge is * * * in many cases, of little moment" (*Schroeder v. Flint, etc. R. Co.*, 103 Mich. 213, 61 N. W. 663).

⁶⁹⁴ *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350, 19 S. W. 58; *Hamilton v. Walla Walla*, 46 Fed. 198 [second mate: not having superintendence].

⁶⁹⁵ *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552.

⁶⁹⁶ The mining boss required by the act of 1885 to be employed by mine owners, is a fellow servant with the miners at work in the mine; and, if the owners have exercised reasonable care in the selection of a mining boss, they are not liable for injuries to workmen resulting from his negligence (*Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577; *Coke Co. v. Roby*, 115 Pa. St. 364, 6 Atl. 593; *Delaware, etc. Canal Co.*

§ 231. Who are vice-principals; New York rule. — It was finally settled, as the law of New York, by the famous case of *Crispin v. Babbitt*,⁶⁰⁷ that “the liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. * * * However low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he had confided to such inferior employee. * * * If the act is one which pertains only

v. Carroll, 89 Pa. St. 374); s. p., *Colorado Coal, etc. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251.

⁶⁰⁷ This rule, first propounded by Church, C. J. (*Flike v. Boston, etc. R. Co.*, 53 N. Y. 540), in 1873, was declared to be the law in *Crispin v. Babbitt*, 81 N. Y. 516 [where a general manager carelessly let steam into an engine while the plaintiff was engaged in working upon the engine]; reaffirmed in *McCosker v. Long Island, etc. R. Co.*, 84 N. Y. 77 [yard-master at the wrong moment signaled to back up]; s. p., *Brick v. Rochester, etc. R. Co.*, 98 N. Y. 211 [general superintendent aiding in repair of railroad]). In all these cases the rule seems to us to have been erroneously applied to work of *superintendence*. In the *Crispin* case it was the duty of the master to see that proper warning was given, before starting dangerous machinery (*Shumway v. Walworth Mfg. Co.*, 98 Mich. 411, 57 N. W. 251; s. p., *Gerrish v. New Haven Ice Co.*, 63 Conn. 9, 27 Atl. 235). *Crispin v. Babbitt* was tried a second time; when judgment was again given for the plaintiff, and finally affirmed (109 N. Y. 653, 16 N. E. 683). The rule was wrongly applied in *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371, citing *Slater v.*

Jewett, 85 N. Y. 61, which bore no analogy; *Wilson v. Merry*, a case not fit to be cited anywhere; and the opinion of Allen, J., in *Wright v. N. Y. Central R. Co.*, 25 N. Y. 562, which was afterwards overruled by all his associates in the new Court of Appeals. This decision is inconsistent even with the opinion of Allen, J., in *Malone v. Hathaway*, 64 N. Y. 5. The captain in *Loughlin's* case was doing every thing which any master could do. There was no other master, and could be none, in bodily form. And his negligence consisted in positive direction of the work; emphatically a master's province. These erroneous decisions have, of course, led to others, *e. g.*, *Riley v. O'Brien*, 53 Hun, 147, 6 N. Y. Supp. 129; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Ruger, C. J.*, and *O'Brien, J.*, dissenting. In *Pendergast v. Union R. Co.*, 10 N. Y. App. Div. 207, 41 N. Y. Supp. 927, it was the duty of a street car conductor to fasten the car platform gate, so as to prevent passengers from falling off. Held, that the conductor represented the master and fellow master of another employee of the master, on the car, on his way home after a day's work, and the master was liable for the conductor's neglect of such duty.

to the duty of an operative, the employee performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow servant for its improper performance." This decision has been so fully accepted in later cases as to be the unquestioned law of New York.⁶⁹⁸ Under this rule, a vice-principal is one to whom is deputed the discharge of some duty or the exercise of some power which belongs to the master, as such. And he does not act as a vice-principal when engaged in any work which does not pertain to the duty or peculiar powers of the master, just as an agent does not act as an agent when doing some act entirely outside of his agency.⁶⁹⁹ But he may be, at the same moment, a vice-principal as to one duty and a fellow servant as to another. He is none the less a vice-principal, as to the master's duties, delegated to him, because of any part which he may take in the servant's work.⁷⁰⁰ The decisions of the courts and the point on which they turned are indicated in the subjoined note.⁷⁰¹

⁶⁹⁸ *Hankins v. N. Y., Lake Erie, etc. R. Co.*, 142 N. Y. 416, 37 N. E. 466; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556.

⁶⁹⁹ A laborer, acting as temporary foreman of a bridge gang, but at the same time actually assisting in the labor, is a fellow servant of the other members of the gang (*Texas, etc. R. Co. v. Rogers*, 57 Fed. 378, 6 C. C. A. 403).

⁷⁰⁰ Thus, while working as a servant, he may issue orders as vice-principal (*Hardy v. Minneapolis, etc. R. Co.*, 36 Fed. 657). The fact that the vice-principal, after having negligently directed the work, assisted in its performance, does not affect the question of the master's liability (*Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *Bergstrom v. Staples*, 82 Mich. 654, 46 N. W. 1035 [en-

gineer carelessly starting machinery as part of daily duty]). In an action by a brakeman for personal injuries, under a count alleging that defendant failed to have sufficient competent inspectors of cars received by it from other roads, by reason of which he was injured, he cannot recover on account of the neglect of an inspector, he being a fellow servant (*Bowers v. Connecticut River R. Co.*, 162 Mass. 312, 38 N. E. 508); *s. p.*, *Mackin v. Boston & Alb. R. Co.*, 135 Mass. 201; *Keith v. New Haven, etc. Co.*, 140 Mass. 175, 3 N. E. 28; *Coffee v. N. Y., New Haven, etc. R. Co.*, 155 Mass. 21, 28 N. E. 1128).

⁷⁰¹ *Arkansas*: Foreman of blasting work a vice-principal (*Burrows v. Ozark White Line Co.*, 101 S. W. (Ark.) 744 (1907); so inspector of mine (*Western Coal, etc. Co. v. Buchanan*, 102 S. W. (Ark.) 694

§ 232. Principle and application of the New York decision. — The principle of the New York rule may be thus stated: In determining the liability of the master to the servant for injuries caused by the negligence of another

(1907). *Connecticut*: One, while in discharge of duty of adjusting defective lacing of belt of a drop press, negligently injuring another is a vice-principal (*Gilmore v. Am. Tube, etc. Co.*, 79 Conn. 498, 66 Atl. 4 (1907)). *Georgia*: General order by one servant to another must relate to a duty of the master (*Moore v. Dublin, etc. Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772 (1907)). Superintendent of a manufacturing plant with relation to the duty of warning a servant of danger known to him, but not to the servant is a vice-principal (*Holland v. McRae, etc. Co.*, 68 S. E. (Ga.) 555 (1910)). *Idaho*: Where scaffolding was negligently constructed by inexperienced men, under the direction of the boss, another servant working on the scaffolding and injured thereby is entitled to recover (*Craesafulli v. Winston Bros. Co.*, 108 Pac. (Ida.) 740 (1910)). *Illinois*: Authority to take charge of and control a particular branch of work, constitutes one vice-principal in governing and directing others engaged therein — they are commands of the master (*Chicago, etc. Ry. Co. v. Rathneau*, 124 Ill. App. 427, aff'd, 225 Ill. 278, 80 N. E. 119 (1907)). Timbermen of mine in their relation to a driver a vice-principal (*Donk Bros., etc. Co. v. Thil*, 228 Ill. 233, 81 N. E. 857, aff'g 128 Ill. App. 249 (1907)); liability depends on the act, whether a non-delegable duty. Master is liable for negligent exercise of authority to control (*East St. Louis, etc. Ry. Co. v. Meeker*, 229 Ill. 98, 82 N. E. 202 (1907)); *Chicago Term. Ry. Co. v. Reddick*, 230 Ill. 105, 82 N. E. 598 (1907)). It is the act and not the title of one performing it that designates him as vice-principal (*Chicago, etc. Ry. Co. v. Barker*, 169 Ind. 670, 83 N. E. 369 (1908)). The company is liable where injury results from the combined effects of the negligence of an employee discharging the duties of master and of co-servant (*Doherty v. Parker Washington Co.*, 146 Ill. App. 219 (1909)). Foreman negligently giving a signal which it was the duty of another servant to do, will render the master liable (*Roebeling Constr. Co. v. Thompson*, 229 Ill. 42, 82 N. E. 196 (1907)). *Indiana*: The character of the duties to be performed and not the relative rank or grade of the parties is the controlling consideration in determining whether one is a vice-principal (*Cleveland, etc. Ry. Co. v. Foland*, 91 N. E. (Ind.) 165 (1910)); the superior servant is not a vice-principal merely because he has control and direction of the manner of doing the work (*Same v. Same, Id.*); the company is liable where the foreman negligently orders the servant to go outside his usual employment and he is injured thereby (*Oolitic Stone Co. v. Ridge*, 91 N. E. (Ind.) 944 (1910)). *Iowa*: One in charge of the work ordering another into a bin of oats, a vice-principal (*Meier v. Way, etc. Co.*, 111 N. W. (Ia.) 420 (1907)); superintendent in charge of raising beams (*McGuire v. Waterloo, etc. Co.*, 113 N. W. (Ia.) 850 (1907)). *Kansas*: Machinist a vice-principal as to his helper (*Missouri, etc. Ry. Co. v.*

servant, the question does not turn merely on matter of subordination and control, but rather on the character of the alleged negligent act. If the act is done in the discharge of some positive duty of the master to the servant,

Quinlan, 93 Pac. (Kans.) 632 (1908). *Kentucky*: Gross negligence is only required to be shown where the negligence is that of a fellow servant, and the engineer of a train does not sustain such relation towards one whose duty it was to notify him that there was another section following closely behind him (Cincinnati, etc. Ry. Co. v. Silvers, 126 S. W. (Ky.) 120 (1910); the association rule, that is, that the master will be liable for the negligence of a fellow servant unless the injured servant and the negligent one are so related in their work that the former may protect himself, and the employment of the two in different departments, declared to constitute in Kentucky exceptions to the fellow-servant doctrine (Milton's Admx. v. Frankfort, etc. Traction Co., 129 S. W. (Ky.) 322 (1910). *Massachusetts*: Company liable for negligence of car dispatcher (Doe v. Boston, etc. Ry. Co., 80 N. E. 814 (1907). *Michigan*: Foreman a fellow servant (Guest v. Edison, etc. Co., 150 Mich. 438, 114 N. W. 226 (1907). The act of one exercising control in exposing one to danger not in line with his duties is the act of the principal (Belmer v. Boyne City, etc. Co., 180 Mich. 669, 125 N. W. 726 (1910). *Minnesota*: Chief engineer in his relation to his assistant in the discharge of a non-delegable duty (Peterson v. G. W. Van Duesen & Co., 101 Minn. 50, 111 N. W. 839 (1907). Foreman negligently directing clearing of snow out of a hole where there was dynamite (Carlson v. James Fore-

stall Co., 101 Minn. 88, 112 N. W. 626 (1907). Shift boss (Laitinen v. Shenango, etc. Co., 103 Minn. 88, 114 N. W. 264 (1908). Where a vice-principal sends one into a place of danger and then negligently starts the machinery, ordinarily the act of a fellow servant, the master will be liable (Cody v. Longyear, 103 Minn. 116, 114 N. W. 735 (1908). *Missouri*: A servant injured by failure of night watchman to turn on the lights in a store, is not a fellow servant with the clerk (Bailey v. Stix, etc. Co., 129 S. W. (Mo.) 799 (1910). *New Hampshire*: Not liable for act of foreman unless a non-delegable duty (Tilley v. Rockingham, etc. Co., 67 Atl. 946 (1907). *New Jersey*: Where it is the custom of the foreman to give warning in a dangerous service, it becomes a duty of the master and he is liable (Germanus v. Lehigh Valley Ry. Co., 67 Atl. (N. J.) 79 (1907). *New York*: Not liable where superintendent was acting as fellow servant (Kujara v. Irving, 106 N. Y. Supp. 837, 122 App. Div. 375 (1907); Williams v. Citizens' S. Boat Co., 106 N. Y. Supp. 975, 122 App. Div. 188 (1907). *North Carolina*: A servant with the right to order and control others and whose duty it is to report and procure discharge of others is a vice-principal (Hipp v. Champion Fibre Co., 152 N. C. 745, 68 S. E. 215 (1910). Master is responsible for negligence of a servant authorized to control (Shaw v. Highland Park Mfg. Co., 146 N. C. 235, 59 S. E. 676 (1907). Must be entrusted with duties of the master

then negligence in the act is negligence of the master, irrespective of the gradations of service as between the servants themselves. If the act is not one in the discharge of such positive duty, then there should be some personal wrong on the part of the master before he can be held liable. It has met with acceptance in much the greater part of the United States. But the value of any general principle of law depends mainly upon the methods of its application. And, while the principle above stated has met with very general acceptance, its value has been greatly reduced in a few States by the narrow spirit in which the personal duties of masters have been defined; while in nearly all other courts its value has been greatly increased by putting in the forefront of those duties the duty of general superintendence, including direction, control, watchfulness, warning, instruction and inspection.⁷⁰²

(*Chesson v. Walker*, 60 S. E. (N. C.) 422 (1908). *Texas*: A foreman charged with the duty of keeping the machines of a saw mill in order discharges a non-delegable duty, but if he merely assists another servant whose proper duty it was, the master is not liable (*Quinn v. Glenn Lbr. Co.*, 126 S. W. 2 (1910). *Washington*: Foreman of crew building a trestle is a vice-principal as to those under him (*Cook v. Chehalis River Lbr. Co.*, 94 Pac. (Wash.) 189 (1908). *Wisconsin*: An employee charged with the duty of disconnecting and making safe electric wires on which others must work is a vice-principal as to such other servants (*Massy v. Milwaukee, etc. Ry. Co.*, 126 N. W. (Wis.) 544 (1910). *United States*: Duty to warn and instruct dangerous service, primary and absolute, cannot relieve by delegation (*Peters v. George*, 154 Fed. 634, 83 C. C. A. 408 (1907); also to effect that vice-principal theory has been largely discarded by Fed-

eral courts, and liability turns rather on character of the act than on relation of the parties. Mere supervision and nothing more will not charge the master, but with other circumstances may do so (*Id.*). Mere direction by foreman in the handling of machinery not sufficient to charge the master (*Kin-near Mfg. Co. v. Carlisle*, 152 Fed. 933, 82 C. C. A. 81 (1907).

⁷⁰² *Alabama*: *Mobile, etc. Ry. v. Smith*, 59 Ala. 245; *Tyson v. South, etc. R. Co.*, 61 Ala. 554. *Arkansas*: *St. Louis, etc. Ry. Co. v. Torrey*, 58 Ark. 217, 24 S. W. 244 (foreman handling rope, master not liable); *Bloyd v. St. Louis, etc. Ry. Co.*, 58 Ark. 66, 22 S. W. 1089 (foreman, laborer injured through obedience to his orders, expressly adopting our section 228 and the *Ross* case). *Colorado*: *Denver, etc. Ry. Co. v. Driscoll*, 12 Colo. 520, 21 Pac. 708, adopting the *Ross* case. *California*: *Daves v. Southern Pac. Co.*, 98 Cal. 20, 32 Pac. 708; *Burns v. Sennett*,

The test to be applied in each case, under this principle, is to inquire: What would have been the duty of the master had he been personally present? To whom did he delegate that duty, he being absent? That delegate,

99 Cal. 363, 33 Pac. 916; *Nixon v. Selby, etc. Co.*, 102 Cal. 458, 36 Pac. 803. Holding master liable for orders negligently given by subordinate of the superintendent while in control of the injured servant (*Ryan v. Los Angeles, etc. Storage Co.*, 112 Cal. 244, 44 Pac. 471 (1896)). *Connecticut*: *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094 (supervision held master's duty); *Sullivan v. New York, etc. Ry. Co.*, 62 Conn. 209, 52 Am. Rep. 59, 25 Atl. 711 (foreman not vice-principal); *Darrigan v. New York, etc. Ry. Co.*, 52 Conn. 285 (rejecting the English decisions and accepting the *Ross* case). *Delaware*: *Foster v. Pusey*, 8 Houst. 168, 14 Atl. 545. *Florida*: *South Florida, etc. Ry. Co. v. Weese*, 32 Fla. 212, 13 So. 436 (1893). *Georgia*: *Cheaney v. Ocean S. S. Co.*, 92 Ga. 726, 19 S. E. 33 (stevedore vice-principal); *Central Ry. Co. v. DeBray*, 71 Ga. 406 (brakeman and conductor on same train not fellow servants); *Augusta Factory Co. v. Barnes*, 72 Ga. 217. *Illinois*: *Fitzgerald v. Honkomp*, 44 Ill. App. 365; *Chicago, etc. Ry. Co. v. Moranda*, 108 Ill. 576; *Gall v. Beckstein*, 173 Ill. 187, 50 N. E. 711, aff'g, 69 Ill. App. 616 (1898); *Chicago, etc. Ry. Co. v. May*, 108 Ill. 288 (where one of a gang of men was killed in consequence of obedience to order carelessly given by a foreman, the court, *Mulkey, J.*, says: "When the negligent act complained rises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable * * * when he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey at the peril of losing their situations; and such commands are, in contemplation of law, the commands of the company; hence it is held responsible for the consequences." This was quoted and followed in several cases of foreman negligently giving orders); *Wabash, etc. Ry. Co. v. Hawk*, 121 Ill. 259, 12 N. E. 253; *Stearns v. Reidy*, 33 Ill. App. 246, aff'd, 25 N. E. 762 (or omitting to give due warning); *Chicago, etc. Ry. v. Gross*, 35 Ill. App. 178, aff'd, 24 N. E. 563 (any servant authorized to superintend and command a gang of men is a vice-principal as to them); *Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801 (the master is responsible for negligence in exercise of authority, conferred by him); *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627 (night foreman). Whether conductor negligently starting a train fellow servant with the laborer on a work train, is for the jury (*Mobile, etc. Ry. Co. v. Massey*, 152 Ill. 134, 38 N. E. 787, aff'g 52 Ill. App. 556). *Indiana*: *New Pittsburgh Coal, etc. Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Indiana Car Co. v. Parker*, 190 Ind. 181; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303 (section foreman failing to apply brake, master not liable); *Hodges v. Standard, etc. Co.*, 152 Ind. 680, 52 N. E. 391 (1898). One engaged in superintendence and command as sole

whether he be high or low, should be deemed, with respect to the duty, a vice-principle. Foremost among the

present representative of the master, and not merely working with and as the other servants, is not a fellow servant; and for his negligence in giving orders or in making the work which he orders unsafe, the master is responsible (*Taylor v. Evansville*, etc. R. Co., 121 Ind. 124, 22 N. E. 876; *Spencer v. Ohio*, etc. Ry. Co., 130 Ind. 181, 29 N. E. 915 [negligent orders]). Where a foreman acts as vice-principal in calling out employees, he does not cease to be such vice-principal and become a fellow servant as soon as he has assigned to the other employees a place to work, but retains his original character while directing the details of the work (*Nall v. Louisville*, etc. Ry. Co., 129 Ind. 260, 28 N. E. 183, also page 611). The court expressly overruled *Columbus*, etc. Ry. Co. v. *Arnold*, 31 Ind. 174, and distinguished many other cases, such as *Brazie*, etc. Coal Co. v. *Cain*, 98 Ind. 282; *Indiana Car Co. v. Parker*, *supra*; *Capper v. Louisville*, etc. Ry. Co., 103 Ind. 305, 2 N. E. 749. *Iowa*: A mere foreman is a fellow servant with his subordinates, "so far as his own mere labor is concerned" (*Baldwin v. St. Louis*, etc. Ry. Co., 68 Ia. 37, 25 N. W. 918, explaining *Peterson v. Whitebreast*, etc. Coal Co., 50 Ia. 673). But any one in full control of timber yard, ordering and discharging men, is a vice-principal (*Baldwin v. St. Louis*, etc. Ry. Co., 75 Ia. 297, 39 N. W. 507), and so is his substitute in his absence (*Id.*); *Barnicle v. Connor*, 110 Ia. 238, 81 N. W. 452 (1900). *Kansas*: *Hannibal*, etc. Ry. Co. v. *Fox*, 31 Kans. 586, 3 Pac. 320; *Atchison*, etc. Ry. Co. v. *Moore*, 29 Kans. 422; *Kansas*, etc. Ry. v. *Salmon*, 14 Kans. 512; *St. Louis*, etc. Ry. Co. v. *Weaver*, 35 Kans. 412, 11 Pac. 408. *Louisiana*: In *Van Amburg v. Vicksburg*, etc. R. Co., 37 La. Ann. 650, a conductor was held not to be a fellow servant with the engineer of his train, *Manning, J.*, saying: "The case of *Chicago*, etc. Ry. Co. v. *Ross*, 112 U. S. 377, has made an inroad on jurisprudence in the right direction; and we have applied the new principle there established at the present term in *Towns v. Vicksburg*, etc. Ry. Co., 37 La. Ann. 630, *reaff'd*, *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363." A foreman in a factory is not a fellow servant of the engineer in charge of the machinery (*Mattise v. Consumers Ice Co.*, 46 La. Ann. 1535, 16 So. 400, adopting the *Ross* case. *Maine*: *Dube v. Lewiston*, 83 Me. 211, 22 Atl. 112. Master not liable for the negligent orders of a conductor (*Lasky v. Canadian Pac. Ry. Co.*, 83 Me. 461, 22 Atl. 367 [denying the *Ross* case]; *Ross v. Chicago*, etc. Ry. Co., 112 U. S. 377; *Cassidy v. Maine*, etc. Ry. Co., 76 Me. 488 [or foreman]; *Doughty v. Penobscot*, etc. Co., *Id.* 143 [or overseer]; *Conley v. Portland*, 78 Me. 217, 3 Atl. 658. Does not depend on the grade of service, but on the relation of the alleged vice-principal to the character of the act performed (*Small v. Allington*, etc. Co., 98 Me. 551, 48 Atl. 177 (1901); *Cowan v. Umbagog Pulp Co.*, 91 Me. 36, 39 Atl. 340 (1895). *Maryland*: *State v. Malster*, 57 Md. 287 (adopting the New York rule, but with that tendency against servants which has usually characterized the Maryland courts). *Massachusetts*: *Moy-*

powers of a master, as already pointed out, is the power of giving orders. Foremost among his duties is that of

nihan v. Hills, 146 Mass. 586, 16 N. E. 574 (reconstructing machinery); *Babcock v. Old Colony Ry. Co.*, 150 Mass. 467, 23 N. E. 325 (inspecting tracks); *O'Brien v. Rideout*, 161 Mass. 170, 36 N. E. 792 (1894). *Michigan*: *Beesley v. Wheeler, etc. Co.*, 103 Mich. 196, 61 N. W. 658; *Findlay v. Russel Wheel, etc. Co.*, 108 Mich. 286, 66 N. W. 50. In harmony with the doctrine stated in the text (*Chicago, etc. Ry. Co. v. Bayfield*, 37 Mich. 205); conductor not fellow servant with laborer on gravel train (*Rodman v. Michigan Cent. Ry.*, 59 Mich. 395, 26 N. W. 651, properly overruling s. c., 55 Mich. 57, 20 N. W. 788 [conductor's negligence]). An assistant road master in control of a gang of men and with power to direct their work and discharge any of them, is a superior servant for whose negligent acts the master is liable (*Harrison v. Detroit, etc. Ry. Co.*, 79 Mich. 409, 44 N. W. 1034; *Palmer v. Michigan Cent. Ry. Co.*, 93 Mich. 363, 53 N. W. 397; but compare *Petaja v. Aurora Min. Co.*, 106 Mich. 463, 64 N. W. 335 (1895); *Wellihan v. National Wheel Co.*, 126 Mich. 1, 87 N. W. 75 (1901). *Minnesota*: *Carlson v. Northwest Tel. Co.*, 63 Minn. 428, 65 N. W. 914 (master liable for negligent orders of foreman sending workman into danger without warning); *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020 (foreman negligent, joint work, master not liable); *Blomquist v. Chicago, etc. Ry. Co.*, 60 Minn. 426, 62 N. W. 818 (foreman, negligent in giving orders); *Bell v. Lang*, 83 Minn. 228, 86 N. W. 95 (1901). *Missouri*: *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 19 S. W. 58 (1892); *Hawk v. McLeod Lbr. Co.*, 166 Mo. 121, 65 S. W. 1022 (1902). *Nebraska*: *Chicago, etc. Ry. Co. v. Lundstrum*, 16 Neb. 254, 20 N. W. 198 (injuries received through negligence of the conductor, while working under his orders). *Cobb, C. J.*, says: "I think the law thus established and laid down in Ohio prevails substantially throughout the western states and will ultimately prevail everywhere," reaff'd, *Burlington, etc. Ry. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921, and again, *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294. In a still later decision the *Rose* case was adhered to, and the later United States decisions (*e. g.* "*Peterson*") overruled in *Nebraska*, *Union Pacific Ry. Co. v. Doyle*, 70 N. W. 43 (1897). *New Hampshire*: *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552, servant charged with inspection a vice-principal. *New Jersey*: *O'Brien v. Amer. Dredg. Co.*, 53 N. J. Law, 291, 21 Atl. 324 (captain of dredge); *Gilmore v. Oxford Iron, etc. Co.*, 55 N. J. Law, 39, 25 Atl. 707 (mining foreman). *New York*: Masters were held liable for negligence of superior servants in general superintendence in *Hankins v. N. Y., etc. Ry. Co.*, 142 N. Y. 416, 37 N. E. 466 (train dispatcher); *Bailey v. Rome, etc. Ry.*, 139 N. Y. 302, 34 N. E. 918 (inspection of machinery); *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Kranz v. Long Island Ry. Co.*, 123 N. Y. 1, 25 N. E. 206 (inspection of place); *Pantzar v. Tilly Foster, etc. Min. Co.*, 99 N. Y. 398, 2 N. E. 24 (general manager failing to protect against dan-

general superintendence. He is equally responsible where he deputes to another the duty of giving orders

gers); *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66 (seaman injured by obedience to orders of superior at sea); *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796 (seaman neglected in sickness by captain); *Conlan v. N. Y., etc. Ry. Co.*, 74 Hun, 115, 26 N. Y. Supp. 659 (brakeman acting as conductor); *Marks v. Rochester, etc. Ry. Co.*, 77 Hun, 77, 28 N. Y. Supp. 314 (car driver and assistant); *Rettig v. Fifth Ave. Tract. Co.*, 6 N. Y. Misc. 328, 26 N. Y. Supp. 896 (superintendent *alter ego* of master in setting a test, dangerous work without proper instructions); *McC Campbell v. Cunard S. S. Co.*, 69 Hun, 131, 23 N. Y. Supp. 477 (superintendent giving orders not fellow servant); *Brenan v. Gordon*, 118 N. Y. 489, 23 N. Y. Supp. 810, 8 L. R. A. 818 (instructions as to the use of elevators). Master held not liable in *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228 (sea captain beating seaman); *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 556; *Murphy v. Boston, etc. Ry. Co.*, 88 N. Y. 146 (engineer and mechanic in repair shop killed by explosion of boiler, negligently inspected); *Beilfus v. N. Y., etc. Ry. Co.*, 29 Hun, 556 (superintendent of wrecking train and employee under him killed by obeying his order); *Scott v. Swing*, 31 Hun, 292 (foreman in charge of a derrick and laborer under him); *Hart v. N. Y., etc. Dock Co.*, 48 N. Y. Sup. Ct. 460 (foreman of dry dock and laborer); *Kenney v. Cunard S. S. Co.*, 52 Id. 434. *North Carolina*: *Dobbin v. Richmond, etc. R. Co.*, 81 N. C. 446 (engineer and laborers on gravel train). *Per Ruffin, J.*, *Cowles v. Richmond, etc. R. Co.*, 84 N. C. 309; *Shadd v. Georgia, etc. Ry. Co.*, 116 N. C. 968, 21 S. E. 554 (adopting Ross decision); *Patton v. Western, etc. R. Co.*, 96 N. C. 455, 1 S. E. 863. *North Dakota*: *Ell v. Northern Pac. R. Co.*, 1 N. D. 336, 48 N. W. 222, 12 L. R. A. 97, 26 Am. St. Rep. 621. *Ohio*: *Longshore, etc. Ry. Co. v. Lavalley*, 36 Ohio St. 221 (foreman who negligently omitted to give warning). *Oregon*: *Miller v. Southern Pac. Co.*, 20 Ore. 285, 26 Pac. 70 (switch tender not a vice-principal). *Compare Knahtla v. Oregon, etc. Ry. Co.*, 21 Ore. 136, 27 Pac. 91; *Anderson v. Bennett*, 16 Ore. 515, 19 Pac. 765. *Pennsylvania*: *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Bridge v. Newberry*, 96 Pa. St. 296. The courts refuse to treat any servant as vice-principal who is not in charge of an entire department (*Faber v. Carlisle Mfg. Co.*, 126 Pa. St. 387, 17 Atl. 621; *Kinney v. Corbin*, 132 Pa. St. 341, 19 Atl. 141; *New York, etc. Ry. Co. v. Bell*, 112 Pa. St. 400, 4 Atl. 50; *McGinley v. Levering*, 152 Pa. St. 366, 25 Atl. 824; *Carnegie v. Penn. Bridge Co.*, 197 Pa. St. 441, 47 Atl. 355 (1903); *Johnson v. Western, etc. Ry. Co.*, 200 Pa. St. 314, 49 Atl. 794 (1901). *Rhode Island*: *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659 (foreman while in ordinary work, fellow servant). See *Larich v. Moies*, 18 R. I. 518, 28 Atl. 661. *South Carolina*: *Gunther v. Graniteville Mfg. Co.*, 18 S. C. 262; *Boatwright v. Northeastern R. Co.*, 25 S. C. 128; *Couch v. Charlotte, etc. Ry.*, 22 S. C. 557 (adopting Ross case). *Tennessee*: The master is liable for the foreman's negligence only in regard

which he ought to give himself, if present; and if he deposes his power and duty of superintendence, he is re-

to some duty to the inferior imposed by law upon the master, and by him entrusted to the superior servant (Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; Knox v. Southern Ry. Co., 101 Tenn. 375, 47 S. W. 491, 12 Am. & Eng. Ry. cases, 684 (1898)). The conductor of a train is a vice-principal and not a fellow servant of a brakeman who is injured in a collision (Illinois, etc. Ry. Co. v. Spence, 93 Tenn. 173, 23 S. W. 211, adopting Ross case). Otherwise, however, where the one assuming to give the order had no authority (Nashville, etc. Ry. Co. v. McDaniel, 12 Lea, 386), or the "order" is a mere request (Bradley v. Nashville, etc. Ry. Co., 14 Lea, 374). *Vermont*: Davis v. Central Vermont R. Co., 55 Vt. 85. *Virginia*: Norfolk, etc. Ry. Co. v. Thomas, 90 Va. 205, 17 S. E. 884; Moon v. Richmond, etc. Ry. Co., 78 Va. 745; Richmond, etc. Ry. v. Williams, 86 Va. 165, 9 S. E. 990. The foreman of a quarry owed by a corporation, whose duties require him to exercise a general superintendence over the men for their guidance, is not a fellow servant of one of such men (Richmond Granite Co. v. Bailey, 92 Va. 554, 24 S. E. 232). *Washington*: Sayward v. Carlson, 1 Wash. St. 29, 23 Pac. 830; Zintek v. Stimpson Mill Co., 9 Wash. St. 395, 37 Pac. 340. *West Virginia*: Criswell v. Pittsburgh, etc. Ry. Co., 30 W. Va. 798, 6 S. E. 31 (foreman omitting to give warning); Madden v. Chesapeake, etc. Ry. Co., 28 W. Va. 619 (not necessary that vice-principal should be *alter ego* or have power to discharge); Cooper v. Pittsburgh, etc. Ry. Co., 24 W. Va. 37 (a well reasoned case). *Wisconsin*: Klochinski v. Shores Lbr. Co., 93 Wis. 417, 67 N. W. 934 (1896), (superintendent handling logs, master not liable); Hartford v. Northern Pac. Ry. Co., 91 Wis. 374, 64 N. W. 1033 (1895), (superintendent turning wheels, master not liable); Stutz v. Armour, 84 Wis. 623, 54 N. W. 1000 (foreman's negligent directions, being only such as one workman, would give to another); Dwyer v. American Ex. Co., 82 Wis. 307, 52 N. W. 304 (1892), (general manager driving wagon); Toner v. Chicago, etc. Ry. Co., 69 Wis. 188, 33 N. W. 433 (station agent, master not liable to brakeman). See also holding master not responsible for negligent conduct and orders of superior servant, Mathews v. Case, 61 Wis. 491; Peschel v. Chicago, etc. Ry. Co., 62 Wis. 338; Hoth v. Peters, 55 Wis. 405; Heine v. Chicago, etc. Ry. Co., 58 Wis. 525; Wiskie v. Montello, etc. Co., 111 Wis. 443, 87 N. W. 461 (1901). *Wyoming*: McBride v. Union Pac. Ry. Co., 3 Wyo. 247, 21 Pac. 687 (1889). Deck hand selected to act as captain of watch (Memphis, etc. Packet Co. v. Hill, 122 Fed. 246, 58 C. C. A. 610 (1903); city engineer, in relation to laborer digging a sewer (City of LaSalle v. Kostka, 190 Ill. 130, 60 N. E. 72, aff'g 92 Ill. App. 9 (1901); control and direction, decisive (Rock Island, etc. Works v. Pohlman, 210 Ill. 133, aff'g 99 Ill. App. 670, 71 N. E. 428 (1904); supervision, control and subjection to orders, best evidence (Union Pac. Ry. Co. v. Doyle, 50 Neb. 555, 70 N. W. 43 (1897); one charged with a non-delegable duty, or in control of entire business or a department of

sponsible for the failure of his deputy to properly superintend. Under any consistent application of the New

it (*Mollhoff v. Chicago, Rock Island, etc. Ry. Co.*, 15 Okla. 540, 82 Pac. 733 (1905); mere passive acquiescence in one assuming authority over another, insufficient (*Texas, etc. Coal Co. v. Manning*, 34 Tex. App. 322, 78 S. W. 545 (1904); "hook tender," in relation to crew moving a tank (*Bailey v. Cascade, etc. Co.*, 132 Wash. 319, 73 Pac. 385 (1903); does not depend on the grade of service, but on the relation of the alleged vice-principal to the character of the act performed (*Skelton v. Pac. Lbr. Co.*, 140 Cal. 507, 74 Pac. 13, 74 Pac. 444 (1903); *Cincinnati, etc. Ry. Co. v. Hill's Admr.*, 28 Ky. L. Rep. 530, 89 S. W. 523 (1905); *Small v. Allington, etc. Co.*, 94 Me. 551, 48 Atl. 177 (1901); *Wellihan v. National Wheel Co.*, 128 Mich. 1, 87 N. W. 75 (1901); *Hawk v. McLeod Lbr. Co.*, 166 Mo. 121, 65 S. W. 1022 (1901); *Galvin v. Pierce*, 72 N. H. 79, 54 Atl. 1014 (1903); *Hutcheson v. Chas. F. Parker & Co.*, 58 N. Y. Supp. 190, 39 App. 133, aff'd, 169 N. Y. 579, 61 N. E. 1130 (1901); *Southern Ry. Co. v. Mauzy*, 98 Va. 602, 37 S. E. 285 (1900); *Jackson v. Norfolk, etc. Ry. Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337 (1897); superior-servant rule rejected (*Small v. Allington, supra*; *Knutter v. N. Y.*, etc. Ry. Co., 67 N. J. Law, 646, 52 Atl. 565, 58 L. R. A. 808 (1902); track foreman (*Allison v. Southern Ry.*, 129 N. C. 336, 40 S. E. 91 (1903); foreman of shift is not (*Davis v. Trade, etc. Min. Co.*, 117 Fed. 122, 54 C. C. A. 636 (1902); foreman of gang clearing away a wreck is not (*Flippen v. Kimball*, 87 Fed. 258, 31 C. C. A. 282 (1898); foreman of work room is not (*Pistoner v. Am. Can. Co.*, 119 Fed. 196 (1902); superintendent of railway division is (*Shuster v. Philadelphia, etc. R. Co.*, 62 Atl. 689, 4 L. R. A. (N. S.) 407 (1906); general superintendent, when acting as such, and not as laborer (*Woolson v. Wm. Johnston, etc. Co.*, 109 Ga. 454, 34 S. E. 587 (1899); foreman when acting as such (*Frazer, etc. v. Collier*, 75 Ill. App. 194 (1898); but only when so acting (*Architectural, etc. Wks. v. Nagels*, 80 Ill. App. 492 (1898); mere foreman is not (*Southern, etc. Ry. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886 (1903); *Dill v. Marmon*, 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163 (1905); foreman of gang building a scaffold is not (*Moore v. McNeil*, 54 N. Y. 956, 35 App. Div. 323 (1898); nor of gang loading a ship (*Kelly v. Hogan*, 76 N. Y. Supp. 913, 37 Misc. 761 (1902); foreman of gang clearing right of way, is not (71 S. C. 53, 50 S. E. 716 (1906); one of a gang merely exercising authority over the others, is not (*Moore Lime Co. v. Richardson's Admr.*, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785 (1897); unless his work relates to non-delegable duties (*Lane Bros v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872 (1904); mine boss, employed in compliance with statute, is not (*Williams v. Thacker Coal, etc. Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812 (1898); general manager is (*Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081 (1906); foreman may be (*Gardner v. New England Tel. Co.*, 170 Mass. 156, 48 N. E. 937 (1898); management and control of distinct

York rule, therefore, the master is represented, as by a vice-principal, by any one to whom he deposes the power

department is (*Taylor v. Ga. Marble Co.*, 99 Ga. 512, 27 S. E. 768, 59 Am. St. Rep. 238 (1896); *Mo.*, etc. *Wks. v. Dillon*, 206 Ill. 145, 69 N. E. 12 (1903); *Hoosier, etc. Co. v. McCain*, 133 Ind. 231, 31 N. E. 956 (1892); *Louisville, etc. Ry. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988, 152 Ind. 696, 50 N. E. 1124 (1898); *Maryland Steel Co. v. Engleman*, 101 Md. 661, 61 Atl. 314 (1905); *Roberts v. Fielder Salt Wks.*, 72 S. W. (Tex. App.) 618 (1903); *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257 (1909); *Boin v. Spreckels Sugar Co.*, 102 Pac. (Cal.) 937 (1909); *Deep Min., etc. Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210 (1895); *Taylor v. Ga. Marble Co.*, *supra*; *Ft. Wayne v. Christie*, 156 Ind. 172, 59 N. E. 385 (1901); *Fox v. Jacob, etc. Pkg. Co.*, 96 Mo. App. 173, 70 S. W. 164 (1903); *New Omaha, etc. Co. v. Baldwin*, 62 Neb. 180, 87 N. W. 27 (1891); *Shaw v. Highland Park Mfg. Co.*, 146 N. C. 235, 59 S. E. 676 (1907); *James v. Fountain Inn Mfg. Co.*, 80 S. C. 232, 61 S. E. 391 (1908); *Lewis v. Seifert*, 116 Pa. St. 11 Atl. 514, 2 Am. St. Rep. 631 (1887). But see *Prevost v. Citizens Ice Co.*, 185 Pa. St. 617, 40 Atl. 88, 64 Am. St. Rep. 659 (1898); *Johnson v. Union Pac., etc. Co.*, 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506 (construing the law in Wyoming (1902); *Evans v. La. Lbr. Co.*, 111 La. 534, 35 Southern 736 (1903); *Dossett v. St. Paul Lbr. Co.*, 47 Wash. 276, 82 Pac. 273 (1905); *Hendricks v. Lesure Lbr. Co.*, 92 Minn. 318, 99 N. W. 1125, 100 N. W. 638 (1904); *Ry. Co. v. Hartel*, 157 Fed. 667, 85 C. C. A. 335 (1907); *Fallon v. Steamboat Co.*, 162 Fed. 329 (1908); *Mfg. Co. v. Otte*, 157 Fed. 230, 84 C. C. A. 673 (1907). *United States*: "There is, in applying this doctrine, a clear distinction to be made * * * between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence" (*Chicago, etc. R. Co. v. Ross*, 112 U. S. 377, 390). In no proper sense of the term is a conductor a fellow servant with the foreman, the brakeman, the porters and the engineer. The latter are fellow servants in the running of the train under his direction. As to them and the train he stands in the place of and represents the corporation" (*Id.*). "If such a conductor does not represent the company, then the train is operated without any representative of its owner" (*Id.* 394). The conductor's negligence, in that case, consisted in omitting to give proper orders. Although that decision has been limited in *Baltimore, etc. R. Co. v. Baugh*, 149 U. S. 368, to the conductor of an entire train, as distinguished from an engineer running an engine with no train, and again, in the *Hambly, Peterson and Charless* cases, so as not to cover foremen, etc. managing small pieces of work, in which they take part, it has never been overruled. In *Union Pac. R. Co. v. Fort*, 17 Wall. 553, the defendant was held liable to a boy for the loss of an arm suffered while adjusting a belt on rapidly moving machinery, by direction of C., whose

of giving orders, which must be obeyed without or before appeal; and he is responsible for those orders as much as if they were his own.⁷⁰³ His deputy, in these and all

orders the boy was bound to obey. *s. p.*, *Daub v. Northern Pac. R. Co.*, 18 Fed. 625 (deck hand injured through negligence of mate, while obeying his order). See *Briggs v. Titan*, 23 Fed. 413 (pilot and deck hand); *Gravelle v. Minneapolis, etc. R. Co.*, 3 *McCrary*, 352 (yardmaster and hand coupling cars under his order); *Miller v. Union Pacific R. Co.*, 17 Fed. 67 (employee ordered by foreman into perilous position); *The Clatsop Chief*, 7 *Sawyer*, 274 (master and foreman of steam tug); *Garrahy v. Kansas City, etc. Ry. Co.*, 25 Fed. 258. But the latest decision of the Supreme Court of the United States remains to be considered. A locomotive engineer and a section foreman are fellow servants of a section hand, and the latter cannot recover from the company for injuries inflicted by the negligence of the foreman in ordering him to jump from a moving train or by the negligence of the engineer in suddenly starting up the train after it had slowed down (*Texas & Pacific Ry. Co. v. Bourman*, 212 U. S. 536 (1909)); in support of the ruling the court refers to *Baltimore & Ohio Ry. Co. v. Baugh*, 149 U. S. 368; *Northern Pac. v. Hamby*, 154 U. S. 349; *Central Ry. Co. v. Keegon*, 160 U. S. 259; *Northern Pac. Ry. Co. v. Peterson*, 162 U. S. 346; *Northern Pacific Ry. Co. v. Charless*, 162 U. S. 359; *Martin v. Atchison, Topeka, etc. Ry. Co.*, 166 U. S. 399; *Alaska Min. Co. v. Whelan*, 168 U. S. 86; *New England R. Co. v. Conroy*, 175 U. S. 323; *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338. The court attempts on explanation of Northern

Pacific Ry. Co. v. Egeland, 163 U. S. 93, where the plaintiff, a common laborer, jumped from the train by order of the conductor, and the company was held liable, saving that the case was misunderstood in the court below, and that the application of the fellow servant doctrine was not presented or considered, but only the defense of contributory negligence. Meaning, we take it, that the order of the conductor was that of a fellow servant for which the company was not liable, but, if the company was otherwise negligent, the order of the conductor might be considered by the jury in determining the question of contributory negligence. But the explanation is unsatisfactory as it is evident from the *England* case that the only ground of recovery was injury by obedience of an order negligently given. Such must be considered the rule of that court, especially in view of the fact that the *Ross* case (1884) was by a divided court of five to four, and has since been ignored; though it is believed to have presented the sounder view of the law.

⁷⁰³ *Carlson v. N. Western Tel. Co.*, 63 *Minn.* 428, 65 *N. W.* 914 [an excellent case]; *Eldridge v. Atlas S. Co.*, 134 *N. Y.* 187, 32 *N. E.* 66; *Patton v. Western, etc. R. Co.*, 96 *N. C.* 455, 1 *S. E.* 863 [briefly, but well reasoned]; *Logan v. N. Carolina R. Co.*, 116 *N. C.* 940, 21 *S. E.* 959; *Taylor v. Evansville, etc. R. Co.*, 121 *Ind.* 124, 22 *N. E.* 876; *Chicago, etc. R. Co. v. May*, 108 *Ill.* 288; *Smith v. Wabash, etc. R. Co.*, 92 *Mo.* 366, 4 *S. W.* 129; *Schroeder v. Chicago, etc. R. Co.*, 108 *Mo.* 322, 18

similar respects, is his vice-principal.⁷⁰⁴ The master's

S. W. 1094 [section foreman]; *Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037 [gang boss, giving negligent orders to boy, vice-principal]. A superintendent who has foremen and workmen under him, whom he employs and discharges at pleasure, and who has entire control of the machinery and men employed is a vice-principal (*Denver, etc. R. Co. v. Driscoll*, 12 Colo. 520, 21 Pac. 708, following "Ross" case). The negligence was in directing work. Followed, holding, in the absence of the superintendent, general foreman a vice-principal (*Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701); *s. p.*, *Colorado Midland R. Co. v. Naylor*, 17 Colo. 501, 30 Pac. 249 [deputy superintendent being absent: deputy vice-principal; master liable for his negligent direction of work]; *Ryan v. Los Angeles Storage Co.*, 112 Cal. 244, 44 Pac. 471 [master liable for negligent orders of engineer in control for time being]; *Borgman v. Omaha, etc. R. Co.*, 41 Fed. 667, per Shiras, J. [foreman intrusted with restoring wrecked trains]. Many decisions are cited in a later note, holding all this and much more. The famous "Ross case" of course does so. But the "Baugh case" inferentially recognizes this rule. Otherwise in Massachusetts, at common law (*Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 34 N. E. 185), and in Maine, and perhaps in Michigan, where it was lately held that even in giving orders to go on, after warning of danger, a shift boss of miners is a fellow servant of a trammer (*Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463, 66 N. W. 951, 64 N. W. 335). This point, however, does not seem to have been much in the mind of the

court. The decision seems to us, on *this point*, inconsistent with *Chicago, etc. R. Co. v. Bayfield*, 37 Mich. 205. Affirming the "general rule" (*Moller v. Am. Sugar Refining Co.*, 123 N. Y. Supp. 301, 138 App. Div. 572 (1910); *McIntosh v. Jones*, 36 Mont. 467, 93 Pa. 557 (1906); *Wilson v. Virginia, etc. Chemical Co.*, 78 S. C. 381, 58 S. E. 1019 (1907); *Southern Ry. Co. v. Smith*, 59 S. E. (Va.) 372 (1907); *Miller v. Centralia Pump, etc. Co.*, 113 N. W. (Wis.) 954, 13 L. R. A. (N. S.) 742 (1907); *Leishman v. Union Iron Wks.*, 148 Cal. 274, 83 Pac. 30, 113 Am. St. Rep. 293, 3 L. R. A. (N. S.) 500 (1905); *Denver Tran. Co. v. O'Brien*, 8 Colo. App. 74, 44 Pac. 766 (1896); *Indianapolis, etc. R. Tr. v. Andis*, 72 N. E. (Ind.) 145 (1904); *Atchison, etc. Bridge Co. v. Miller*, 71 Kan. 13, 80 Pac. 18, 1 L. R. A. (N. S.) 682 (1905); *Taylor v. Washington Mill Co.*, 50 Wash. 306, 97 Pac. 243 (1908); *Ill. Centr. Ry. Co. v. Hart*, 176 Fed. 245, 100 C. C. A. 49 (1910). Affirming the "separate department rule" (*Hjelm v. Volz*, 127 N. W. (Neb.) 211 (1910); *Milton's Admx. v. Frankfort, etc. Trac. Co.*, 129 S. W. (Ky.) 322 (1910), (and the "association theory," *Id.*); to the same effect (*Chaplin v. Ill. Term. Ry. Co.*, 227 Ill. 166, 81 N. E. 15 (1907); *Gathman v. City of Chicago*, 127 Ill. App. 150 (1906); and *Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481 (1907); *Southern Pac. Co. v. McGill*, 5 Ariz. 36, 44 Pac. 302 (1896); *Levins v. Bancroft*, 114 La. 105, 38 So. 72 (1905); *Pool v. Southern Pac. Co.*, 20 Utah, 210, 58 Pac. 326 (1899).

⁷⁰⁴ Suppose the owner of a mill, employing a thousand men, should call them together and say, in so

responsibility for the acts of his vice-principal is to be determined, not merely by the character of the act which the latter performs, but also by the character of that which he *fails to perform*. If, therefore, a vice-principal, invested with the power and duty of superintendence, negligently permits any act to be done which it would be the duty of the master, if present, to prevent, the master is responsible to a servant injured thereby, simply because of the failure of his superintending vice-principal to prevent it being done.⁷⁰⁵ And the master is none the less liable, if the negligent act is done by the vice-principal himself.⁷⁰⁶ So the master is responsible for the failure of

many words: "I have deputed the management of this mill to the superintendent, who will appoint twenty foremen over fifty hands each. I give notice that each of you is to obey, absolutely and without hesitation, every order which is given to you by your foreman, whether it seems to you reasonable or not. If you do not, you will be instantly discharged. Do not appeal to me or to the general superintendent; for we will listen to no appeal, until after you have obeyed the foreman's orders." Could there be any doubt that such an employer would be liable for the consequences of obedience to such orders, negligently given? Yet such notice is as effectually given by the notorious invariable usage of employers to act in this manner, as if it were given in express words to each employee. Every master, putting any of his servants under the orders of another servant, by that very act leaves to him discretion to judge whether his orders are wise or unwise, and denies to the subordinate servants all right to discuss that question. He does this knowingly and intentionally; and he knows that the superior servant,

thus entrusted with absolute control, will sometimes use it negligently to the injury of the other servants; for universal experience proves that such will be the result. It is, of course, extremely convenient for employers thus to relieve themselves from responsibility; but it is difficult to understand how any court could allow them to do it. The true test is, whether the inferior servant is allowed any discretion as to obeying the orders of the superior. If he is not, but is by usage of the master dismissed or suspended for disobedience, the master should in law, as well as in common sense, be held to have personally authorized in advance any order given by the superior servant, however negligent or reckless; and he should be held personally responsible.

⁷⁰⁵ *Shumway v. Walworth Mfg. Co.*, 98 Mich. 411, 57 N. W. 251; *Gerrish v. New Haven Ice Co.*, 63 Conn. 9, 27 Atl. 235 [general manager omitting to prevent starting machinery]. To the contrary, *Crispin v. Babbitt*, 81 N. Y. 516, but without notice of this distinction.

⁷⁰⁶ Where a section foreman, under whom plaintiff was employed, di-

a superintending servant to give such due warning of dangers as the master should have given, if present.^{708a}

§ 233. [Consolidated with § 232.]

§ 233a. **Examples of who are or who are not vice-principals.** — This section is omitted as the illustrations were chiefly drawn from the railway service, now controlled in almost every State in the Union by statute.

§ 233b. **Peculiar local rules.** — In Ohio, at an early date, it was held, and is still settled law, that any servant having control over another is not a “ fellow servant ” of the latter, and that the common master is responsible to the servant controlled for the negligence of the superior servant.⁷⁰⁷ But this rule is limited to the case of servants vested with actual control over injured servants. In any other case, superiority of position

rected a keg to be placed on a hand car for his seat, and allowed the keg to fall off, thus causing the car to leave the track, defendant is liable (*Russ v. Wabash, etc. R. Co.*, 112 Mo. 45, 20 S. W. 472). “ The principle of liability is not confined to negligent orders ” (*Id.*). So the master is liable, when a vice-principal personally *does* that which as master he ought to *forbid* (*Dayharsh v. Hannibal, etc. R. Co.*, 103 Mo. 570, 15 S. W. 554).

^{708a} *Chicago, etc. R. Co. v. Ross*, 112 U. S. 377, 5 S. Ct. 184 [conductor omitting signal]; *Gerrish v. New Haven Ice Co.*, *supra*; *Dayharsh v. Hannibal, etc. R. Co.*, 103 Mo. 570, 15 S. W. 554; *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467. Company liable for section foreman’s failure to notify conductor of snow slide (*Fisher v. Oregon, etc. R. Co.*, 22 Ore. 533, 30 Pac. 425).

⁷⁰⁷ This point was first decided

where an engineer was allowed to use an old time-table, through the negligence of the conductor of his train or the superintendent of the road, and, in consequence, a collision occurred by which he was injured (*Little Miami R. Co. v. Stevens*, 20 Ohio, 415). Afterwards, where a brakeman was injured by a collision, through the negligent management of a conductor, whose orders he was bound to obey, it was held that the company was liable (*Cleveland, etc. R. Co. v. Keary*, 3 Ohio St. 201; see *Mad River, etc. R. Co. v. Barber*, 5 Ohio St. 541, 563). But a brakeman and an engineer on the same train are fellow servants, though the former is bound to observe the signals of the latter to apply or lessen the brakes (*Pittsburgh, etc. R. Co. v. Lewis*, 33 Ohio St. 196; compare *Pittsburgh, etc. R. Co. v. Ranney*, 37 Ohio St. 665).

makes no difference.⁷⁰⁸ No distinction is made between the different kinds of negligence, of which such superior servant may be guilty. He stands in the place of the master, alike when doing the work of a servant, or when doing that of a master.⁷⁰⁹ The Ohio rule was at one time adopted in the courts of several States; but they have nearly all modified their position, until only Virginia, Nebraska and Utah seem to be left in line with Ohio;⁷¹⁰ and the decisions even there might be sustained upon a somewhat different theory. Nevertheless, the Ohio judges are entitled to the honor of having been the first to strike out on the right path; although they made some mistakes in details, and failed to state their ideas with accuracy. In Kentucky, a master is not liable to a servant for the negligence of a fellow servant in the same or an inferior rank, no matter how gross it may be;⁷¹¹ nor for anything *less* than gross negligence on the part of any servant whatever;⁷¹² but he is liable for the gross negli-

⁷⁰⁸ Pittsburgh, etc. R. Co. v. Devinney, 17 Ohio St. 198.

⁷⁰⁹ Berea Stone Co. v. Kraft, 31 Ohio St. 287.

⁷¹⁰ *Virginia*: Moon v. Richmond, etc. R. Co., 78 Va. 745 [conductor of gravel train and laborer]; fully sustained in Ayers v. Richmond, etc. R. Co., 84 Va. 679, 5 S. E. 582; Richmond, etc. R. Co. v. Williams, 86 Va. 165, 9 S. E. 990. All these were really acts of superintendence. *Nebraska*: Chicago, etc. R. Co. v. Lundstrom, 16 Neb. 254, 20 N. W. 198; Burlington, etc. R. Co. v. Crockett, 19 Neb. 138, 26 N. W. 921. The court has recently adhered to this doctrine, refusing to follow the Peterson case, 162 U. S. 346; Union Pac. R. Co. v. Doyle, 50 Neb. 555, 70 N. W. 43. *Utah* adopts the full Ohio rule (Armstrong v. Oregon, etc. R. Co., 8 Utah, 420, 32 Pac. 693).

⁷¹¹ Volz v. Chesapeake, etc. R. Co.,

95 Ky. 188, 24 S. W. 119 [workmen driving piles]; Casey v. Louisville, etc. R. Co., 84 Ky. 79 [common laborers]. "This court is fully committed to the doctrine of what is known as the 'association theory,' or, in other words, that the master will not be excused for negligence resulting in injury to one servant which is inflicted by a fellow servant unless the servants are so engaged and situated as that each by carefulness and attention in the performance of his duties may protect himself from injury caused by the negligence of the person with whom he is working" (Louisville, etc. Ry. Co. v. Hibbitt, 129 S. W. 319 (1910); Louisville, etc. Ry. Co. v. Brown, 127 Ky. 732, 106 S. W. 795, 13 L. R. A. (N. S.) 1135 (1908).

⁷¹² When an employee of a railroad company is injured by the negligence of another employee in a higher grade of the same service, in

gence of a superior servant of any kind, whether in control or not.⁷¹³ In an action for causing death, under the statute, *willful* negligence must be proved.⁷¹⁴ The rule adopted in Texas is peculiar, but is at least intelligible and easily applied. Any servant in Texas, high or low, is a vice-principal as to other servants whose work he superintends, and whom he has power to hire and discharge.⁷¹⁵ All these powers must co-exist in the same person; or he is not a vice-principal.⁷¹⁶ Such a vice-principal is not a "fellow servant" with the others; and for his

order to recover he must show that such negligence was gross; and a verdict in his favor, stating that the negligence was "ordinary," will be set aside (*Louisville, etc. R. Co., v. Brantley*, 96 Ky. 297, 29 S. W. 477 [engineer and porter "not fellow servants"]). A railroad porter who is engaged with the engineer in making up a train can recover for injury received through the fault of such engineer only on proof of gross negligence (*Cincinnati, etc. R. Co. v. Palmer* [Ky.], 33 S. W. 199).

⁷¹³ *Louisville, etc. R. Co. v. Collins*, 2 Duvall, 114; *Louisville, etc. R. Co. v. Cavens*, 9 Bush, 559 [train dispatcher, through whose negligence an engineer was killed]; *Greer v. Louisville, etc. R. Co.*, 94 Ky. 169, 21 S. W. 649 [engineer superior of brakeman]. The "gross negligence" theory of the Kentucky courts is limited to the gross negligence of a superior servant (*Milton's Admx. v. Frankfort, etc. Tr. Co.*, 129 S. W. 322 (1910)).

⁷¹⁴ *Chesapeake, etc. R. Co. v. McMichael* [Ky.], 15 S. W. 878 [not proved]; *Newport News, etc. R. Co. v. Dentzel*, 91 Ky. 42, 14 S. W. 958 [proved].

⁷¹⁵ *Nix v. Texas, etc. R. Co.*, 82 Tex. 473, 18 S. W. 571; *Gulf, etc. R. Co. v. Wells* [Tex.], 16 S. W. 1025; see

s. c., 81 Tex. 685, 17 S. W. 511; s. p., *Ft. Worth, etc. R. Co. v. Peters*, 87 Tex. 222, 27 S. W. 257; *Missouri Pac. R. Co. v. Williams*, 75 Tex. 4, 12 S. W. 835 [foreman in repair department]; *Galveston, etc. R. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562 [railroad superintendent]. "It is settled by the decisions of this court * * * that the common master is not responsible for the negligent acts of the foreman, or boss, unless the latter has been trusted with the power to employ and discharge" (*Young v. Hahn*, 96 Tex. 99, 70 S. W. 950 (1903)).

⁷¹⁶ Thus a brakeman and the conductor on the same train are fellow servants, in the absence of authority by the conductor to employ and discharge brakemen (*Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486); and so as to conductor and laborer (*Corona v. Galveston, etc. R. Co.* [Tex.], 17 S. W. 384); and a locomotive engineer and fireman (*Gulf, etc. R. Co. v. Blohn*, 73 Tex. 637, 11 S. W. 867). To justify a finding for plaintiff, the evidence must show that the temporary foreman had full control of the work, with power to employ and discharge the men (*St. Louis, etc. R. Co. v. Lemon*, 83 Tex. 143, 18 S. W. 331). But all these limitations, so far as they relate to *railroad ser-*

negligence, whether in management or in any other respect, the master is responsible.⁷¹⁷

§ 234. Servants must be in same common employment.

— In order to constitute an exception to the general rule of the master's liability for the negligence of his servant, it is necessary that the person suffering the injury should be not only a fellow servant, but also in the *same common employment* with the servant whose negligence has caused the injury.⁷¹⁸ And the injury must have occurred while both servants were actually serving *in this employment*. The opinions of the courts have generally failed to distinguish between the questions of what constitutes a fellow servant and what constitutes a common employment; and in many cases it has been held that two ser-

vants, have been substantially abolished by the statutes of March 10, 1891, and May 4, 1893.

⁷¹⁷ In Texas there is no distinction, as regards the master's liability for the vice-principal's negligence, between the latter's acts in performing the non-assignable duties entrusted to him specially and those ordinary acts which he and the servants under him are in the habit of indiscriminately performing (*Sweeney v. Gulf, etc. R. Co.*, 84 Tex. 433, 19 S. W. 555 [foreman throwing switch]; *Texas, etc. R. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058 [assisting in the making up of trains]).

⁷¹⁸ *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 30; *Abraham v. Reynolds*, 5 Hurlst. & N. 143; *Gillenwater v. Madison, etc. R. Co.*, 5 Ind. 339; *Ohio, etc. R. Co. v. Hammersley*, 28 Ind. 371; *Toledo, etc. R. Co. v. Moore*, 77 Ill. 217; *McAndrews v. Burns*, 39 N. J. Law, 117; *Rogers, etc. Works v. Hand*, 50 Id. 464, 14 Atl. 766; *Baird v. Pettit*, 70 Pa. St. 477. In *Mullan v. Phila., etc.*

S. S. Co., 78 Pa. St. 25, it was held to be a question for the jury whether a stevedore, employed by a ship owner to unload a vessel, was a fellow servant, in a common employment, with the mate, whose negligence in splicing a rope occasioned an injury to the former. If the stevedore was a "contractor," it is clear that the two men would not be fellow servants (see *Hass v. Philadelphia, etc. S. S. Co.*, 88 Pa. St. 269 [question for jury]).

⁷¹⁹ As to the injured servant, all the cases agree. But it is equally clear as to the servant in fault. *Both* must have actually co-operated in one employment. The cases upon the first question are reviewed in *State v. Western Maryland R. Co.*, 63 Md. 433, where Stone, J., points out that they all agree in this, "that if the plaintiff is not, at the time of the accident, engaged in the actual service of the company, or some way connected with such service, the company is liable for the negligence of its employees."

vants of the same master were not fellow servants, when all that was really meant by the court was that they were not in the same common employment. We shall endeavor to classify the cases according to their real meaning, but may not be always able to succeed. So far as we can see, the only tests as to fellow service are the common service of one master by both servants and the absence of any such difference of grade between them as would put one in the position of a master over the other. All questions as to the engagement of servants of the same master in such spheres of labor as to bring the common master within the rule of exemption, or to exclude him therefrom, belong to the realm of common employment. Thus, sailors employed upon different vessels by the same owner may be fellow servants; but they are not in the same common employment.

§ 235. Common employment; general rule.—Under the rule first established in England and Massachusetts,⁷²⁰ but which, upon this point, is accepted by the U. S. Supreme Court,⁷²¹ as well as the courts in all New England,

⁷²⁰ Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266; Bartonshill Coal Co. v. McGuire, Id. 300; Charles v. Taylor, 3 C. P. Div. 492. "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty" (Farwell v. Boston & Worcester R. Co., 4 Metc. 49).

⁷²¹ The general rule is that those entering the service of a common master become thereby engaged in a common service, and are fellow servants; and, *prima facie*, the common master is not liable for the

negligence of one of his servants which has resulted in an injury to a fellow servant (Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843). In Northern Pac. R. Co. v. Hambly, 154 U. S. 349, Brown, J., sums up the cases very fairly, thus: "It may be said in general that, as between laborers employed upon a railroad track and the conductor or other employees of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas and Wisconsin hold the relation of fellow servants to exist (Farwell v. Boston, etc. R., 4 Metc. 49; Clifford v. Old Colony R. Co., 141 Mass. 564, 6 N. E. 751; Brodeur v.

New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Mississippi, Texas, Arkansas, Ohio, Indiana, Michigan, Wisconsin, Iowa, Minnesota, the two Dakotas, Idaho, California and other States, it is not necessary, in order to establish a "common employment," that the two servants should be en-

Valley Falls Co., 17 Atl. 54, 16 R. I. 448; *Harvey v. N. Y. Central R.*, 88 N. Y. 481; *Gormley v. Ohio, etc. R.*, 72 Ind. 31; *Collins v. St. Paul, etc. R. Co.*, 30 Minn. 31; *Pennsylvania R. v. Wachter*, 60 Md. 395; *Houston, etc. R. Co. v. Rider*, 62 Tex. 267; *St. Louis, etc. R. Co. v. Shackelford*, 42 Ark. 417; *Blake v. Maine Central R.*, 70 Me. 60; *Ryan v. Cumberland Valley R.*, 23 Pa. St. 384; *Sullivan v. Miss. & Mo. R.*, 11 Ia. 421; *Fowler v. Chicago & N. W. R. Co.*, 61 Wis. 159; *Kirk v. Atlantic, etc. R. Co.*, 94 N. C. 625; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; while in Illinois, Missouri, Virginia, Ohio and Kentucky the rule is apparently the other way (*Chicago, etc. R. v. Moranda*, 93 Ill. 302; *Sullivan v. Mo. Pac. R. Co.*, 97 Mo. 113, 10 S. W. 852; *Richmond, etc. R. Co. v. Norment*, 84 Va. 167, 4 S. E. 211; *Dick v. Railroad Co.*, 38 Ohio St. 389; *Louisville, etc. R. v. Caven*, 9 Bush, 559; *Madden v. Chesapeake, etc. R. Co.*, 28 W. Va. 610). The cases in Tennessee seem to be divided (*East Tenn., etc. R. Co. v. Rush*, 15 Lea, 145; *Louisville, etc. R. Co. v. Robertson*, 9 Heisk. 276; *Haley v. Mobile, etc. R. Co.*, 7 Baxter, 239; *Nashville, etc. R. Co. v. Jones*, 9 Heisk. 27; *East Tenn., etc. R. Co. v. Gurley*, 12 Lea, 46). The list of States thus given by Judge Brown must be modified by excluding from those supposed to have adopted the Illinois doctrine, Ohio, where it never was really adopted (see *Consolidated Coal Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610; *Whaalan v. Mad River R. Co.*, 8 Ohio St. 249); and Virginia, where it has since been expressly repudiated (*Norfolk, etc. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342; overruling earlier cases); while the apparent conflict in Tennessee is settled by holding that the "Illinois rule" applies to railroad companies and to no other employers (*Nashville, etc. R. Co. v. Carroll*, 62 Tenn. [6 Heisk.] 347, as limited in *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387), which is also the case in Georgia (*Ellington v. Beaver Dam Co.*, 93 Ga. 53, 19 S. E. 21). The general rule also prevails in New Jersey (*Smith v. Oxford Iron Co.*, 42 N. J. Law, 467); Idaho (*Snyder v. Viola Mining Co.*, 2 Ida. 771, 26 Pac. 127); and at common law in Mississippi (*McMaster v. Ill. Central R. Co.*, 65 Miss. 264, 4 So. 59); but changed there in part by statute. *Kennefick-Hammond v. Rohr*, 77 Ark. 290, 91 S. W. 179 (1905); *McQueeney v. Norcross*, 75 Conn. 381, 53 Atl. 780 (1903); *Colley v. Southern Cotton Oil Co.*, 120 Ga. 258, 47 S. E. 932 (1904); *Enright v. Oliver*, 69 N. J. Law, 357, 55 Atl. 277, 101 Am. St. Rep. 710 (1903); *Zilver v. Robert Graves Co.*, 106 App. Div. 582, 94 N. Y. Supp. 714 (1905); *Buck v. N. J. Zinc Co.*, 204 Pa. 132, 53 Atl. 740, 60 L. R. A. 453 (1902); *Consumer's Cotton Oil Co. v. Jonte*, 36 Tex. App. 18, 80

gaged in the same kind of work, or even in the same department. It is held to be enough if they are both engaged in serving one master in one general business, aiming at one general result, with such notice of risk as is stated in the next section.

§ 236. Who are in common employment. — Under the generally prevailing rule, fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to the risk of injury.⁷²² That this

S. W. 847 (1904); *Fanquet v. New York, etc. Ry. Co.*, 53 Misc. 121, aff'd, 123 App. Div. 804, 108 N. Y. Supp. 525 (1907); *Wilson v. Virginia, etc. Co.*, 78 S. C. 381, 58 S. E. 1019 (1907); *Southern Ry. Co. v. Smith*, 59 S. E. (Va.) 372 (1907); *Miller v. Centralia Pulp, etc. Co.*, 113 N. W. (Wis.) 954, 13 L. R. A. (N. S.) 742 (1907); *Laragy v. E. Jersey Pipe Line Co.*, 72 Atl. (N. J.) 57 (1909); *Amer. Bridge Co. v. Valente*, 73 Atl. (Del.) 400 (1909); *Shank v. Edison, etc. Co.*, 225 Pa. 393, 74 Atl. 210 (1909); *Stearns, etc. Co. v. Fowler*, 58 Fla. 362, 50 So. 680 (1909); *Streicher v. Davenport Brick, etc. Co.*, 124 N. W. (Ia.) 327 (1910); *Halivas v. Amer. Granite Co.*, 141 Wis. 147, 123 N. W. 789 (1909); *Atlantic, etc. Ry. Co. v. Farmer*, 176 Fed. 692, 100 C. C. A. 244 (S. C.) (1909); *Consol. Stone Co. v. Ellis*, 91 N. E. (Ind. App.) 1095 (1910); *Miller v. Amer. Sugar, etc. Co.*, 138 App. Div. 512, 123 N. Y. Supp. 301 (1910); *Ongaro v. Twohy*, 57 Wash. 668, 107 Pac. 834 (1911); *Stewart v. Hinckle Iron Co.*, 141 App. Div. 224, 125 N. Y. Supp. 1073 (1910); *Erjanschek v. Kramer*, 141 App. Div. 545, 126 N. Y. Supp. 289 (1910); *Sloppy v. Pennsylvania Ry. Co.*, 228 Pa. 638, 77 Atl. 1010 (1910); *Proctor, etc. Co. v. Williams*, 183 Fed. 695, 106 C. C. A. 45 (N. Y.) (1910); *Mills v. Bartow Lbr. Co.*, 70 S. E. (Ga.) 983 (1911).⁷²² *McAndrews v. Burns*, 39 N. J. Law, 117; *Baird v. Pettit*, 70 Pa. St. 477; *Norfolk, etc. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342. See *Louisville, etc. R. Co. v. Robinson*, 4 Bush, 507 [brakeman and conductor on different trains]; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Barstow v. Old Colony R. Co.*, 143 Mass. 535, 10 N. E. 255. In *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. 300. Lord Chelmsford said: "There may be some nicety and difficulty, in peculiar cases, in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertook, a satisfactory conclusion may be arrived at." The servant of a glue factory, loading the glue in sacks in a wagon, and the driver are in a common employment

is the proper test is evident, if it is true, as stated in the English cases and those following them, that the reason for the exemption of masters from liability to their servants is that the servant takes the risk into account in fixing his wages. He cannot take into account a risk which he has no reason to anticipate; and he should take into account those risks which the average experience of his fellows has led them as a class to anticipate.

(McCaffrey v. Tamm Bros. Glue Co., 123 S. W. (Mo. App.) 944 (1909); and a housekeeper and her 14-year-old son of her employer doing general housework (Waxham v. Fink, *supra*); and an engineer in charge of a derrick and a stone mason (John Diebold & Sons v. Wollborn, 122 S. W. (Ky.) 212 (1909); and a motorman and conductor on different cars of the same line (Birmingham, etc. Co. v. Mosely, 51 So. (Ala.) 424 (1910); and the boss of a gang engaged with others in handling rails loaded into a car (Whitfield v. Louisville, etc. Co., 7 Ga. App. 268, 66 S. E. 973 (1910); and the engineer and hostler of an engine when it is being run on the ash pit with one attending to the ashpit (Konoski v. Delaware, etc. Ry. Co., 77 N. J. Law, 645, 74 Atl. 516 (1909); and the station agent and the brakeman on a train switching at the station (Hallock v. N. Y., etc. Ry. Co., 197 N. Y. 450, 90 N. E. 1124 (1910); and motormen on different cars of the same company (Murtorg v. Joline, 119 N. Y. Supp. 218 (1909); and ordinarily the operator of a lathe in a machine shop and a blacksmith employed to temper steel parts of it (Hohi v. Howett Motor Co., 106 N. Y. Supp. 881, 121 App. Div. 866 (1907); and a draughtsman and the operator of the elevator, where the former is provided by the common employer with a room in the building (Fanquet v. N. Y., etc. Ry. Co., 108 N. Y. Supp. 525, 123 App. Div. 804 (1908); and a shoveler in a mill and those pushing a car, though in different departments and under different foremen (Wilson v. Virginia, etc. Corp., 78 S. C. 381, 58 S. E. 1019 (1907); and the electrician of a pulp mill and one hauling pulp from one room to another (Miller v. Centralia, etc. Co., 113 N. W. (Wis.) 954, 13 L. R. A. (N. S.) 742 (1907); and an employer operating a machine with incidental authority to supervise his assistants (Bori v. Hess, 107 N. Y. Supp. 1001, 123 App. Div. 389 (1908); and a section foreman and a locomotive engineer (Chicago, etc. Ry. Co. v. Barker, 169 Ind. 670, 83 N. E. 369 (1908); and a conductor and engineer on different trains (Wabash Ry. Co. v. Hassett, 83 N. E. (Ind.) 705 (1908); and a checkman on an interurban electric road and the train master (Indiana, etc. Tr. Co. v. Pring, 83 N. E. (Ind. App.) 733 (1908); and in the courts of the United States a section foreman while operating his hand car with the section men (Chandler v. St. Louis, etc. Ry. Co., 127 Mo. App. 34, 106 S. W. 553 (1907); and a locomotive engineer and an employee in charge of switch and semaphore signals (Pearsall v. N. Y. Cent. Ry. Co., 189 N. Y. 474, 82 N. E. 752 (1907); a locomotive

§ 237. **Who are not in common employment.** — On the other hand, the mere fact that two servants of the same man are both engaged in adding to his wealth or ministering to his tastes or comforts, does not necessarily bring them within the definition of a common employment. Thus, where a merchant carries on a regular trade in his store, and at the same time owns a ship, the clerks in his store and the sailors in his ship are clearly not in a common employment. Indeed, if he owns two ships, a sailor in one is not in a common employment with a sailor in the other.⁷²³ Workmen in a quarry owned by a railroad company are not in common employment with the railroad hands.⁷²⁴ Still less are domestic servants, engaged in providing for the wants of their employer at home, in a common employment with his clerks, operatives or other servants in his business. So a draftsman is not in the same common employment with a man excavating a cellar below the same office.⁷²⁵

engineer and a locomotive cleaner (Sage v. Baltimore, etc. Ry. Co., 219 Pa. 129, 67 Atl. 985 (1907)).

⁷²³ The Petrel (1893), Prob. & Adm. 320; Connolly v. Davidson, 15 Minn. 519.

⁷²⁴ Dixon v. Chicago, etc. R. Co., 109 Mo. 413, 19 S. W. 412.

⁷²⁵ Baird v. Pettit, 70 Pa. St. 477; Texas, etc. R. Co. v. Kirk, 62 Tex. 227 [track repairer and stock and fuel agent]. The conductor and flagman and brakeman on the same train are not in a common employment (Atlantic, etc. Ry. Co. v. Beazley, 54 Fla. 311, 45 So. 761 (1908)); nor those loading tenders with the brakeman (Louisville, etc. Ry. Co. v. Clark, 32 Ky. L. Rep. 736, 106 S. W. 1184 (1908)); nor one in the track department with those managing trains in the operating department (Illinois Cent. Ry. Co. v. Tandy, 32 Ky. L. Rep. 962, 107 S. W. 715 (1908)); nor a section

foreman and employees of the roundhouse (101 Tex. 259, 106 S. W. 465, 109 S. W. 112 (1908)); nor a switchman under the orders of a conductor (Yeates v. Illinois Cent. Ry. Co., 145 Ill. App. 11, aff'd, 89 N. E. 338 (1909)); nor necessarily a conductor on a cable car and the motorman on an electric car of the same master (Bennett v. Chicago City Ry. Co., 243 Ill. 420, 90 N. E. 735 (1910)); nor a trackman and a brakeman (Hale v. Crown, etc. Paper Co., 56 Wash. 236, 105 Pac. 480 (1910)); nor motormen of different cars of the same company (Louisville Ry. Co. v. Haynes, 128 S. W. (Ky.) 1055 (1910); Same v. Hibbitt, 129 S. W. (Ky.) 319 (1910)); nor one in charge of a logging train and a brakeman (Williams v. W. R. Pickering Lbr. Co., 125 La. 1087, 52 So. 167 (1910)); nor a car inspector and the crew of a yard engine (127 N. W. (Minn.) 433 (1910)).

§ 238. **Common employment; "association" rule.** — In Illinois, Missouri, Kansas, Kentucky, Nebraska, Utah and perhaps elsewhere, what may be called the "association" rule is established.⁷²⁶ Under this rule, fellow servants are not in the "same common employment," unless they are so engaged that their duties bring them into association with each other, either generally⁷²⁷ or at the time of the injury in question,⁷²⁸ to such a degree that they can exercise some influence upon each other, in favor of care and caution for their mutual safety.⁷²⁹ In some cases

⁷²⁶ *Illinois*: Chicago, etc. R. Co. v. Moranda, 93 Ill. 302; Chicago, etc. R. Co. v. Snyder, 117 Ill. 376, 7 N. E. 604. It is proper to charge that, to constitute fellow servants, the servants should be actually co-operating at the time of the injury in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety (Chicago, etc. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023). So in *Missouri*, although with considerable dissent, on the part of new judges (Dixon v. Chicago, etc. R. Co., 109 Mo. 413, 19 S. W. 412 [track laborer not in common employment with trainmen]; Schlereth v. Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110 [same]; Sullivan v. Mo. Pacific R. Co., 97 Mo. 113, 10 S. W. 852 [same]; but compare Parker v. Hannibal, etc. R. Co., 109 Mo. 362, 19 S. W. 1119 [where trainmen were unloading with trackmen; and the court divided equally]; and Relyea v. Kansas City, etc. R. Co., 112 Mo. 86, 19 S. W. 1116; again, 20 S. W. 480 [brakeman on one train in common employment with fireman on another]). So in *Kansas* (Atchison, etc. R. Co. v. McKee, 37 Kans. 592;

St. Louis, etc. R. Co. v. Weaver, 35 Kans. 412, 11 Pac. 408 [section foreman and engineer of train, not in common employment]); in *Kentucky* (Kentucky, etc. R. Co. v. Ackley, 87 Ky. 278, 8 S. W. 691). *Nebraska* (Union Pac. R. Co. v. Erickson, 41 Neb. 1, 59 N. W. 347; Omaha, etc. R. Co. v. Krayenbuhl, 48 Neb. 553, 67 N. W. 447 [section foreman not in common employment with train engineer]); and *Utah* (Armstrong v. Oregon, etc. R. Co., 8 Utah, 420, 32 Pac. 693; Webb v. Denver, etc. R. Co., 7 Utah, 363, 26 Pac. 981 [car repairer and engineer]). The Illinois rule was once approved in *Virginia* (Richmond, etc. R. Co. v. Norment, 84 Va. 167); but is now expressly repudiated (Norfolk, etc. R. Co. v. Nuckols, 94 Va. 193, 21 S. E. 342).

⁷²⁷ This is declared in all the cases.

⁷²⁸ If they are thus co-operating, at the time of the injury, it makes no difference that their usual duties are in separate departments (Casey v. Louisville, etc. R. Co., 84 Ky. 79; Abend v. Terre Haute, etc. R. Co., 111 Ill. 202).

⁷²⁹ North Chicago Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Chicago, etc. R. Co. v. O'Brien, 155 Ill. 630, 40 N. E. 1023. Where the usual duties of servants of a com-

this rule is stated as limiting "common employment" to "the same department;"⁷³⁰ but the definition of a department seems to be as above stated. This rule is adopted in Tennessee, with respect to railroad companies, but no further.⁷³¹

§ 239. Illustrations of common employment. — Except in the States specified in section 238, the rule of common employment includes all employed in the same factory, mill, shop, warehouse or office,⁷³² all employed in operat-

mon master bring them into habitual association, giving them the opportunity of observing and the power of influencing one another, they are engaged in a common employment (Illinois Terminal Co. v. Chopin, 128 Ill. App. 170, aff'd, 227 Ill. 166, 81 N. E. 15 (1907); Gathman v. City of Chicago, 127 Ill. App. 150 (1906); Koerner v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481 (1907); Heimberger v. St. Louis, etc. Ry. Co., 140 Ill. App. 241 (1908); Burkard v. A. Lechen & Son's Rope Co., 217 Mo. 466, 177 S. W. 35 (1909); Aldrich v. Illinois, etc. Ry. Co., 241 Ill. 402, 89 N. E. 702 (1900); Lyons v. Joseph T. Ryerson & Son, 242 Ill. 409, 90 N. E. 288 (1909); Bennett v. Chicago City Ry. Co., 243 Ill. 420, 90 N. E. 735 (1910); McMurray v. St. Louis, etc. Ry. Co., 225 Mo. 272, 125 S. W. 751 (1910); Waxham v. Fink, 86 Neb. 180, 125 N. W. 145 (1910); Hale v. Crown, etc. Co., 56 Wash. 236, 105 Pac. 480 (1909); Gearner v. Amer. Car Co., 147 Ill. App. 76 (1909); Donnelly v. Cudahy Packing Co., 68 Kans. 653, 75 Pac. 1017 (1904). *Rule*, ("That whenever co-employees under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely

related that each employee must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he is thus exposed"); Atchison, etc. Ry. Co. v. Miller, 71 Kans. 13, 80 Pac. 18, 1 L. R. A. (N. S.) 682 (1905); Louisville, etc. Ry. Co. v. Brown, 32 Ky. L. Rep. 552, 106 S. W. 795, 13 L. R. A. (N. S.) 1135 (1908); Westlake v. Murphy, 85 Neb. 45, 122 N. W. 684 (1909); Johnson v. Union Pac. Coal Co., 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506 (1904), (declaring the law in Wyoming). See Consol. Stone Co. v. Ellis, 91 N. E. (Ind. App.) 1095 (1910).

⁷³⁰ St. Louis, etc. R. Co. v. Weaver, 35 Kans. 412, 11 Pac. 408.

⁷³¹ The doctrine that where employees are in different departments of service the fellow-servant rule does not apply, has no application in this State except as to railroad companies (Coal Creek Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387; limiting Nashville, etc. R. Co. v. Carroll, 6 Heisk. 347).

⁷³² Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270 [furnace with separate departments]; Sayward v. Carlson, 1 Wash. St. 29, 23 Pac. 830 [sawyer and carpenter].

ing the same mine, whether above or below,⁷³³ all persons employed upon the trains, yards, stations and depots of the same railroad,⁷³⁴ and certainly all co-operating in a single piece of work⁷³⁵ or the construction of a single thing, such as a building,⁷³⁶ no matter how different their special lines of work may be.⁷³⁷ Workmen employed by a railroad company, and carried free to and from their work, *as part of their contract for service*, upon trains in the management of which they do not in the least degree participate, are in a common employment with the engineer and other servants in charge of the train,⁷³⁸ and with switchmen upon the track,⁷³⁹ and, therefore, cannot

⁷³³ Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266; Bartonshill Coal Co. v. McGuire, Id. 300; Coal Creek Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387.

⁷³⁴ The employees of an extra freight train are the fellow servants of section hands going to their work upon a hand car, so that the negligence of the former in failing to give proper signals, whereby a collision results, does not render the company liable for injuries to one of the section men (Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 S. Ct. 848). Trackmen and trainmen of a railroad company are fellow servants (Schaible v. Lake Shore, etc. R. Co., 97 Mich. 318, 56 N. W. 565; St. Louis, etc. R. Co. v. Welch, 72 Tex. 298, 10 S. W. 529). So held, under a code, using the words, "the same general business" (Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 S. Ct. 983). Employees in a roundhouse in whose charge plaintiff, an inexperienced workman, was placed, and who ordered plaintiff to clean an engine, are fellow servants of plaintiff, as is also the engineer in charge of such engine (Spencer v. Ohio, etc. R. Co., 130 Ind. 181, 29 N. E. 915).

⁷³⁵ Morgan v. Vale of Neath R. Co., 5 Best & S. 570, aff'd, Id. 740, L. R. 1 Q. B. 149; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Fitzgerald v. Boston, etc. R. Co., 156 Mass. 293, 31 N. E. 7 [stowing hay]; Bergquist v. Minneapolis, 42 Minn. 471, 44 N. W. 530; see Neal v. Northern Pac. R. Co., 57 Minn. 365, 59 N. W. 312 [men blasting for track and men laying telegraph line]. One unloading coal from a car is in the same common employment with one employed by the same master to place cars in a position for unloading (Rehm v. Pennsylvania R. Co., 164 Pa. St. 91, 30 Atl. 356).

⁷³⁶ Armour v. Hahn, 111 U. S. 313, 4 S. Ct. 433.

⁷³⁷ Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017.

⁷³⁸ Boldt v. N. Y. Central R. Co., 18 N. Y. 432; Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; Gillshannon v. Stony Brook R. Co., 10 Cush. 228; Seaver v. Boston & Maine R. Co., 14 Gray, 466; Whaalan v. Mad River, etc. R. Co., 8 Ohio St. 249; McQueen v. Central, etc. R. Co., 30 Kans. 689; Capper v. Louisville, etc. R. Co., 103 Ind. 305.

⁷³⁹ Gilman v. Eastern R. Co., 10 Allen, 233; Tunney v. Midland R.

hold the company liable for the negligence of the latter. But if servants thus traveling were *not* carried in pursuance of their contract for service, even though they traveled under a free pass which would not have been given to them but for their service, they are not in service during their journey, and, therefore, are not in common employment with anybody.⁷⁴⁰ And in Pennsylvania it is held that a servant who accepts reduced wages in consideration of being allowed to travel upon the road to and from his work, is not in service while thus traveling.⁷⁴¹

§ 240. [Omitted as superfluous.]

§ 241. [Omitted for the same reason as section 233.]

§ 241a. **Effect of statutes and codes.**— Mere general language in statutes, especially in codes, declaring persons or corporations to be liable for the negligence of themselves or of their servants, in such broad terms as, if there were no rule of common law exempting masters from liability to their servants, would undoubtedly leave no room to imply such an exemption, is not to be construed as abolishing the exemption of the common law, but is to be taken as simply affirming the general liability of such persons or corporations, subject to all the established exceptions of the common law. Therefore, a statute prescribing certain rules and declaring that a corporation neglecting to comply therewith “shall be liable to any person injured for all damages sustained by reason of such neglect,” does not alter the common-law rule so

Co., L. R. 1 C. P. 291; *Vick v. N. Y. Central, etc. R. Co.*, 95 N. Y. 267. not, while being transported, a fellow servant of the conductor (*North-*

⁷⁴⁰ *State v. Western Md. R. Co.*, 63 Md. 433. A foreman of a railroad’s bridge carpenters, who has, by the order of his superior (the superintendent of the bridge building department), gone on a train, to be transported to his place of work, is

⁷⁴¹ *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239, which case, however, is declared to be “not sound law,” in *Vick v. N. Y. Central, etc. R. Co.*, 95 N. Y. 267.

as to make a corporation liable to its servants for the consequences of such neglect on the part of a fellow servant.⁷⁴² Nor, on the other hand, will general language in a statute, especially a code, be construed so as to restrict the liability of masters to something less than that imposed by the common-law, where the intent of the legislature to produce that result does not plainly appear.⁷⁴³ Nor will it be construed as abolishing the common-law rule as to contributory negligence.⁷⁴⁴ The only attempt to codify the whole law on this subject is to be found in one section of the Civil Codes of the Dakotas and California.⁷⁴⁵

§ 241b. Statutes of general application. — The liability of masters to their servants has been regulated by statute in several States. The first example of careful general legislation was given in Great Britain in 1880.⁷⁴⁶ This statute was sound and liberal in principle, but, as usual in such cases, was spoiled by the House of Lords in its details. The principles of the British statute were embodied in statutes of Alabama in 1885 and of Massachusetts in 1887. The general effect of these statutes (apart from special rules affecting railroad companies) is to make clear the liability of masters for the negligence

⁷⁴² *Randall v. Baltimore, etc. R. Co.*, 109 U. S. 478. So, also, in the case of a statute declaring that railroad companies shall be liable for all damages happening to "any person," in consequence of the neglect of their agents (*Carle v. Bangor, etc. R. Co.*, 43 Me. 269; *Sullivan v. Mississippi, etc. R. Co.*, 11 Iowa, 421). *s. p.*, *Railroad Co. v. Rush*, 15 Lea (Tenn.), 150. But where the statute, taken as a whole, was evidently framed for the purpose of affording increased protection to servants, the rule is otherwise (*Le May v. Can. Pac. R. Co.*, 18 Ontario, 314).

⁷⁴³ *Randall v. Baltimore, etc. R. Co.*, 116 U. S. 642; construing Civil Code of Dakota.

⁷⁴⁴ *Lorimer v. St. Paul R. Co.*, 48 Minn. 391, 51 N. W. 125.

⁷⁴⁵ Civil Code, Dakota, § 1130; do. Cal. § 1970. (This part of these Codes was framed by the writer, nearly forty years ago, just after his admission to the bar, when he knew no better than to quote literally from the ponderous *obiter dicta* of learned judges. The section contains at least two errors to every line. T. G. S.) See appendix.

⁷⁴⁶ Stat. 43 and 44 Vic. c. 42. See appendix.

⁷⁴³ *Northern Pac. R. Co. v. Herbert*,

of any servants entrusted with powers of superintendence or command in the execution of such powers.⁷⁴⁷ They also define more clearly the master's liability for defects in ways, works and machinery.⁷⁴⁸ These statutes do not abolish the rule as to the effect of a perfectly voluntary assumption of risks by a servant.⁷⁴⁹ They do not super-

⁷⁴⁷ Who are superintendents within the statute; foreman of gang (*Pren-dible v. Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675); foreman of five men (*Mahoney v. N. Y. & New England R. Co.*, 160 Mass. 573, 36 N. E. 588); foreman of a section gang doing no work (*Davis v. N. Y., New Haven, etc. R. Co.*, 159 Mass. 532, 34 N. E. 1070); foreman, doing a slight amount of work (*Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197); section master (*Babcock v. Old Colony R. Co.*, 150 Mass. 467, 23 N. E. 325); overseer (*Patnode v. Warren Cotton Mills*, 157 Mass. 283, 32 N. E. 161). In that case the factory owner was represented in the carding room by a card grinder, who was acting as second hand, and who ordered plaintiff to leave his ordinary work and assist him in his work, which plaintiff did. Held, plaintiff was not properly employed in rendering such assistance. What is negligence in superintendent (*McPhee v. Scully*, 163 Mass. 216, 39 N. E. 1007; *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83. Who is not a superintendent; one doing the same work and receiving the same pay as those to whom he gives directions (*Dowd v. Boston & A. R. Co.*, 162 Mass. 185, 38 N. E. 440; *Adasken v. Gilbert*, 165 Mass. 443, 43 N. E. 199); or who is at work "pretty much all the time" with the others (*O'Brien v. Ride-out*, 161 Mass. 170, 36 N. E. 792; and see *O'Neil v. O'Leary*, 164 Mass.

387, 41 N. E. 662); weaver operating a loom (*Roseback v. Ætna Mills*, 158 Mass. 379, 33 N. E. 577). Who is "in charge of a train" (*Devine v. Boston & A. R. Co.*, 159 Mass. 348, 34 N. E. 539 [conductor]; *Davis v. N. Y., New Haven, etc. R. Co.*, 159 Mass. 532, 34 N. E. 1070 [engineer]). Who is not in charge (*Louisville, etc. R. Co. v. Richardson*, 100 Ala. 232, 14 So. 209 [hostler]).

⁷⁴⁸ What are such defects (*Toomey v. Donovan*, 158 Mass. 232, 33 N. E. 396; *Gustafsen v. Washburn, etc. Mfg. Co.*, 153 Mass. 468, 27 N. E. 179; *Kansas City, etc. R. Co. v. Webb*, 97 Ala. 157, 11 So. 888 [defects in track]. What are not "defects in the ways, works, or machinery connected with or used in the business of the employer," within the meaning of St. 1887, ch. 270, § 1, cl. 1; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550 [earth bank]; *Burns v. Washburn*, 160 Mass. 457, 36 N. E. 199 [temporary staging]; *Carroll v. Willcutt*, 163 Mass. 221, 39 N. E. 1016 [stone on a scaffold]; *Shea v. Wellington*, 163 Mass. 364, 40 N. E. 173 [exploder]; *May v. Whittier Mach. Co.*, 154 Mass. 29, 27 N. E. 768 [pile of wood on way]; *Fisk v. Fitchburg R. Co.*, 158 Mass. 238, 33 N. E. 510 [awning]; see *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119. Company not liable for car (*Coffee v. N. Y., New Haven, etc. R. Co.*, 155 Mass. 21, 28 N. E. 1128) on

sede the common law upon the same subject; and a servant may, if he desires to do so, maintain his action at common law, instead of relying upon the statute.⁷⁵⁰ In 1893 a statute was enacted in Indiana enlarging the liability of all corporations to their servants.

§ 241c. Statutes applying to railroad companies. —

Georgia was the first State to legislate on this subject. In 1855 the entire exemption of railroad companies from liability for negligence of fellow servants was abolished by a statute,⁷⁵¹ which was literally copied in Florida in 1887,⁷⁵² substantially enacted in Kansas in 1874,⁷⁵³ and

track not owned by it, though temporarily used (*Trask v. Old Colony R. Co.*, 156 Mass. 298, 31 N. E. 6).

⁷⁴⁹ *Cassady v. Boston & A. R. Co.*, 164 Mass. 168, 41 N. E. 129. The statute does not change the doctrine of *volenti non fit injuria* (*Birmingham R. Co. v. Allen*, 99 Ala. 359, 13 So. 8 [voluntary use for year, without objection]; overruling *Mobile, etc. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146; *Highland Ave. etc. R. Co. v. Walters*, 91 Ala. 435, 8 So. 357; and approving *Thomas v. Quartermain*, 18 Q. B. Div. 685; *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100).

⁷⁵⁰ *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766; *Clark v. Merchants', etc. Trans. Co.*, 151 Mass. 352, 24 N. E. 49.

⁷⁵¹ Georgia Code, § 3033. In Georgia, a railroad company is liable for injuries to an employee wholly caused by the negligence of a fellow servant, whether or not such injuries are connected with the running of trains (*Georgia R. Co. v. Brown*, 86 Ga. 320, 12 S. E. 812); s. p., *Georgia R. Co. v. Miller*, 90 Ga. 571, 16 S. E. 939. Under the same statute, a railroad employee may recover for injuries resulting

from the negligence of a co-employee where he himself was free from fault (*Maloy v. Port Royal, etc. R. Co.*, 97 Ga. 295, 22 S. E. 588). For cases of non-liability, see *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227, 5 S. E. 492; *Georgia Railroad Co. v. Nelms*, 83 Ga. 70, 9 S. E. 1049 [hammer is not machinery].

⁷⁵² Florida Stat. June 7, 1887 (Gen. Laws, ch. 3744); and by statute May 4, 1891, any person or property is injured by the operation of railroad trains, cars, locomotives, or machinery, or by any person in the employ of the company, the burden shall be on the company to show ordinary and reasonable care and diligence (Laws 1890-91, ch. 4071).

⁷⁵³ Kansas Stat. 1874, ch. 93; Compiled Laws, § 5204. The Kansas statute is constitutional (*Atchison, etc. R. Co. v. Koehler*, 37 Kans. 463, 15 Pac. 567). For cases of liability under the Kansas statute, see *Chicago, etc. R. Co. v. Pontius*, 157 U. S. 209, 15 S. Ct. 585, aff'g s. c., 52 Kans. 264, 34 Pac. 739; *Atchison, etc. R. Co. v. Brassfield*, 51 Kans. 167, 32 Pac. 814; *Missouri Pac. R. Co. v. McCally*, 41 Kans. 639, 21 Pac. 574; *Chicago, etc. R. Co. v. Stahley*, 62 Fed. 363, 11 C. C. A. 88.

followed in Iowa, also in 1874, so far as relates to wrongs "connected with the use and operation of any railroad,"⁷⁵⁴ leaving negligence in the *construction* of a railroad subject to common-law rules.⁷⁵⁵ A similar statute was enacted in Minnesota in 1887.⁷⁵⁶ But it is held that, under a constitution prohibiting class legislation, such a special burden could not be imposed upon any one class of masters in that State, if applicable to all the corporate business; and therefore the effect of the statute is restricted to those hazards which are peculiar to the operation of railroads.⁷⁵⁷ Therefore it does not apply at all to street railroads in a city or town operated by cable⁷⁵⁸ or horse power. In Mississippi, by the constitution of 1890,⁷⁵⁹ and in Texas, by statutes of 1891 and 1892,⁷⁶⁰ rail-

⁷⁵⁴ Iowa Stat. 1874, ch. 65, Code, § 1307. For examples of liability under the Iowa statute, see *Chicago, etc. R. Co. v. McLaughlin*, 119 U. S. 566, 7 S. Ct. 1366; *Keatley v. Illinois Cent. R. Co.*, 94 Iowa, 685, 63 N. W. 560; *Butler v. Chicago, etc. R. Co.*, 87 Iowa, 206, 54 N. W. 208; *Larson v. Illinois Cent. R. Co.*, 91 Iowa, 81, 58 N. W. 1076; *Haden v. Sioux City, etc. R. Co.*, 92 Iowa, 226, 60 N. W. 537; *Smith v. Humeston, etc. R. Co.*, 78 Iowa, 583, 43 N. W. 545; *Neville v. Chicago, etc. R. Co.*, 79 Iowa, 232, 44 N. W. 367; *Nelson v. Chicago, M., etc. R. Co.*, 73 Iowa, 576, 35 N. W. 611; *Pierce v. Central Iowa R. Co.*, 73 Iowa, 140, 34 N. W. 783.

⁷⁵⁵ This is expressly provided by the Minnesota statute (Laws 1887, ch. 13).

⁷⁵⁶ *Id.*

⁷⁵⁷ *Lavallee v. St. Paul, etc. R. Co.*, 40 Minn. 249, 41 N. W. 974; *Johnson v. St. Paul, etc. R. Co.*, 43 Minn. 222, 45 N. W. 156. For cases of liability, see *Nichols v. Chicago, etc. R. Co.*, 60 Minn. 319, 62 N. W. 386; *Smith v. St. Paul, etc. R. Co.*, 44

Minn. 17, 46 N. W. 149; Schneider v. Chicago, etc. R. Co., 42 Minn. 68, 43 N. W. 783; *Steffenson v. Chicago, etc. R. Co.*, 45 Minn. 355, 47 N. W. 1068.

⁷⁵⁸ *Funk v. St. Paul R. Co.*, 61 Minn. 435, 63 N. W. 1099. *s. p.*, *Riley v. Galveston R. Co. (Tex. Civ. App.)*, 35 S. W. 826.

⁷⁵⁹ Const. 1890, § 193, provides that employees of any railroad corporation shall have the same rights and remedies as are allowed to persons not employees, for injuries caused by the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, or of a fellow servant engaged in another department of labor, etc. Held, that negligence will not be inferred from the fact of injury to an employee, but it must be shown, since the rule applicable in case of injury to passengers does not apply to an employee (*Short v. New Orleans, etc. R. Co.*, 69 Miss. 848, 13 So. 826).

⁷⁶⁰ Texas Stat. March 10, 1891, ch. 24. This statute held not to apply to the employees of a receiver of a

road companies are made liable to servants for any negligence of a superior agent or of any person having the right to control or direct the injured servant,⁷⁶¹ or where servants are engaged in different departments of labor.⁷⁶² In Montana, since 1887, railroad companies have been liable to servants for the fault of any superior.⁷⁶³ In Ohio, by Act of April 2, 1890, "every person in the employ of such company having charge or control of employees in any separate branch or department, shall be held to be the superior and not fellow servant of employees in any other branch or department, who have no power to direct or control in the branch or department in which they are employed."⁷⁶⁴ In Wisconsin, since 1893, railroad companies have been liable to servants for the negligence of engineers and officers superior to them, and

railway corporation (*Campbell v. distinct, are fellow servants (Texas, Cook, 86 Tex. 630, 26 S. W. 486; etc. R. Co. v. Tatman, 10 Tex. Civ. Turner v. Cross, 83 Tex. 218, 18 S. App. 434, 31 S. W. 333).* W. 578; San Antonio, etc. R. Co. v. Reynolds (Tex. Civ. App.), 30 S. W. 846). It was therefore amended in 1892 so as to include receivers. These statutes apply to street railway corporations (*Austin R. Co. v. Groethe (Tex. Civ. App.), 31 S. W. 197).*

⁷⁶¹ Engineer and brakeman, held, fellow servants (*Evans v. Louisville, etc. R. Co., 70 Miss. 527, 12 So. 581.* To the contrary: *San Antonio, etc. R. Co. v. Bowles (Tex. Civ. App.), 30 S. W. 89; Galveston, etc. R. Co. v. Waldo (Tex. Civ. App.), 26 S. W. 1004.*

⁷⁶² A fireman on an engine and a telegraph operator are engaged in different departments (*Illinois Cent. R. Co. v. Hunter, 70 Miss. 471, 12 So. 482).* Under Gen. Laws 1891, ch. 24, conductors of switch engines in the same yard, engaged in moving cars, etc., under a common superior, but whose duties are separate and

⁷⁶³ Under Comp. St. Mont. 1887, ch. 25, § 697. Under this statute, a railroad company is liable for an injury to a fireman on one train, caused by the negligence of a conductor on another train in leaving a switch open (*Northern Pac. R. Co. v. Mase, 63 Fed. 114, 11 C. C. A. 63, approving Ragsdale v. Northern Pac. R. Co., 42 Fed. 383).*

⁷⁶⁴ An engineer in charge of a locomotive, who has authority to direct or control a fireman serving on the same locomotive, is a "superior," within the meaning of Act, April 2, 1890, and therefore not fellow servant with a brakeman on another train (*Cincinnati, etc. R. Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11).* A chief inspector of cars, having other inspectors under him, is not a fellow servant of a brakeman (*Columbus, etc. R. Co. v. Erick, 51 Ohio St. 146, 37 N. E. 128).*

also for that of telegraphers, signalmen and switchmen.⁷⁶⁵ Notwithstanding decisions to the contrary in Georgia⁷⁶⁶ and Texas,⁷⁶⁷ it is the settled general rule that these statutes apply to receivers or trustees operating railroads⁷⁶⁸ belonging to corporations. They do not apply to individuals or private firms owning railroads, but not acting as common carriers.⁷⁶⁹

The foregoing section is retained because presenting an instructive résumé of the progressive development of the law by legislation; there are, however, but few States in the Union where the law has not been changed by subsequent legislation. For the present state of the statutory law on the subject treated and its interpretation, reference is made to the statutes and decisions in the Appendix.

§ 241d. Exemption from liability by special contract.

— In Great Britain, and in some American courts, it is held that a servant can, by express contract, release his master from all liability for the ordinary negligence of the master, and for any negligence of the master's agents, either at common law or under a statute.⁷⁷⁰ But there must be some good consideration for such a contract, and if made while the servant is in employment, without some

⁷⁶⁵ Stat. 1893, ch. 220; Sanb. & B. Hornsby v. Eddy, 56 Fed. 461, 5 C. Ann. St. § 1816a. See *Promer v. C. A. 560, 12 U. S. App. 404; Rouse Milwaukee, etc. R. Co., 90 Wis. 215, v. Hornsby, 67 Fed. 219, 14 C. C. A. 63 N. W. 90; Albrecht v. Milwaukee, 377.*

etc. R. Co., 87 Wis. 105, 58 N. W. 72. Under the previous statute of 1889, a foreman of a shop was not a "superintendent" (*Hartford v. Northern Pac. R. Co., 91 Wis. 374, 64 N. W. 1033*).

⁷⁶⁶ *Thurman v. Cherokee R. Co., 56 Ga. 376; Henderson v. Walker, 55 Id. 481.*

⁷⁶⁷ See note 760, *supra*.

⁷⁶⁸ *Sloan v. Central Iowa R. Co., 62 Iowa, 728, 16 N. W. 331; Rouse v. Harry, 55 Kans. 589, 40 Pac. 1007;*

⁷⁶⁹ *Beeson v. Busenbark, 44 Kans. 669, 25 Pac. 48.*

⁷⁷⁰ As between master and servant, the latter in the contract of hiring may assume all risks appertaining to the service, save such as arise from criminal negligence (*Western, etc. R. Co. v. Bishop, 50 Ga. 465; Western, etc. R. Co. v. Strong, 52 Id. 461; Fulton Bag Mills v. Wilson, 89 Ga. 318, 15 S. E. 322*). A mere notice will not have this effect, especially if not brought clearly to

new consideration, it is void.⁷⁷¹ Some courts hold such contracts void as against public policy.⁷⁷² Several statutes expressly prohibit such contracts.⁷⁷³

the servant's mind (*Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294, 12 S. E. 923).

⁷⁷¹ *Purdy v. Rome, etc. R. Co.*, 125 N. Y. 209, 26 N. E. 255.

⁷⁷² An employer cannot provide that his employees shall look after and be responsible for their own safety (*Louisville, etc. R. Co. v. Orr*, 91 Ala. 548, 8 So. 360; *Hissong v. Richmond, etc. R. Co.*, 91 Ala. 514, 8 So. 776). An employee in a factory cannot waive the protection afforded by Laws 1892, ch. 673, requiring machinery to be properly guarded (*Simpson v. N. Y. Rubber Co.*, 80 Hun, 415, 30 N. Y. Supp. 339). A parent cannot exempt the employer from responsibility to a minor (*Internat-*

tional, etc. R. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681; see *Shepard v. N. Y. Central R. Co.*, 18 N. Y. Supp. 665). The provisions of Illinois laws, 1887, p. 235, in relation to the care that the mine owner must exercise with regard to the protection of his employees from personal injuries, cannot be dispensed with by contract (*Chicago, etc. Coal Co. v. Peterson*, 39 Ill. App. 114). See also *Louisville, etc. R. Co. v. Davis*, 91 Ala. 487.

⁷⁷³ So in Texas (*Gen. Laws* 1891, ch. 24, § 3), and Wyoming (*Laws* 1890-91, ch. 28), and in Iowa, as to the special statutory liability of railroad companies (*Code*, § 1307).

